
# 806:Labor Law Issues Affecting the Nonunion Employer

**Nicholas Bouler**
*Deputy General Counsel*
BE&K, Inc.

**Frank W. Jackson III**
*Assistant General Counsel*
Blue Cross and Blue Shield of Michigan

**Frank Lopez**
*Senior Counsel—Labor & Employment Law*
Ryder System, Inc.

# Faculty Biographies

**Nicholas Bouler**

Nicholas Bouler is deputy general counsel with BE&K, Inc. in Birmingham, Alabama. His primary legal responsibilities are employment and labor law and major contract drafting and negotiation. He is also involved in developing and delivering supervisor training seminars on employment and labor issues. BE&K is an international design-build firm providing large-scale engineering, construction, and maintenance for process oriented industries, commercial real estate projects, and the telecommunication industry.

Mr. Bouler has been active in Associated Builders and Contractors, serving as a past chair of the national benefits committee, and currently as a taskforce chair for the Alabama chapter. He is also a current member of the board of ACC's Alabama chapter.

Mr. Bouler received his BA from the University of South Alabama and is a graduate of Cumberland School of Law at Samford University in Birmingham, Alabama.

**Frank W. Jackson III**

Frank W. Jackson, III is assistant general counsel with Blue Cross Blue Shield of Michigan in Detroit. In this position, he leads the employee relations section of the office of general counsel. He provides advice and counsel to leadership at all levels of the company on all matters relating to labor and employment discrimination law. He supervises two attorneys and various outside counsel and represents the company, company officers, and employees in trial, in arbitration, and before state and federal tribunals and agencies.

Prior to joining Blue Cross and Blue Shield, Mr. Jackson was director of litigation for the City of Detroit law department, where he had supervisory responsibility for all of the litigation activities of more than 45 attorneys, as well supervisory responsibility for the litigation activities of outside counsel. Previous positions for the City of Detroit include supervisor of assistant corporation counsel for the labor and workers' compensation department, assistant corporate counsel, and legal intern. He was also a major in the U.S. Army Reserves.

Mr. Jackson is vice chair of ACC's Labor and Employment Law Committee and is a former member of the board of directors for ACC's Michigan Chapter. He is also a member of the board of trustees for Life Directions Inc. in Detroit and the John Wesley AMEZ Church. Other memberships include the Wayne County Civil Service Commission, the board of visitors of the University of Michigan Law School, the board of visitors for the School of Nursing at Oakland University, and Alpha Phi Alpha, Gamma Lambda chapter.

Mr. Jackson graduated with a BA from Wayne State University and received hiss JD from the University of Michigan Law School.

 

**Frank Lopez**

Frank Lopez is senior counsel for labor and employment law at Ryder System, Inc., a Fortune 500 company with 30,000 employees worldwide. Mr. Lopez is responsible for handling all labor, employment, business immigration, and employee benefit matters. He also counsels management on developing business solutions for preventing and resolving labor and employment law matters.

Prior to joining Ryder, Mr. Lopez was an associate at Fisher & Phillips LLP, a national labor and employment law firm. At Fisher & Phillips, he represented management in all areas of labor and employment.

Mr. Lopez received a BA from Florida International University and is a graduate of Emory University School of Law.

 

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Part I. - How Labor Law Issues Arise in the Non-Union Workplace

Nicholas Bouler
Deputy General Counsel
BE&K, Inc.
Birmingham, Alabama

## I. Introduction

It doesn't take a specialist to know that the volume of statutory employment law in the United States has exploded in the time most of us have practiced, producing an alphabet-soup of acronyms (FMLA, ADA, I-9, ADEA, FCRA, EPPA), in addition that old war-horse, Title VII. The result is that as much as 80% of the typical workforce is covered, as a member of a protected class, under one or another of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and/or the Americans with Disabilities Act. Even employees who are not (yet) covered under those Acts are subject to the Family Medical Leave Act, the privacy protections mandated by HIPAA, and the I-9 requirements. For the generalist in a small- to medium-sized law department, it can be bewildering to keep up. So it is somewhat discouraging to report that there is another entire body of law which affects all our employees every day, but

 

about which many of us know very little – labor law, as enacted in the National Labor Relations Act.

What makes this problem even more acute is that structural changes in the way many historically non-union companies operate have, unintentionally, made it essential that in-house counsel understand the basic rules of the National Labor Relations Act. Downsizing, mergers, reliance on supplemental workforces and outsourcing have all created stress in the traditional workforce that can cause labor law issues to arise where they have not previously been experienced.

## II. Discussion Scenarios

Consider the following scenarios:

### A. Read all about it!

An employee sends out a group e-mail criticizing your company's benefit plans, making unflattering comparisons to plans offered by competitors and suggesting ineptitude, if not moral cowardice, on the part of the company's managers. Your manager of benefits feels insulted and points out the company's policy against speech which is disparaging or humiliating. The employee's termination paperwork has been filled out and comes to you for review. The employee is a white male American citizen in good health who is 36 years old.

