

FIFTH
EDITION

LABOR GUIDE **TO LABOR LAW**

Bruce S. Feldacker and Michael J. Hayes

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1

FEDERAL REGULATION OF LABOR-MANAGEMENT RELATIONS

A Statutory and Structural Overview

THIS BOOK IS A PRACTICAL GUIDE to labor law in the private sector. The first 8 chapters present a discussion of legal principles primarily based on the Labor Management Relations Act (LMRA), 1947, as amended, commonly referred to as the “Act.” The remaining chapters discuss principles based on the Labor Management Reporting and Disclosure Act and the Civil Rights Act of 1964, as amended, as well as on the LMRA.¹

This chapter begins with a brief historical survey of federal labor legislation leading to the passage of the LMRA in the current form studied in this book. This survey is followed by an introductory overview of the major provisions of the LMRA, which are considered in detail in subsequent chapters, and by an explanation of the structure and procedures of the National Labor Relations Board, the agency administering the Act.

PART I: The Historical Development of the Labor Management Relations Act

A. Collective Bargaining before the Statutory Era

Before the passage of the federal labor legislation discussed in this book, regulation of labor relations was left largely to the states. The law governing labor relations was primarily developed by state courts on a case-by-case basis. This process of judicial development is known as the “common law,” in contrast to statutory law (laws made by the legislature) or administrative law (laws made by administrative agencies).

Workers began to organize into workers’ associations, the historical forerunner of today’s unions, in America in the late 1700s. The concept of workers uniting together to improve their working conditions was initially greeted by hostility in the courts. Thus, in the historically important *Philadelphia Cordwainers*¹ case, decided in 1806, the court ruled that it was an unlawful conspiracy for workers to form an organization in which the membership agreed that none of them would work as shoemakers except at certain specified prices higher than the price that had previously been paid. The doctrine that an organization of workers formed to better their working conditions constituted an unlawful conspiracy was frequently followed in the United States until the mid-1850s. However, in 1842, the Massachusetts Supreme Court issued an important decision upholding the right of workers to form associations, and this viewpoint gradually was adopted in other states.

¹ The complete text of a statute discussed in this chapter may be reviewed on the website of the agency enforcing that law. Please consult the Guide to Basic Research Resources in the front part of this book.

Although the state courts began to recognize the rights of workers to form labor organizations, the courts continued to restrict the methods that unions could use to accomplish their goals as the labor movement grew in the second half of the nineteenth century. Some courts distinguished between the right to strike and the right to picket. These courts upheld the right of workers to withhold their own services in order to force a change in their working conditions. But such courts, reasoning that an employer had the right to continue operations during a strike and that employees (those who chose to) had the right to continue working, frequently issued injunctions prohibiting unions from picketing in support of their strike on the theory that even peaceful picketing coerced and interfered with the rights of the employer to continue operation and of employees to continue working. Obviously, this approach seriously undermined the effectiveness of strike activity. Even those state courts that upheld the right of workers to strike and to picket under some circumstances frequently issued injunctions limiting the scope of union conduct if the judge did not approve of the conduct or the purpose of the strike. This was known as the ends/means test. Thus, in some states, picketing in support of a union's claim to certain work in a jurisdictional dispute was held to be for an unlawful purpose (end), and the state court would enjoin the picketing. Product boycotts in support of a strike were sometimes enjoined as being an unlawful method.

The American economy in the second half of the nineteenth century and early in the twentieth century was philosophically based on the concept of open competition, unfettered by governmental restrictions, commonly referred to as *laissez-faire* (French words meaning "to do as one pleases") government. The conservative pro-business courts of the period applied this philosophy in determining the lawfulness of union conduct. For example, strikes protesting an employer's unilateral change in production methods, resulting in a loss of jobs for the affected employees, were enjoined by the courts on the grounds that such strikes were for the

unlawful purpose of interfering with the employer's right to determine the manner of production. In many states, collective bargaining agreements, once entered into, were valid and binding. However, an employer was under no obligation to engage in collective bargaining or to sign a collective bargaining agreement. Thus, in such states, a court would enjoin a strike to compel an employer to sign a collective bargaining agreement, on the grounds that such a strike was for the unlawful purpose of interfering with the employer's right to enter or not enter into such an agreement on a voluntary basis.

Of course, the rights of employees and labor unions during this prestatutory era varied according to the social and political climate of the state. Labor unions engaged in a broader range of permissible conduct in those states where judges were more progressive, or where the labor movement had greater political strength. In every state, however, the probusiness legal doctrines applied in determining the legality of union conduct and the broad discretion that individual judges had under the common law in applying these doctrines placed unions under restraints varying from court to court and from case to case, with many resultant inconsistencies between decisions and principles that they applied.

The federal courts also interfered in the organization and conduct of labor unions. With the passage of the federal Sherman Antitrust Act in 1890 (see chapter 8, part IV), the federal courts frequently issued injunctions against union strike activity or boycotts of employers involved in a labor dispute on the grounds that such union conduct interfered with the free flow of goods in commerce and was thus a combination or conspiracy in restraint of trade violating the antitrust laws. As discussed below and in chapter 8, the passage of the Norris-LaGuardia Act in 1932 restricted the federal courts' right to enjoin union conduct on the grounds that it violated the antitrust laws.

This, then, was the generally unfavorable legal climate in which labor functioned through the 1920s until the beginning of the modern statutory era.

B. The Railway Labor Act

The Railway Labor Act, passed by Congress in 1926, was the first comprehensive federal statutory regulation of labor-management relations. It originally covered only railroad employees but was amended in 1936 to cover airlines as well. The Railway Labor Act is important to all employees because it was the first comprehensive federal legislation specifically recognizing the right of employees to form unions and engage in collective bargaining.

C. The Norris-LaGuardia Act

In 1932, Congress passed the Norris-LaGuardia Act, a fundamental turning point in federal statutory regulation. The Act prohibited federal courts from issuing injunctions in any labor dispute, regardless of the strike's purpose. The law prevented federal judges from engaging in the previously common practice of enjoining a strike because the judge did not approve of the strike's goals or methods. However, the law did not guarantee the employees any collective bargaining rights. Bargaining rights, except in the railroads, were still won in a test of economic strength between an employer and a union. But with the Norris-LaGuardia Act, the federal courts' injunctive power was removed as a weapon against labor.

D. The National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act (NLRA), frequently referred to as the Wagner Act after the New York senator who sponsored the legislation. The Supreme Court upheld the NLRA's constitutionality in 1937. The NLRA was enacted as part of President Franklin Roosevelt's New Deal legislation during the depression and was, in effect, a peaceful revolution in labor relations.

The NLRA established employee rights to organize, join unions, and engage in collective bargaining. The NLRA established employer unfair labor practices, making it unlawful for an employer to interfere with an employee's

right to join a union and engage in concerted (union) activities. Employers were required to bargain in good faith with the union and were prohibited from discharging or otherwise discriminating against employees because they engaged in union activities.

The NLRA also established procedures by which employees may elect their bargaining agent. Before passage of the NLRA, employees could secure bargaining rights only if their employer voluntarily agreed to recognize the union or if the employees struck and forced recognition. The NLRA thus dramatically paved the way for peaceful unionization, especially of industrial workers whose employers had consistently opposed organizing efforts until then. The provisions first enacted in the NLRA remain the basic franchise of American workers in their places of employment.

Beyond establishing employee rights and employer unfair labor practices, the NLRA established the National Labor Relations Board (NLRB, or the Board) to enforce its provisions. Today it is common for federal laws to be enforced by administrative agencies, as the NLRB was established to enforce the NLRA. But until the 1930s, it was far more common for the courts to enforce all laws. Congress established the NLRB because it mistrusted the manner in which the courts, which were historically associated with employer interests, might enforce the law. Congress also felt the need for a specialized agency to develop and apply expertise in the unique field of labor relations.

E. The Taft-Hartley Act (The Labor Management Relations Act)

In 1947, Congress passed the Taft-Hartley Act, named after Senator Taft and Congressman Hartley, who cosponsored the legislation. The Taft-Hartley Act extensively revised the NLRA and renamed it the Labor Management Relations Act (LMRA), 1947. The LMRA, incorporating the original NLRA as amended by the Taft-Hartley Act in 1947, is the basic statute studied in this book. The term NLRA is still used

sometimes to refer to the provisions of the original NLRA that were continued as part of the LMRA.

The original NLRA was pro-labor, establishing employee rights and restricting employer acts. Congress intended for the Taft-Hartley Act to embody what it regarded as a better balance between labor and management. For example, the NLRA established the right of employees to engage in collective bargaining and other mutual aid and protection; the Taft-Hartley Act added a provision that employees also have the right to refrain from any or all such activities. The NLRA established employer unfair labor practices now contained in LMRA Section 8(a); the Taft-Hartley Act added Section 8(b), union unfair labor practices, which prohibits unions from interfering with employee rights, prohibits unions from coercing or discriminating against employees because of their union activities, and requires unions to bargain in good faith—provisions that place the same restrictions on unions as the NLRA placed on employers. The restrictions on secondary boycotts and on picketing (see chapter 7) are all an outgrowth of the Taft-Hartley Act.

F. The Landrum-Griffin Act

In 1959, Congress passed the Landrum-Griffin Act, named after the congressional cosponsors, formally entitled the Labor Management Reporting and Disclosure Act (LMRDA). The LMRDA primarily regulates internal union matters. It established the so-called Bill of Rights for union members; internal union election procedures; and reporting and disclosure requirements for unions, union officers, employers, and labor relations consultants. (see chapter 11).

The LMRDA also amended the LMRA by adding additional restrictions on picketing, closing certain “loopholes” in Taft-Hartley, and by adding Section 8(e) of the LMRA, prohibiting “hot cargo” clauses prohibiting one employer from dealing with other employers who are nonunion or who are on strike (see chapter 8). After 1959, the formal name of the LMRA was changed to the “Labor Management Relations Act, 1947, as amended,” the present formal title.

G. The Postal Reorganization Act

Chapter 12 of the Postal Reorganization Act of 1970 established the collective bargaining rights of postal workers. The Reorganization Act placed the United States Postal Service under the jurisdiction of the National Labor Relations Board for determining employee representation issues and also provided that labor relations in the Postal Service would be governed by the Labor Management Relations Act to the extent not inconsistent with the Reorganization Act itself. Two major differences between the rights of postal workers and private sector employees covered by the LMRA are that the postal workers, as federal employees, do not have the right to strike; and the Reorganization Act forbids required union membership (a “union shop”) as a condition of employment (see chapter 10). The Reorganization Act also provides for final and binding arbitration if the parties are unable to agree on the terms of their collective bargaining agreement (called interest arbitration), which is not required under the LMRA (see chapter 9).

H. The Health Care Amendments

In 1974, the LMRA was amended to delete the provision previously included in Section 2(2) of the Act excluding nonprofit hospitals from the Act’s coverage. This means that both profit and nonprofit hospitals are now covered. In addition to extending coverage to nonprofit hospitals, the 1974 amendments also enacted special provisions for the health care industry, both profit and nonprofit, as to bargaining notice requirements (Section 8(d)) and the right to picket or strike (Section 8(g)).

I. The Religious Belief Exemption

The 1974 Health Care Amendments added Section 19 to the Act that as initially enacted provided that a health care industry employee who has religious objections to joining a labor union cannot be required to join or financially support a union as a condition of employment.

Effective December 24, 1980, Section 19 was extensively revised, and the religious objection exemption was extended to all employees, not just to those in the health care industry. To qualify for the exemption, an employee must be a member of a bona fide religious organization that historically holds conscientious objection to joining or financially supporting a labor union (see chapter 10).

PART II: An Overview of the Labor Management Relations Act in Current Form

A word of caution and encouragement is in order before reviewing the LMRA in its present form. This is an introductory overview providing a general understanding of the structure and coverage of the Act. Do not expect to understand all of the statute at first reading. The statute is complex. Some of it is of interest only to lawyers, and other parts are understandable only in the light of subsequent court decisions interpreting the language discussed in later chapters. Sections briefly highlighted here are discussed in detail in subsequent chapters.

A. Basic Structure and Definitions: Sections 1 through 6

Section 1 of the Act contains basic findings and policies stating the background reasons for which Congress originally passed the NLRA. Section 2 of the Act includes the definitions used throughout the Act. Note the definition of employer in Section 2(2). Federal and state governmental agencies are excluded from coverage under the Act. Labor organizations are covered by the Act when acting as an employer for their own employees. For example, the secretaries of a labor union have the rights of employees. Note the definition of employee in Section 2(3). An employee who is on strike is still entitled to the protection of the Act. Agricultural and domestic employees are excluded from the Act, as are people employed by their own parent or spouse, independent contractors, and supervisors (see chapter 2).

Section 2(11) defines the term supervisor and Section 2(12) defines the term professional employees. Supervisors are excluded from coverage under the Act, and professional employees have the right to a bargaining unit of their own (see chapter 2).

Sections 3, 4, 5, and 6 of the Act all pertain to the establishment and structure of the National Labor Relations Board (see part III of this chapter).

B. Sections 7 and 8: The Unfair Labor Practice Sections

Section 7 of the Act establishes the basic right of employees to bargain collectively. Section 8 is the heart of the Act. Section 8(a) establishes employer unfair labor practices, and Section 8(b) establishes union unfair labor practices. Sections 8(a)(1) through 8(a)(5) and Sections 8(b)(1) through 8(b)(3) generally prohibit either employers or unions from taking certain actions against each other or against employees. Thus, Section 8(a)(1) and Section 8(b)(1)(A), respectively, prohibit an employer and a union from interfering with employee rights under Section 7. Section 8(a)(3) prohibits an employer from discriminating against an employee because the employee is or is not a union member, but permits employers and unions to agree to make union membership mandatory (“union security agreements”) under certain circumstances (see chapter 10). Section 8(b)(2) prohibits a union from causing the employer to violate Section 8(a)(3). Sections 8(a)(5) and 8(b)(3) require both an employer and a union to engage in good-faith bargaining (see chapters 3 through 6).

Section 8(b)(4) contains the secondary boycott provisions of the Act. Section 8(b)(5) prohibits excessive or discriminatory union initiation fees. Section 8(b)(6) is aimed at prohibiting “feather-bedding.” Section 8(b)(7) regulates union picketing for recognition or organizational purposes (see chapters 7 and 8).

Section 8(c) is the so-called free speech provision under which employers (and unions) are permitted to express their opinion about

union representation (see chapter 3). Section 8(d) defines good-faith bargaining and establishes notice requirements before a contract can be terminated or modified (see chapter 5).

Section 8(e) prohibits hot cargo provisions (see chapter 8). Section 8(f) permits certain pre-hire contracts in the construction industry and shortens the period after which an employee may be required to join a union to 7 days after hiring in the construction industry, in contrast to the 30-day requirement in other industries. Section 8(g) contains the special notice requirements for a strike or for picketing in the health care industry.

C. Section 9: Election Procedures

Section 9 governs union election procedures leading to the certification of a union as the employees' bargaining representative (see chapter 2). Under Section 9(a), the certified representative is the exclusive representative of the employees (see chapter 4). Under Section 9(b), the Board has very broad discretion in determining the appropriate bargaining unit of employees whom the union would represent. However, Section 9(b)(1) gives professional employees the right to a separate vote before they can be included in a unit that includes nonprofessionals; Section 9(b)(2) places certain restrictions on the Board's right to include craft employees in a broader unit; and Section 9(b)(3) requires that guards be certified separately in a unit composed only of guard employees.

Sections 9(c)(1) through 9(c)(5) regulate the election process. Section 9(c)(3) prohibits a valid election from being held more than once a year, establishes the right of economic strikers to vote in an election, and establishes the procedure for runoff elections if no choice initially receives a majority of the valid votes counted. Section 9(e)(1) permits employees whose contract contains a union security clause to hold a deauthorization election rescinding the clause.

D. Section 10: Enforcement of the Unfair Labor Practice Provisions

Under Section 10(a) the NLRB is established as the authority for enforcing the unfair labor practice provisions found in Section 8.

Under Section 10(b) an unfair labor practice charge must be filed within 6 months after an unfair labor practice has occurred. Sections 10(b), (c), and (d) establish trial procedures in unfair labor practice cases. Sections 10(e) and (f) of the Act set the procedures that the Board follows in enforcing its decisions or that a party may follow to appeal a Board decision to the courts.

Consider the differences between Sections 10(j) and 10(l) of the Act. Under Section 10(j), the Board (acting through its general counsel) has *discretionary* authority after a complaint has been issued to seek a federal district court injunction temporarily prohibiting the alleged unfair labor practices, pending the outcome of the NLRB proceedings. Under Section 10(l), charges alleging violations of Sections 8(b) (4) (A), (B), or (C); Section 8(b) (7); or Section 8(e) of the Act must be given priority, and the regional director must seek an immediate injunction, even before a complaint is issued, if there is reasonable cause to believe that the charge is true. The mandatory provisions of Section 10(l) primarily apply only to union unfair labor practices. The only exception is for Section 8(e) violations, which may apply to either an employer or a union (but which involves relatively few charges; see chapter 8). Unions have frequently complained that the injunction provisions of the Act are heavily weighed against labor and that, historically, the Board seldom invokes its discretionary authority under Section 10(j) to seek temporary relief against employer unfair labor practices. The Board seeks Section 10(j) injunctions now more often than was its practice in the past, but the number is still low. Thus, in fiscal year 2012, the Board received 169 requests from regional offices for permission to file suit for Section 10(j) injunctions. The Board authorized such suits (which would be filed by the general counsel)

in 58 cases, and 37 petitions for Section 10(j) injunctive relief were actually filed in a federal district court. The success rate was 97 percent. (The Board regards “success” as either a voluntary settlement with the charged employer for appropriate relief or substantial success in the litigation.)² This high figure may reflect the close scrutiny the Board gives to a case before it authorizes the filing of a Section 10(j) action. The general counsel’s willingness to seek injunctions has undoubtedly deterred violations in other cases as well. Still, in contrast to Section 10(l), where temporary injunctions are routinely requested unless the charged party voluntarily agrees to stop the alleged misconduct pending the outcome of the case, Section 10(j) injunctions are limited to fairly extreme cases of flagrant violations of the Act.

Section 10(k) is a unique provision giving the Board authority to determine the merits of a work assignment dispute if any party to the dispute threatens to strike, picket, or engage in other concerted activities in order to force a work assignment (see chapter 8). Section 11 sets out the investigatory powers of the Board, the manner in which Board documents are served, and other procedural matters. Section 12 makes it a criminal act to interfere with the Board’s processes.

E. Protection of the Right to Strike: Section 13

Section 13 preserves the right to strike. Two other important sections deal with the right to strike. Section 8(b)(4) provides that “nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.” Under the provisions of Section 502 an individual employee cannot be

required to work without his or her consent, and employees who quit in good faith because of abnormally dangerous conditions are not considered to be on strike (see chapter 6).

Section 14(a) permits supervisors to be members of a labor organization. However, employers are not required to bargain about the working conditions of supervisors or to recognize a supervisor’s union.

Section 14(b) permits individual states to pass so-called right-to-work laws. Section 19, as discussed above, exempts employees with a religious objection from being required to join or financially support a union under a contractual union security clause (see chapter 10).

F. Titles II and III of the Act

Title II of the Act establishes the Federal Mediation and Conciliation Service and defines its authority³.

Section 301 authorizes the enforcement of collective bargaining agreements. Section 301 has encouraged the growth of arbitration rather than the courts or strikes as the primary method of resolving labor-management disputes when these parties have an agreement in effect. (see chapter 9).

Section 302 restricts employer payments to union representatives. This section prohibits union representatives from receiving gifts from employers and prohibits an employer from giving financial support to a union (see chapter 4). Important subsections include Section 302(c)(4), which permits an employer to deduct union dues from an employee’s wages; and Section 302(c)(5), which establishes the basic structure and purpose of jointly administered fringe benefit trust funds. The establishment and operation of employee fringe benefit funds are extensively regulated by the Employee Retirement Income Security Act (ERISA), effective Labor Day 1974.

² Source: National Labor Relations Board, Performance and Accountability Report, 2012, P. 53.

³ This book does not discuss the FMCS in detail except as the agency’s activities relate to statutory matters such as bargaining notice requirements. Most of the agency’s activities relate to the bargaining process beyond the scope of this text.

Section 303 permits a court to award damages against a union engaging in unfair labor practices in violation of Section 8(b)(4) (the secondary boycott provisions). Sections 301, 302, and 303 are all enforced by the courts rather than the NLRB.⁴

PART III: Structure and Procedure of the National Labor Relations Board

The NLRB administers the LMRA following set procedures in unfair labor practice and representation cases established by the statute and by regulations issued by the Board. Most of the principles discussed in this book were developed by the NLRB in decisions made through the procedures outlined here. This outline gives the basic information needed to understand the process. Do not expect to remember the details of these procedures at first reading. Read this part now to get a general understanding of the Board's structure and procedures. Then review this material as you study the following chapters.

A. The National Labor Relations Board and the General Counsel

The National Labor Relations Board, located in Washington, D.C., has five members. The members, who serve for 5-year terms, are appointed by the president and approved by a vote of the Senate. One of the five is appointed as Board chairman by the president with Senate confirmation. Usually the Board decides cases using three-member panels, but important cases can be decided by all five members (*en banc*).

In addition to the Board, the Labor Management Relations Act established a separate, independent general counsel, also appointed by the president and approved by the Senate for a 4-year term. Figure 1.1 is an organizational

chart of the National Labor Relations Board and of the Office of the General Counsel.⁵

To understand the functions of the five-member Board and the general counsel, think of the relationship between a prosecutor and a judge. In unfair labor practice cases (Section 8), the Board acts as the judge, and it decides whether the charged party (the defendant) has violated the Act. Judges do not decide cases unless a prosecutor brings a charge alleging a violation of the law. The Board functions in a similar way, hearing only cases in which a complaint has been filed alleging an unfair labor practice. The general counsel fills the prosecutor function. Anyone may file a charge with the general counsel alleging that the Act has been violated.⁶ The general counsel investigates and decides whether a charge has merit. If it does, the general counsel issues a complaint charging that the Act has been violated, just as a prosecutor might file a complaint in a criminal case. The case is then tried, and the Board decides whether there has been a violation, just as a judge (or jury) might in a criminal case.

The division of authority between the Board and the general counsel applies only to unfair labor practice cases under Section 8. The general counsel has no authority to decide election issues under Section 9; these are within the exclusive jurisdiction of the Board. However, the Board has delegated administrative responsibility over the regional offices in certain matters to the general counsel. Thus, for example, the general counsel has issued administrative time guidelines for the regions to follow in processing both unfair labor practice charges and representation petitions. The authority for the guidelines is derived from the general counsel's own statutory authority under Section 10 to prosecute unfair labor practices and from

⁵ The charts in this chapter are based on publications of the National Labor Relations Board and reproduced with the agency's permission. Please visit the NLRB website, www.nlr.gov, to review other charts and statistical information concerning the agency's operations.

⁶ People frequently refer to filing a charge with the Board, but, as discussed in this chapter, a charge is actually filed with the general counsel.

⁴ The relationship between the NLRB and the federal courts in enforcing the Act is discussed in chapter 15.



Figure 1.1 NLRB organization chart (chart indicates incumbent officials as of January 2014 and is subject to change)

authority delegated by the Board under Section 9 to investigate and determine representation issues.

B. The Regional Offices

Although the headquarters for both the Board and general counsel are in Washington, D.C., the workload is far too heavy to handle from Washington. Thus, the Board has regional offices across the United States that administer the Act. There are currently 26 regions. Each region is headed by a regional director appointed

by the Board who serves two functions. First, the regional director is the local representative of the general counsel in processing unfair labor practice charges and, second, pursuant to authority delegated by the Board, the regional director renders decisions in representation cases under Section 9. The Board has recently reorganized its regional structure and is still considering further changes. A number of regional offices, subregions, or field offices are or have been merged or the geographic area they serve is modified. For the latest list of the regions with a map of their geographic coverage, go to www.nlr.gov/who-we-are/regional-offices.

This book frequently refers to the Board, the general counsel, or the regional director as taking certain action. That is because they are ultimately responsible for certain decisions. Remember, however, that the Board, the general counsel, and the regional director all have large staffs to support them. As indicated in the organizational chart (Fig. 1.1), each Board member has a personal staff to assist the member, and the Board has an executive secretary who administers a large office staff to assist the Board in its overall functions. The general counsel has a number of associate and assistant general counsels in charge of the various functions of the office. The regional offices have a large staff of attorneys and field examiners under the supervision of the regional director. Field examiners are career civil servant employees performing primarily investigatory functions in unfair labor practice and representation matters.

C. Jurisdiction of the NLRB

It is important to understand the limited jurisdiction of the Board's authority. Some employees go to the NLRB every time they are dissatisfied with an action of their employer or union. But the Board was not established to regulate the entire relationship between employers, unions, and employees. The Board enforces only Section 8 (unfair labor practices) and Section 9 (elections) of the Act. All the other provisions of the LMRA provide the framework within which the Board enforces these two sections.

The Board's authority is even more limited because some employers and some employees are not covered by the Act. Thus, state and federal agencies are excluded from coverage under Section 2(2) as are persons subject to the Railway Labor Act.

In general, to be excluded from the Board's jurisdiction as a state agency (a subdivision of the state), the employing organization must be created directly by the state or administered by individuals who are responsible to public officials or to the general electorate. An organization is regarded as responsible to the general electorate only if the persons eligible to vote for the organization's governing body are

sufficiently the same as the voters in general political elections, so that the organization is subject to a similar type and degree of popular political control. Thus, for example, electrical cooperatives are usually not exempt from the Board's jurisdiction as political subdivisions because they are not directly created by a state and a cooperative is usually administered by individuals who are not responsible to public officials or to the general electorate, but, rather, only to the cooperative's own members.

Agricultural workers, domestic employees in private homes, independent contractors, and supervisors are excluded by the definition of covered employees under Section 2(3) (see chapter 2). As a matter of policy, the Board has also declined jurisdiction over the horse racing and dog racing industries, primarily on the grounds that those industries are subject to extensive state control including control over some aspects of labor relations policies.

1. Employers Supported by Government Funds

The Board's position as to its jurisdiction over contractors (both for profit and nonprofit) that provide services to or for an exempt governmental agency, such as head start programs, child care, and medical clinics that are supported by state and/or federal funds, has varied over the years. Since 1995, however, in its decision in *Management Training Corp.* (1995),⁷ the Board will assert jurisdiction over a contractor with close ties to an exempt government agency if it meets the definition of employer under Section 2(2) of the Act and meets the applicable monetary standard (see below) for asserting jurisdiction. Governmental control may restrict subjects for bargaining but is not a basis for declining jurisdiction.

2. Organizations Operated by Religious Groups

The Supreme Court held in *NLRB v. Catholic Bishop of Chicago*⁸ that the Board cannot assert jurisdiction over instructors in church-operated

⁷ See legal principle 1.A.

⁸ See legal principle 1.B.

schools because such jurisdiction would violate the First Amendment to the United States Constitution establishing freedom of religion and separation of church and state. The Supreme Court concluded, in overruling the Board's decision, that the religious and secular purposes of church-sponsored schools are so interwoven that the Board's jurisdiction would unconstitutionally interject the Board into the operations and policies of the church. The Board has held that the *Catholic Bishop* decision applies to religiously affiliated colleges and universities as well as to parochial, elementary, and secondary schools, even when those schools are controlled by a predominantly lay board. With regard to instructional employees in all these types of schools, the test most often applied currently is one set forth by the U.S. Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB* (2002).⁹ Under that test, the NLRB does not have jurisdiction over instructional employees in any educational institutions that (1) "holds itself out to students, faculty and community as providing a religious educational environment"; (2) "is organized as a nonprofit"; and (3) "is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."

In contrast, the Board has consistently asserted jurisdiction over church-operated, non-profit social agencies, such as nursing homes and hospitals, and over noninstructional employees of schools and childcare employers because such organizations essentially function the same as their secular counterparts; and their activities only tangentially relate to the sponsoring organization's religious mission.

3. The Commerce Standard

The Board's jurisdiction covers only employers whose operations affect commerce as defined in Sections 2(6) and (7) of the Act. Section 9(c)(1) empowers the Board to hold elections

only if it determines that there is a question concerning representation affecting commerce. Section 10(a) empowers the Board "to prevent any person from engaging in any unfair labor practice [listed in Section 8] affecting commerce" (emphasis added). Why does the statute have these restrictions, and what do they mean?

The federal government has limited constitutional authority. Some conduct is not subject to federal regulation. The broadest scope of Congress's constitutional authority is that Congress, under the commerce clause of the Constitution (Article I, Section 8), can regulate any activity that affects commerce among the states. This is the clause under which most federal legislation in the fields of labor, education, and social welfare is upheld. The LMRA was originally upheld on the legal theory that labor unrest disrupts commerce. Goods will not flow in commerce between states if there is a strike. Thus, Congress can regulate labor relations to maintain industrial peace and prevent disruption of commerce.

Because the LMRA applies to any employer or unfair labor practice affecting commerce, the statute has the broadest possible constitutional reach, covering most small employers. For example, the operation of a small business whose customers are all located within the same state as the business would still "affect commerce" if the business purchases supplies produced in another state. A business that purchases all of its supplies within the state would still affect commerce if it has customers in or if its products are sold in another state. A business that operates solely within a single state may still affect commerce if a labor dispute at the business would affect the operations of another employer that does engage in interstate commerce. For example, a small manufacturer may supply a part to another manufacturer in the same state for a product shipped to other states. If the manufacturer of the part is shut down by a labor dispute, the interstate manufacturer will not be able to produce the product, and the flow of goods in interstate commerce will be disrupted. The operations of the parts manufacturer, therefore, affect commerce under the Act. However, some employers' operations may be so small that they might not affect commerce. Thus, although the

⁹ See legal principle 1.B.

operations of almost all employers would affect commerce as the courts have interpreted this term, employees must be aware that some employers may not meet the standard.

4. The Board's Jurisdictional Standards

In addition to the constitutional and statutory requirement that an unfair labor practice or representation matter affect commerce under Section 8 or 9, the Board has set certain monetary jurisdictional standards that an employer must meet before the Board will assert jurisdiction. Because so many small employers meet the constitutional and statutory requirement of affecting commerce, the Board established these jurisdictional standards to avoid being engulfed with more cases than it can possibly handle. These standards apply to both unfair labor practice and representation cases.

The monetary standards that an employer must meet before the Board will assert jurisdiction vary by industry and may be based either on the amount of sales or on gross revenue. Nonretail businesses must either have \$50,000 in direct or indirect sales outside their state or make direct or indirect purchases of supplies from businesses in other states in that amount. Direct sale or purchase means that the transaction is directly with the out-of-state consumer or supplier. Indirect sale or purchase means that the employer sells to or buys from another company within the same state that meets one of the Board's direct jurisdictional standards. A non-retail business must meet either the sales or supply standard. Costs of sales and supplies cannot be combined to meet the \$50,000 standard.

The general retail enterprise standard is at least \$500,000 annual volume of business. Hotels and taxicab companies must also meet the \$500,000 standard. Other industries have different annual volume of business jurisdictional requirements: \$250,000 for public utilities and transportation companies; \$200,000 for newspapers; \$100,000 for communication companies; \$100,000 for nursing homes; \$250,000 for all other health care institutions; and \$1,000,000 for private colleges and symphony orchestras.

Interstate transportation companies must meet a \$50,000 annual income requirement.

The Board will assert jurisdiction over defense contractors that affect commerce and have a substantial defense impact, regardless of the monetary amount. The Board has established a jurisdictional standard of \$250,000 annual revenue for all social service organizations other than those for which there is another specific standard applicable for the type of activity in which the organization is engaged. For example, the specific \$100,000 standard would still apply for a nursing home.

Thus, if an employer commits an act that you believe may violate the LMRA or if you are about to organize a new employer, first consider whether the employer meets the definition of an employer covered by the Act and whether the employees meet the definition of an employee under the Act. Be sure alleged employer misconduct is the type covered by the Act, not, for example, just a contract violation. Then consider whether the employer meets both the statutory standard of affecting commerce and the appropriate Board monetary jurisdictional standard. Proceed to the Board only after reasonably satisfying yourself on all these matters.

D. Processing an Unfair Labor Practice Charge¹⁰

1. Filing the Charge

The procedures followed in unfair labor practice cases are outlined in Figure 1.2. The first step is filing a document called a "charge." The Board has a standard form for filing a charge that is

¹⁰ The processing time for serving and/or filing certain document during the course of Board proceedings and the number of copies required as noted in this chapter in both unfair labor practice and representation matters are those required when such documents are filed in paper form. However, the Board has an extensive E-Filing Program, for which parties may register, which permits most documents, other than the initial unfair labor practice charge or representation petition, to be filed with the Board and served on the other parties by email. This prevents the need to file multiple "hard" copies by the due date. For complete information on this system, go to www.nlr.gov, and click on E-file, or contact your Regional Office. Most NLRB procedural requirements have been in effect for many years, and are quite stable despite changes in the Board's membership and shifts in the substantive law. They are, however, subject to change, and it is therefore advisable to "double-check" on the relevant filing and service requirements that apply for any proceeding in which you may be involved.

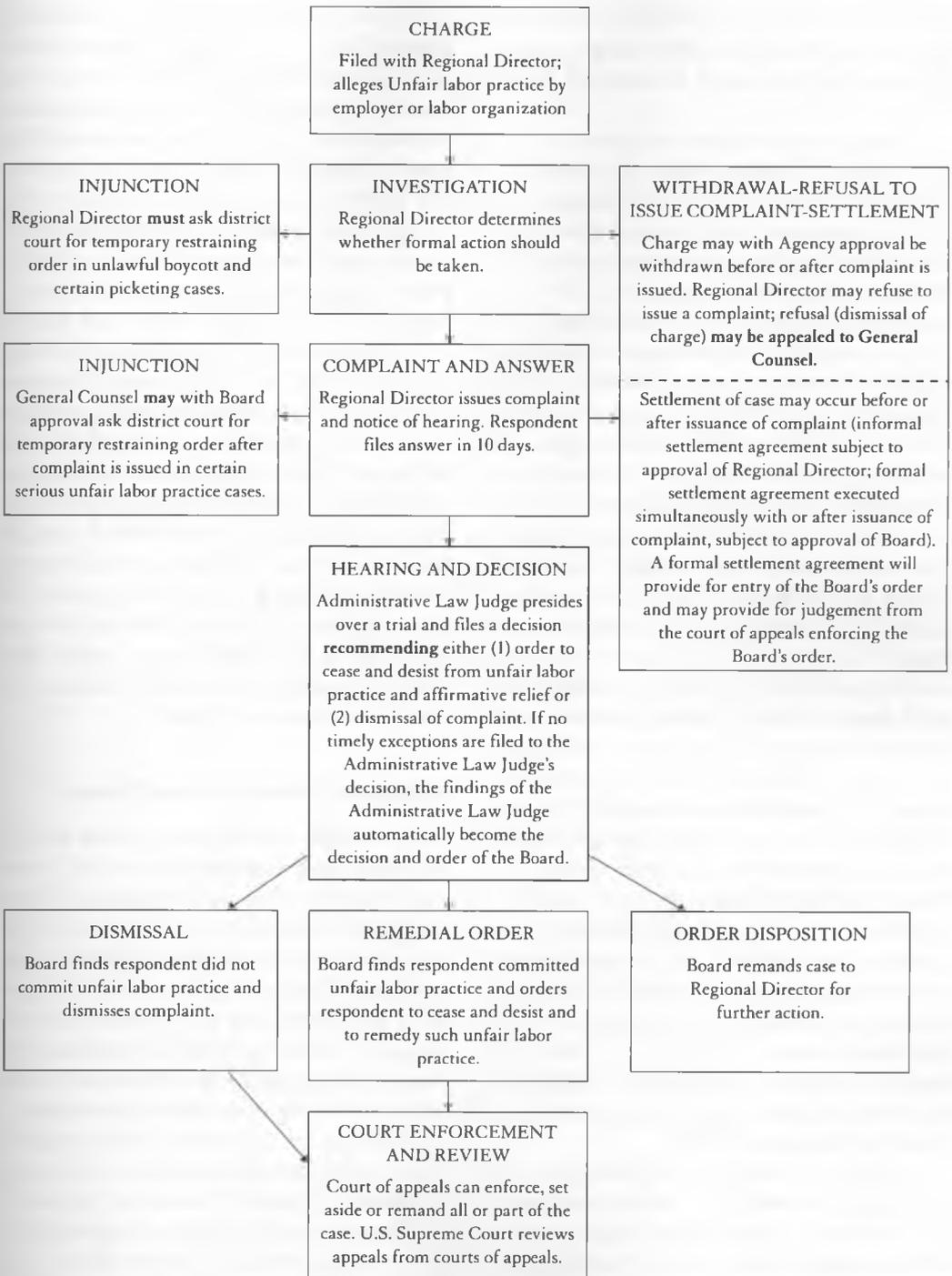


Figure 1.2 National Labor Relations Board: Basic procedures in cases involving charges of unfair labor practices

used in all regional offices. A copy of the form is available at www.nlr.gov (home-what-we-do-resources (forms)). The person filing a charge, called the charging party, states the facts constituting a violation of the Act. Anyone—an

employer, an employee, or a union—can file a charge. Usually the facts alleged in a charge are set forth in general terms rather than in great detail. The regional office will assist the charging party in filing the charge. A charge

must be filed and *served* within 6 months of the date of the alleged unfair labor practice, or else it will be barred as untimely under Section 10(b).

A charge must be based on conduct occurring within the Section 10(b) time limitation. However, earlier conduct may be considered as evidence to support a later charge to the extent that it “sheds light” on the nature of conduct occurring within the 6-month period. The date for filing a charge begins with the date there is unequivocal and unconditional notice of an alleged unlawful act, not the date the act’s consequences become effective (e.g., from the date that an employee is told he or she is going to be discharged even though the discharge itself is not effective immediately). There is a narrow exception for so-called continuing violations. For example, suppose an employer established a work rule on January 15 of a given year that unlawfully restricted the right of employees to discuss their working conditions at any time during the workday, but did not actually discipline any employee for violating the rule until July 30. A charge filed in August challenging the unlawful discipline would be timely because it was filed within six months of the unlawful disciplinary action even though the rule was adopted more than six months before the charge was filed. A discharge is not a continuing violation, so a charge must be filed within 6 months of the violation. The continuing violation principle is narrowly applied and subject to varying interpretations in its application. Thus, it is usually better to file a charge within six months of the first alleged violation rather than to rely on the continuing violation principle to extend the limitations period.

A charge is filed in the regional office in the region in which the unfair labor practice occurred. A copy of the charge must be served, usually by mail, on the charged party. The regional director cannot refuse to accept a charge even though the facts alleged are clearly outside the Board’s jurisdiction. A charge is simply an allegation; the fact that a charge is filed is not an indication that the facts alleged are true or that they constitute a violation of the Act.

The NLRB uses a standard case numbering system. The first two numbers indicate the region in which the charge is filed; the next two letters indicate whether the charge is against an employer or a union and the provision of Section 8 allegedly violated. The final numbers (six digits) are the numerical sequence of the charge. This use to be the number within the region where the charge was filed, but there is now a single nationwide numerical list in the order filed. For example, in the case number 14-CA-096323, the 14 indicates that the charge was filed in the fourteenth region, C indicates that the case is an unfair labor practice charge, and A indicates that the charge alleged a violation of Section 8(a), a charge against an employer. The 096323 is the sequence number on the national list. Figure 1.3 is an NLRB chart of the types of cases and the lettering system that the Board uses in both unfair labor practice and representation cases. Unfair labor practice cases begin with a C. For this reason, unfair labor practice charges are frequently referred to by labor practitioners as “C cases.”

2. Regional Determination and Appeal

After a charge is filed in the regional office, it is referred to either an attorney or a field examiner within the office for investigation. The investigator reviews the facts, researches the law, and takes sworn statements (affidavits) from witnesses. The investigator asks the charged party for a statement of its position and any evidence it wishes to offer in its defense. The charged party must decide whether and to what extent it will cooperate with the investigation.

Sometimes a charge filed with a regional office involves a unique question or a legal area in which the Board’s position is unclear. In that case, the regional director may refer the charge to the Division of Advice of the Office of the General Counsel. This office advises the regional directors on difficult or unique cases. Occasionally the Advice Division issues memorandums or directives to the regional directors on how to handle cases raising certain issues. Sometimes the general counsel requires that all cases raising a certain issue be forwarded

**I. CHARGES OF UNFAIR LABOR PRACTICES
(C CASES)**

Charge against Employer		Charge against Labor Organization						
Section of the Act	CA	Section of the Act	CB	Section of the Act	CC	Section of the Act	CD	
	<p><i>B(a)(1)</i> To interfere with, restrain, or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain).</p> <p><i>8(a)(2)</i> To dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it.</p> <p><i>8(a)(3)</i> By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.</p> <p><i>8(a)(4)</i> To discharge or otherwise discriminate against employees because they have given testimony under the Act.</p> <p><i>8(a)(5)</i> To refuse to bargain collectively with representatives of its employees.</p>		<p><i>B(b)(1)(A)</i> To restrain or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain).</p> <p><i>8(b)(1)(B)</i> To restrain or coerce an employer in the selection of its representatives for collective bargaining or adjustment of grievances.</p> <p><i>8(b)(2)</i> To cause or attempt to cause an employer to discriminate against an employee.</p> <p><i>8(b)(3)</i> To refuse to bargain collectively with an employer.</p> <p><i>8(b)(5)</i> To require of employees the payment of excessive or discriminatory fees for membership.</p> <p><i>8(b)(6)</i> To cause or attempt to cause an employer to pay or agree to pay money or other thing of value for services which are not performed or not to be performed.</p>		<p><i>8(b)(4)(i)</i> To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, work stoppage, or boycott, or</p> <p><i>(ii)</i> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object is:</p> <p><i>(A)</i> To force or require any employer or self-employed person to join any labor or employer organization or to enter into any agreement prohibited by Section 8(e).</p> <p><i>(B)</i> To force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or force or require any other employer to recognize or bargain with a labor organization as the representative of its employees unless such labor organization has been so certified.</p> <p><i>(C)</i> To force or require any employer to recognize or bargain with a particular labor organization as the representative of its employees if another labor organization has been certified as the representative.</p>		<p><i>8(b)(4)(i)</i> To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, work stoppage, or boycott, or</p> <p><i>(ii)</i> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object is:</p> <p><i>(D)</i> To force or require any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another trade, craft, or class, unless such employer is failing to conform to an appropriate Board order or certification.</p>	
						Section of the Act	CG	
							<p><i>8(g)</i> To strike, picket, or otherwise concertedly refuse to work at any health care institution without notifying the institution and the Federal Mediation and Conciliation Service in writing 10 days prior to such action.</p>	

(Continued)

I. CHARGES OF UNFAIR LABOR PRACTICES (C CASES)		I. CHARGES OF UNFAIR LABOR PRACTICES (C CASES)	
Charge against Labor Organization	Charge against Labor Organization and Employer	By or on Behalf of Employees	By or on Behalf of Employees
<i>Section of the Act</i> CP	<i>Section of the Act</i> CE	<i>Section of the Act</i> RC	<i>Section of the Act</i> UD
<p>8(b)(7) To picket, or cause or threaten the picketing of, any employer where an object is to force or require an employer to recognize or bargain with a labor organization as the representative of its employees, or to force or require the employees of an employer to select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:</p> <p>(A) where the employer has lawfully recognized any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c).</p> <p>(B) where within the preceding 12 months a valid election under Section 9(c) has been conducted. or</p> <p>(C) where picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing; except where the picketing is for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, and it does not have an effect of interference with deliveries or services.</p>	<p>8(e) To enter into any contract or agreement (any labor organization and any employer) whereby such employer ceases or refrains or agrees to cease or refrain from handling or dealing in any product of any other employer, or to cease doing business with any other person.</p>	<p>9(c)(1)(A)(i) Alleging that a substantial number of employees wish to be represented for collective bargaining and their employer declines to recognize their representative.*</p>	<p>9(e)(1) Alleging the employees (30 percent or more of an appropriate unit) wish to rescind an existing union security agreement.</p>
		<p><i>Section of the Act</i> RD</p>	<p>By a labor Organization or an Employer</p>
		<p>9(c)(1)(A)(ii) Alleging that a substantial number of employees assent that the certified or currently recognized bargaining representative is no longer their representative:</p>	<p><i>Section of the Act</i> RM</p>
		<p>By an Employer</p>	<p><i>Section of the Act</i> RM</p>
		<p>9(C)(1)(B) Alleging that one or more claims for recognition as exclusive bargaining representative have been received by the employer.*</p>	<p><i>Subpart C</i> Seeking clarification of an existing bargaining unit.</p>
		<p>*If an 8(b)(7) charge has been filed involving the same employer, these Statements in RC, RD, and RM petitions are not required.</p>	<p><i>Section of the Act</i> RM</p> <p><i>Subpart C</i> Seeking amendment of an outstanding certification of bargaining representative.</p>

Figure 1.3 Types of cases

Charges filed with the National Labor Relations Board are letter-coded and numbered. Unfair labor practice charges are classified as "C" cases and petitions for certification or decertification of representatives as "R" cases. This chart indicates the letter codes used for "C" cases, at left, and "R" cases, above, and also presents a summary of each section involved.

to Advice for consideration. This ensures that similar problems arising throughout the country are handled uniformly.

If a case is referred to the general counsel for a decision, the local Board agent assigned to the case informs all parties that the case is "on advice."

As discussed above, cases in which the Board is required to seek an injunction under Section 10(l) of the Act have priority for investigation. Sometimes a union charged with a violation of Sections 8(b)(4), 8(b)(7), or 8(e) of the Act, to which Section 10(l) applies, voluntarily stops the alleged unlawful conduct after a charge is filed and gives the regional office assurance that it will not resume the conduct while the charge is pending. In that case, the regional director does not have to seek an injunction.

If the regional director, after investigation, or consultation with Advice, determines that the charge lacks merit, the Board agent conducting the investigation will contact the charging party and suggest that the charge be withdrawn. This is basically a face-saving gesture to avoid a formal dismissal. If the charging party will not withdraw the charge, and the regional director has determined that it lacks merit, the regional director dismisses the charge. If the charge is dismissed, the charging party can appeal the dismissal to the General Counsel Office of Appeals.

If the charging party is not planning to appeal, it is best in most cases to withdraw the charge rather than having it formally dismissed. The only exception might be if the charging party wants detailed reasons for the regional director's decision. A union, for example, might want to present its members with the regional director's detailed reasons if the regional director dismisses a union charge on issues the members consider to be very significant.

The regional director uses one of two dismissal formats: a short or long form. The short-form dismissal briefly states that the charge has been dismissed and can be appealed, without giving any detailed reasons for the dismissal. The long form gives a detailed explanation of the reasons. The charging party's choice is

again a tactical one. The charging party is allowed to choose the format the regional director uses. The long form gives the charging party a more detailed statement of the regional director's reasons and may make the appeal slightly more effective. On the other hand, the long form frequently contains strong statements supporting the charged party. A union might not want a strong statement upholding the employer's position on the record and should therefore request the short form. Fewer than 10 percent of the regional directors' decisions that are appealed to the general counsel are reversed. The general counsel's decision is final. There is no further appeal to the Board. Also, there is no right to court review of the general counsel's decision to issue or not issue a complaint.

A general counsel's decision upholding the regional director's dismissal is not binding on either an arbitrator or a court should there be proceedings before either on the same issue giving rise to the unfair labor practice charge, nor is the dismissal binding on the Board itself in any other case. Still, there may be an adverse psychological effect if the general counsel refuses to proceed. Thus, the decision to appeal the regional director's determination must be carefully considered. An appeal should be taken only if the case is sufficiently important and there is a reasonable likelihood of success.

3. Settlement or Issuance of a Complaint

If the regional director determines, based on the investigation, that a charge has merit, the director will usually advise the charged party of this determination and propose a settlement. A settlement is an agreement in which the violator, whether an employer or a union, agrees to cease the particular unfair labor practice and take whatever action may be necessary to correct the wrong, including back pay if appropriate. Under a recent policy change, the general counsel will now accept a settlement that provides for front as well as back pay for a discharged employee who agrees in writing to waive the right to reinstatement to his/her former employment. A written settlement may be either informal or formal. An informal

settlement is approved by the regional director. A formal settlement is usually used only in aggravated or extensive unfair labor practice cases. A formal settlement is approved by the Board in conjunction with the issuance of a complaint. The Board order approving the settlement requires that the charged party take certain remedial action, and provides for the entry of a court of appeals judgment approving the Board order (so that the Board can seek a contempt citation from the court if the employer fails to comply with the settlement). If the charged party is unwilling to enter into such a settlement, the regional director issues a complaint. A complaint is a detailed legal document, drafted with the same care and precision as a suit to be filed in court. It contains detailed allegations to show that the Board's jurisdictional standards are met, summarizes the facts giving rise to the violation, and lists the provisions of the Act that have been violated. Even after a complaint has been issued, the Board will still try to settle the case. This settlement rate usually varies between 91 and 96 percent in any given year.¹¹

A charge can be filed by anyone, and filing a charge does not indicate that the facts alleged are true or that the charge has merit. In contrast, a complaint is issued only if the regional director determines that the charge has merit. As discussed above, after a complaint is issued, the Board has power under Section 10(j) of the Act to seek a preliminary injunction or temporary restraining order from a district court against the alleged violations. Procedurally, the general counsel may request that the Board authorize a Section 10(j) injunction if the general counsel believes that the case warrants it. This request is reviewed by the Board, which may then authorize the general counsel to seek injunctive relief in the Board's behalf. As discussed in Part II-D above, this authority is relatively rarely used.

Basically, a complaint describes in greater detail the facts generally alleged in the charge. However, a complaint may allege acts that were not even mentioned in the charge and that the charging party might not have even known

about. The general counsel is permitted to base a complaint on the charges alleged and on any additional violations occurring within the limitations period that the Board investigator discovers during the course of the investigation that are reasonably related to the charge. Usually, to avoid any question of the relationship, the regional director will ask a charging party to file an amended charge alleging additional violations discovered during the course of the investigation.

A charge must be filed and served within 6 months of the date of the alleged unfair labor practice. (Thus a charging party should, if possible, avoid waiting until the last minute to file a charge or risk the chance that it may not be served in time.) However, there is no maximum time limit between when a charge is filed and a complaint is issued. Sometimes many months may elapse between the filing of a charge and the issuance of a complaint, especially in complex cases that have been referred to Advice for a decision or in which a complaint is issued pursuant to successful appeal to the Office of Appeals.

4. Trial Procedures and Board Decision

After a complaint is issued, there is a hearing before an administrative law judge, commonly referred to as an ALJ (previously known as trial examiner). The administrative law judge, a civil service appointee, is independent of the Board and hears the case independently. Unfair labor practice cases are tried in the region where the case arose. There are currently approximately 34 administrative law judges. They are permanently attached to offices in Atlanta, New York, Washington, D.C., and San Francisco, but travel to the regions for hearings.

The trial of an unfair labor practice case is similar to a typical civil trial, except there is no jury. The ALJ functions very much like a federal judge. An unfair labor practice trial is a formal proceeding, very different from typically informal arbitration hearings. Section 10(b) of the Act provides that the federal rules of evidence apply in an unfair labor practice case hearing so far as practicable. The ALJ

¹¹ Source: NLRB Performance and Accountability Report, 2012, p. 49.

assigned to a case will usually contact the parties several weeks prior to the hearing to discuss the possibility of settlement as well as discuss pretrial procedural issues. In an effort to encourage settlements prior to trial, the Board, in March 2009, permanently established a voluntary ADR (Alternative Dispute Resolution) program to mediate unfair labor practice matters pending before it. This program is available at any stage in the unfair labor practice litigation process.

At the trial, the general counsel has the burden of proving that the Act has been violated as alleged in the complaint. An attorney from the regional office representing the general counsel tries the case. The charging party is not required to have its own attorney, although it is permitted to have one at its own expense. Even if the charging party has an attorney, the general counsel's attorney has the primary responsibility for trying the case, and controls the legal theory for establishing the alleged violation. The charging party's attorney can, however, give valuable assistance to the Board's attorney because of familiarity with the case. At trial, the charged party, termed the respondent, is entitled to an attorney at its own cost.

There is one important difference between the role of an ALJ and a federal judge. District court judges enter binding decisions that can be appealed. However, an administrative law judge simply makes a recommended decision and order for the Board. This decision is not binding unless approved by the Board.

The ALJ's decision contains recommended findings of fact and conclusions of law as to whether the facts constitute a violation of the Act. If the ALJ finds a violation, the ALJ issues a recommended order listing the actions the respondent must undertake to cure the effects of its unlawful actions, such as requiring back pay for a discharged employee. Either the charging party, the general counsel, or the respondent has an absolute right to appeal the ALJ's decision to the Board. The Board then makes a binding decision.

A party files an appeal of the ALJ's decision by filing "exceptions" to the ALJ's decision. This is a formal document listing the alleged errors

the ALJ made in factual conclusions, legal conclusions, or in the proposed remedy. Briefs and counterbriefs are filed. The Board makes the final decision and order based on the transcript of the hearing, the exhibits, and the briefs. There is not another full trial before the Board. In some cases of unique importance or interest, such as raising an issue the Board has not previously considered, the Board may permit other parties (e.g. the AFL-CIO or the United States Chamber of Commerce) to file "amicus" briefs on the issue in dispute or even publish an order inviting interested parties to submit a brief. In rare cases, the Board may hold oral argument in a case. This may occur only one or two times a year; there are many years without any oral arguments at all. The Board's decision is a binding, enforceable order. The Board may remedy the violation alleged in the complaint or other violations reasonably related to those specified in the complaint if the issue was closely connected to the subject matter of the complaint and was fully litigated in the trial. Also, in certain limited case categories, the rules authorize an ALJ to issue a "bench decision," subject to appeal to the Board, on the record within 72 hours of the close of the trial without all the formalities of a full written decision.

5. Appeal Procedures

After the Board's decision, the case can be appealed to a United States Court of Appeals. Figure 1.4 illustrates the enforcement process. There are 11 courts of appeals, each serving an appellate circuit composed of a number of states, and one appellate court for the District of Columbia. The party losing before the Board can appeal the decision to the court of appeals covering the state where the alleged unfair labor practice occurred, where the appealing party resides or transacts business, or in the United States Court of Appeals for the District of Columbia.

On the other hand, the respondent can simply refuse to obey the Board's decision. In that case, the general counsel can file a petition in the appropriate court of appeals to enforce the Board's decision.

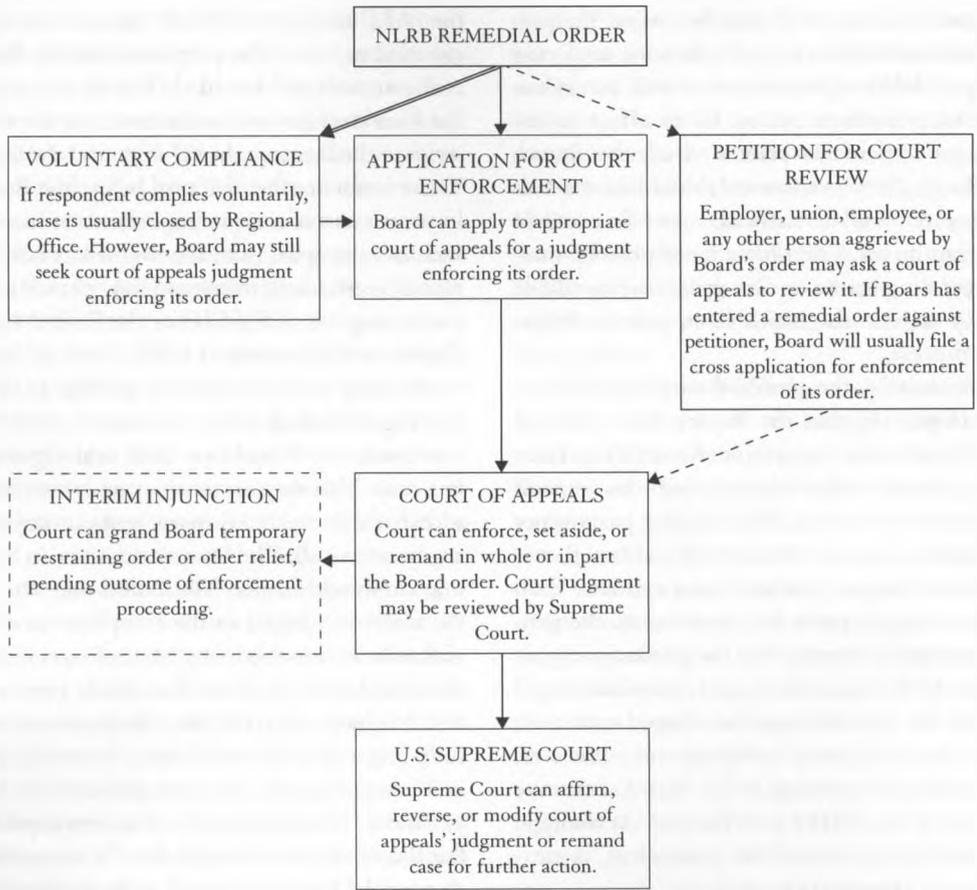


Figure 1.4 NLRB order enforcement chart

There is no new trial before the court of appeals. The court bases its decision on the transcript and exhibits of the hearing before the ALJ and the Board's decision. The Supreme Court has held that a court of appeals must uphold the Board's decision if it is based on substantial evidence on the record as a whole. This means that if there is substantial evidence to support the Board's decision, the court of appeals cannot reverse the Board even though the court might have reached a different conclusion on the same evidence. This standard is applied because in establishing the NLRB, Congress intended the Board, not the courts, to be the primary agency to interpret and apply the Act.

The court of appeals can enforce the Board's decision and order in full, modify the Board's decision in some aspect and enforce the decision as modified, or vacate the Board's entire

decision. Sometimes the court may remand a case to the Board for reconsideration in light of some point raised by the court of appeals that the court feels the Board should consider before further action is taken. Only a relatively few cases reach the appellate level each year. Overall, most of the Board's decisions are upheld either in full or in substantial part. Practically, there is little chance of reversing the Board on appeal if the only issue is one of fact, such as whether an employee was discharged for cause or for union activity. There is a greater likelihood of success on appeal if the issue pertains to the law's meaning. The substantial evidence rule discourages the courts from substituting their judgment for the Board's on fact issues.

There is a unique relationship between the NLRB and the courts of appeals that is sometimes difficult for laypersons to understand.

The Board is bound by only Supreme Court interpretations. The Board is bound by a court of appeals decision in a particular case affirming, denying, modifying, or remanding the Board's decision. However, the Board is not bound by any general interpretations of the Labor Management Relations Act that a court of appeals may make. Sometimes a particular court of appeals' interpretation will differ from the Board's on a specific point. The Board may continue to issue decisions applying one view of the law that the court of appeals consistently reverses because the court has a different interpretation. Sometimes some courts of appeals may agree with the Board's interpretation while other courts of appeals may not. This means that some courts of appeals will affirm the Board's decision on a given point while other courts of appeals will refuse to enforce the Board's decision on the same issue. That conflict may continue until such time as the Board changes its view, the courts of appeals finally reach agreement with the Board, or the Supreme Court issues a binding decision.

A party appealing a Board's decision usually has a choice as to where to appeal; because courts of appeals may disagree with the Board or among themselves, a party may maneuver to file its appeal in a court of appeals that would interpret the law favorably. This is called forum shopping. Generally, the court of appeals in which an appeal is first filed has jurisdiction over the case. Sometimes parties engage in a "race to the courthouse," attempting to file their respective appeals as quickly as possible in a court of appeals favorable to their position. Although forum shopping or courthouse races do occur in important or unique cases, appeals in most cases are routinely filed in the court of appeals where the unfair labor practice occurred.

Appeal to the Supreme Court Following a court of appeals decision, it is possible to appeal to the Supreme Court. In contrast to the court of appeals, which must consider every case appealed to it, the Supreme Court has discretion as to whether it will consider a case. The technical term for requesting the Supreme Court to

hear a case is a Petition for Writ of Certiorari (abbreviated Cert). A petition for Cert describes the basic facts of the case and the reasons why the Supreme Court should consider it. The petition is reviewed by the Court, and if at least four of the justices agree to hear the case, the petition is granted. The case is then placed on the Court's appeal calendar. There is no trial before the Supreme Court; the appeal is based on the trial transcript, the Board's and court of appeals' decisions, and the parties' briefs.

The Supreme Court usually does not hear a case just because the facts are complicated. Normally, the Supreme Court considers only a case involving a unique issue of law or if the courts of appeals have reached conflicting decisions on the same issue and the Court wants to resolve the uncertainty that the conflict creates. Sometimes, however, an issue may be so controversial that the Court will simply prefer not to consider the matter at that time until the ramifications are clear. Denial of a Writ of Certiorari does not indicate that the Court agrees or disagrees with the lower court decision; it simply means that the Court, for whatever reason, chose not to hear that particular case.

Supreme Court action, either in denying a Writ of Certiorari or in affirming or reversing the decision of the court of appeals on the merits, is the final step in the judicial process. Of course, sometimes the same case may be before a court of appeals or the Supreme Court more than once. A court of appeals, for example, may modify or remand a Board decision, and the case may come back to a court of appeals for a second time. Similarly, the Supreme Court may remand a case to the court of appeals for reconsideration in light of a principle stated by the Supreme Court. The decision on remand may be reappealed to the Supreme Court after the court of appeals issues its second opinion.

6. Compliance Proceedings

After an unfair labor practice charge is finally resolved, either by settlement, by a Board decision, or by a final appellate court decision, the case goes to the compliance stage. Each regional office has a compliance officer who ensures that

the Board's order or the terms of a settlement agreement are complied with. That includes making sure that required notices have been posted, that any back pay has been paid, or that any other actions required have been taken.

An unlawfully discharged employee is entitled to back pay based on the difference between what would have been earned and what was earned, on a quarterly basis, after discharge. Back pay is taxable. However, the Board has recently ruled that if a lump-sum back pay award covers more than a one year period, and the payment results in an employee receiving credit for more income from his employer in a year than the employee would have otherwise received, the employer must compensate the employee for any additional tax the employee must pay as a result. Also, the employer must notify the Social Security Administration of the payment so that it is allocated to the appropriate month for social security credit. If there is a disagreement on the amount of back pay under a Board decision that the parties cannot settle, the matter is resolved in a back pay specification hearing. The regional director issues a back pay specification alleging the amount of back pay the regional director has determined the employee should receive. The employer has the burden of proving that the amount claimed is erroneous and that a lesser amount is due. These cases usually involve issues such as whether the employee was actively looking for work while unemployed, as the law requires; or whether the employee would have been legitimately terminated before the date the Board ordered the reinstatement (such as by a legitimate economic layoff), so that the back pay period should end prior to the date the Board ordered reinstatement. Back pay specification hearings follow the same procedures followed in an unfair labor practice case and are heard by an ALJ. There is again an absolute right to appeal the ALJ's decision to the Board and ultimately to a court of appeals.

Usually, the compliance officer simply checks with the charging party about 60 days after the Board's decision has been rendered or a case has been settled to make sure that the Board's decision or settlement is being complied with. If so, the case is routinely closed. If a settlement is not being complied with, the settlement can be set aside and the case will be resumed as a formal

proceeding. If an employer fails to follow a Board decision, the matter can be appealed to a court of appeals by the Board. If there has been a court decision enforcing the Board's award, and the respondent is not complying with the court decision, the Board can request the court of appeals to find the respondent in contempt of court.

The Board decides whether or not a respondent is complying with a Board order and what action to take if it is not. Suppose that an employer has been ordered to bargain in good faith with a union. The compliance officer will contact the union about the employer's compliance. If the union believes that the employer is not bargaining in good faith, the compliance officer will investigate the facts. The regional director, acting for the general counsel, determines whether the employer is complying.

If the regional director decides that the employer is complying, notwithstanding the union's assertion that it is not, what can the union do? Can the union seek court enforcement or contempt of court if the employer is failing to comply? No, it is the general counsel's decision; he or she controls the case. If the general counsel does not act, the union cannot go to court on its own. There have been cases involving flagrant employer violations, in which the general counsel has settled pending court actions over the union's objection that the settlement was too lenient. The unions involved could protest, but they could not prevent the general counsel from taking such action.

7. Unfair Labor Practice Processing Time

Subject to certain narrow exceptions discussed earlier in Part III-D-1, a charge has to be filed and served within 6 months of the unfair labor practice. As with other administrative or judicial proceedings, processing a charge before the National Labor Relations Board takes substantial time. Thus, in fiscal year 2013 the median time from the issuance of a complaint to the date of a hearing before an ALJ was 81 days. There were 84 days from the close of hearing to the issuance of the ALJ's decision.¹² Although

¹² Source: Office of the Executive Secretary, National Labor Relations Board.

there are no precise statistics, the Board may take close to a year to decide a case before it on appeal from an ALJ decision. The cases taking the longest are usually those that may involve a new legal issue or reconsideration of existing precedent, or those over which the Board members themselves are divided. Such cases may be held by the Board for several years. If a case raises an issue that the Board is considering for the first time or that it is reconsidering, other cases raising the same issue may be held up for long periods while the Board decides the point.

If a case is appealed to a circuit court of appeals, it takes close to a year (longer in some circuits) after the appeal is filed before the court's decision is rendered. That time includes time for filing the Board's case record with the appellate court, filing briefs, oral argument, and court consideration. The courts of appeals also, of course, have a backlog of cases to consider. If a case is appealed to the Supreme Court and the Court agrees to hear the case, it may take at least another year before the Court reaches a decision.

Thus, some NLRB cases may take nearly 4 years to resolve: 2 years to process the case through the Board, a third year (or more) for an appellate court decision, and a fourth year if the case reaches the Supreme Court. Some employers may take advantage of this time span, even in a case they know lacks merit, in an effort to delay bargaining or otherwise circumvent employee rights. However, most cases do not go through this entire process. For example, in fiscal year 2012,¹³ there were 21,629 charges filed. The general counsel found merit in 36 percent of the charges. 1,314 complaints were issued. Ninety-one percent of the merit cases were settled (before or after a complaint was issued). In fiscal year 2012, 72.7 percent of *all* unfair labor practice charges were resolved within 120 days of the charge and 83.8 percent of meritorious (prosecutable) charges were at the compliance stage within 365 days. All these statistics tend to be fairly consistent from year to year. The Board

issued only 277 decisions in unfair labor practice cases, some of which were not contested.

The success rate of the general counsel in prosecuting complaints before the Board is consistently high. Thus in fiscal year 2012 the Regional Offices won 91.1 percent of Board, ALJ ULP, and compliance decisions in whole or part. Although precise figures are not available, it is generally the case that only a small percentage of Board decisions reach the appellate court level, and that a substantial majority of these decisions are upheld by the courts of appeals in whole or in part.

The general counsel has adopted internal procedures and time guidelines for the regions to follow in processing unfair labor practice charges. For example, charges are divided into three categories with Category III (cases with "exceptional impact") to receive the highest priority. Under the guidelines, Category III cases are to be initially resolved (dismissed, settled, or complaint issued) within 7 weeks; Category II (significant) cases within 9 weeks; and Category I (important) cases within 12 weeks. The regional offices are also making greater use of email and other electronic communications, telephone interviews and faxed transmission of evidence to expedite investigations. Because these guidelines are subject to change and their implementation varies between regions, persons filing a charge should check with the appropriate region as to the internal procedures and time guidelines it uses in processing charges.

E. Procedure in Representation Cases

The form filed to start a representation proceeding is a petition. The Board has a standard petition form for filing a charge that is used in all regional offices. A copy of the form is available in the regional offices and at www.nlrb.gov (home-what-we-do-resources (forms)). Figure 1.5 is a chart of the representation proceedings process. Just as unfair labor practice cases have a "C" letter designation, representation cases also have letter designations. A petition filed by a union to represent employees has the designation "RC." Figure 1.5 shows the types of representation petitions and the

¹³ The processing statistics cited in this and the next paragraph are taken from the National Labor Relations Board Performance and Accountability Report, 2012, for the 2012 fiscal year ending September 30, 2012. Please review footnote 10.

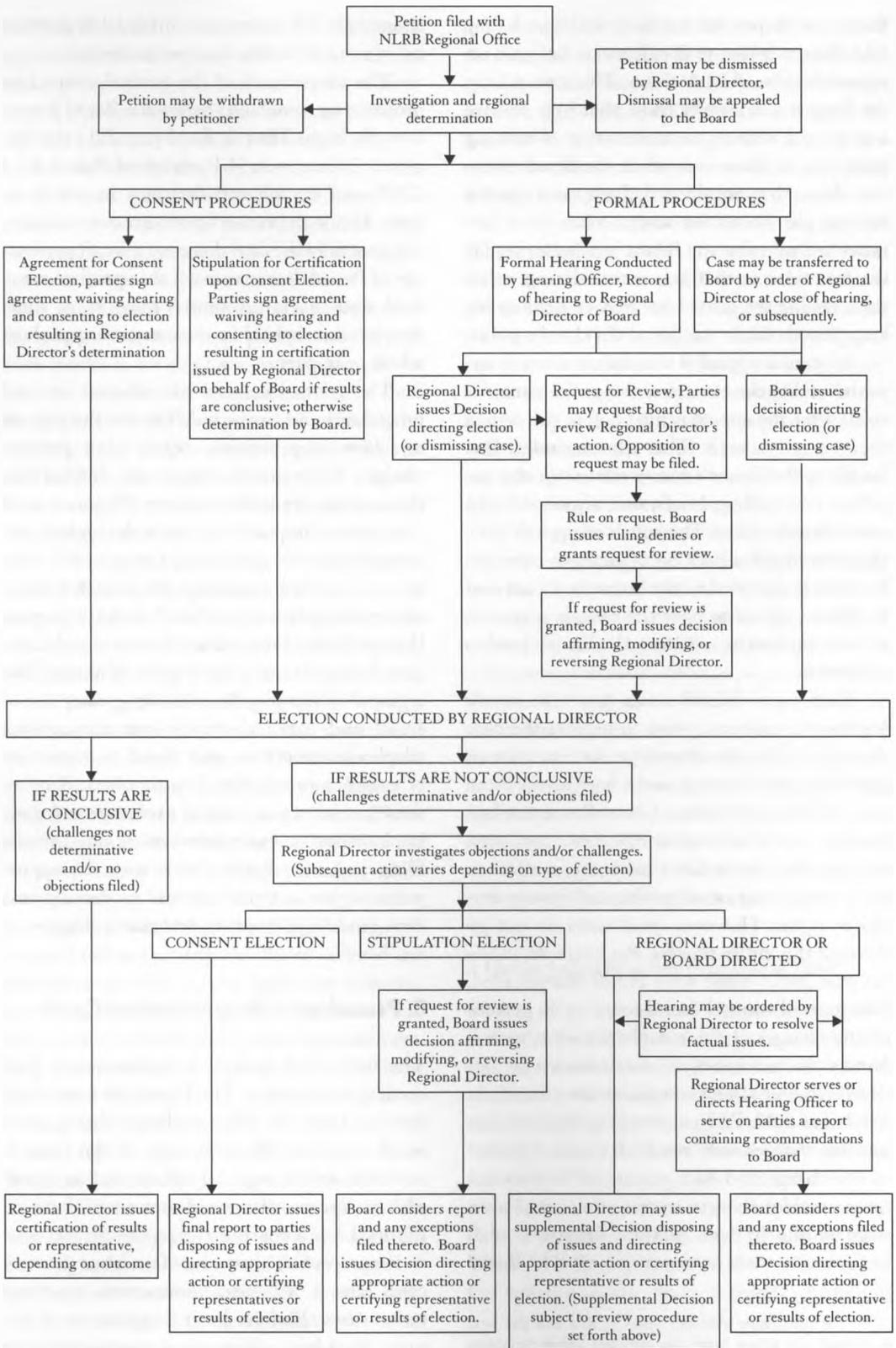


Figure 1.5 Representation election process chart

designations used. Representation petitions use the same numbering system as used in unfair labor practice cases: the regional number, the letter code, and the case number. Representation cases are commonly referred to as "R" cases. As noted in chapter 2, Part F., of this text, the Board has considered changes to its rules to expedite the representation case handling process; but the fundamental processes outlined in this chapter would remain basically the same.

1. Administrative Investigation—The "Showing of Interest"

Representation matters are governed by Section 9 of the Act. A representation petition filed by a union must be supported by a "showing of interest" that at least 30 percent of the employees in the proposed unit want an election. This rule prevents the Board from getting bogged down in elections that the union has no chance of winning. However, an incumbent union can satisfy the "showing of interest" requirement by submitting a recently expired collective bargaining agreement, including a prehire agreement permitted in the construction industry (see chapter 4).

Usually a union showing of interest is made by authorization cards signed by 30 percent of the employees in the bargaining unit stating that they wish union representation. However, cards are not the only method that can be used. For example, employees can simply sign a petition circulated by the union. However, cards are undoubtedly the preferred method. In general, the Board requires that cards be dated when signed. However, if undated cards are submitted, the Board may accept an affidavit attesting to the date the cards were signed. As a matter of good practice, cards should also be initialed by the person getting the signatures. In that way, if there is ever any question about the authenticity of the card, a witness can verify it. Usually, a union submits its "showing of interest" (normally recognition cards) at the same time that it files the petition. However, the Board's rules permit the showing of interest to be submitted within 48 hours after the petition was filed but not later than the last day on which the petition would be timely.

The Board makes an "administrative investigation" to determine whether the petition is supported by the 30 percent showing. Someone from the field office conducts the investigation, usually by verifying the number of cards against a payroll list submitted by the employer to the regional office. The Board has consistently held that the question of a "showing of interest" is an internal matter for the Board to resolve. That means that there is no hearing on the question of showing of interest. Rather, if showing of interest is disputed, either side may informally submit evidence on the question to the regional director for consideration.

Another union may intervene in a representation case proceeding and appear on the ballot if it has at least one valid representation card signed by a bargaining unit employee or if it is a party to a collective bargaining agreement purportedly covering the proposed unit. However, to participate in the representation hearing (beyond appearing on the ballot), the union must have valid representation cards signed by at least 10 percent of the employees in the proposed unit. To seek a change in the scope of the unit requested by the union that filed the original petition, the intervening union must have valid representation cards from 30 percent of the employees in the unit that it seeks to represent.

2. Consent Elections

If, after preliminary investigation, the regional director determines that the petition raises a question concerning representation (that the petition is properly supported by a "showing of interest" and that the Board appears to have jurisdiction as discussed above), a regional office staff member normally contacts the union and the employer to determine whether the parties can agree to the terms of an election. If so, the parties may enter into a consent election agreement that includes a description of the appropriate unit, the employee classifications to be included and excluded, the time and place of the election, and the payroll eligibility date (the date by which a person must be employed in order to vote). These issues are discussed in detail in chapter 2.