### B. How Much Was <u>Your</u> Raise?

A human resources manager leaves a voicemail asking you to "sign off" on a termination. An employee is being fired at his manager's insistence for violating a company policy against discussing wages. You verify that the company handbook contains the following language:

 

*Standards of Conduct - Rule 13:*

*Ethical business practice is expected of all employees in financial matters and in the protection of vital company confidential information. Disclosure or discussion of confidential pricing, compensation, procurement and other financial information, unless strictly required in performing job duties, is expressly forbidden.*

A signed acknowledgment form in the HR file confirms that the employee received, and agreed to be bound by, the handbook. The employee is a white male American citizen in good health who is 36 years old.

### C. There's a Meeting Here Tonight!

One of your managers brings to you a handbill which invites employees to attend a meeting to discuss the amount of outsourcing your company is doing. The top corner of the handbill is torn slightly, as though it has been ripped from a thumbtack. He asks you to write a memo reminding employees of the policy on use of the company billboards, and requests your sign-off on a written reprimand to the employee who posted the handbill.

Later, another manager shows you a copy of the same handbill. This one has a small grease stain on it. The manager says he was able to "lift" it from an employee's workstation, so he would know the time and place of the meeting.

### D. Let's Form a Committee!

Your COO asks for your input on a continuous improvement initiative. The plan is to form "enhancement teams" made up of employees in various sectors of the business. The teams will work with designated management representatives to improve production and morale. Your first impulse is to remind the COO that employees should be selected for membership on the teams in a manner that assures equal representation of the various EEOC classifications.

Consider the e-mail scenario above. In many companies the legal analysis would center on the identity of the employee who had published the e-mail. Typically, the manager would

 

want to discipline or fire this person for insubordination. The in-house attorney evaluating that discipline would likely run through the traditional protected classifications to determine that the employee was a white male under the age of 40 with no known disabilities or strong ethnic identification and might logically conclude that no employment law would be violated by such a termination (assuming that no employment contract was present and the workplace was located in an employment-at-will jurisdiction). A similar analysis would undoubtedly occur with respect to the other scenarios except for that of the committee, which would not involve a request to discipline or terminate employees. But in all of these cases the analysis will be flawed unless the cornerstone of American labor law, the National Labor Relations Act, is taken into account.

## III. Unfair Labor Practices - Employers

The current National Labor Relations Act (29 U.S.C. §§ 151-169) represents an evolution of national labor policy that began with the passage of the Wagner Act in 1935. The Act grew out of a period of tumult so violent it approached warfare and established a mechanism for administration and enforcement by a Board authorized to seek enforcement of its orders through the court system.

A discussion of the full content of the Act is beyond the scope of this paper but, generally speaking, the Act:

establishes the National Labor Relations Board;

establishes a right of employees to organize for collective activity, or to refrain from doing so;

 

establishes mechanisms to define bargaining units so that the composition of bargaining units is not manipulated in order to affect the outcome of elections; and

establishes certain categories of conduct that are made illegal as being disruptive to the free exercise of employees' rights to be represented or to choose not to be.

The National Labor Relations Board maintains a helpful website (www.nlrb.gov), which includes extensive libraries of decisions as well as current case summaries and a large number of useful publications. By clicking on "Publications" one can be directed to a page which includes a link to the Basic Guide to the National Labor Relations Act, an excellent quick introduction to both the Act and, equally important, the Board's position on interpreting it. Where this paper refers to statements of, or examples by, the Board that material comes from the Basic Guide.

Under the Act certain types of conduct, referred to as UNFAIR LABOR PRACTICES, are prohibited. Some of these practices are typically performed by employers, others are typically performed by unions and for convenience the Act divides these into separate sections. Thus it is common for labor practitioners to refer to Section 7 rights which are the rights of the employees to organize and become part of a unit, or to elect not to do so. In turn practitioners refer to Section 8 charges, which allege unfair labor practices of employers, and Section 9 charges, alleging unfair labor practices of labor organizations. Since the primary responsibility of in-house counsel is to assure compliance by the company with applicable law, this paper will focus on Section 8 unfair labor practices. These are found at 29 U.S.C. § 158.

 

**Section 8 (a)(1), Interference with Section 7 Rights.** As noted above, Section 7 rights are the rights of the employees to join or form labor organizations, or to refrain from doing so. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The Board interprets this provision against interference so broadly that whenever a violation of the other Section 8 provisions is found, a violation of this Section 8(a)(1) will also be found. The reasoning is that any other violation must, by definition, constitute interference and therefore the 8(a)(1) violation is "derivative" of the first one.

In addition, however, the Board's Basic Guide gives the following examples of Section 8(a)(1) unfair labor practices which can be committed independently (that is, without a violation of any other part of Section 8):

> threatening employees with the loss of jobs or benefits if they should join or vote for a union.
>
> threatening to close down the plant if a union should be organized in it.
>
> questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees
>
> spying on union gatherings or pretending to spy.
>
> granting wage increases deliberately timed to discourage employees from forming or joining a union.

It is important to note that these are merely examples of the effect or goal of illegal conduct, not descriptions of what specific conduct is prohibited. The Board will look closely at the context of employer conduct in finding a violation, and will always make a broad interpretation of the statutory language to achieve the goals of the Act. Thus, driving by a union

 

hall located on a public street, without ever leaving the public way, will constitute "spying" if the purpose in driving by was to determine how many employees were attending a meeting being held at the hall. This is true even though no attempt is made to be surreptitious when driving by.

**Section 8(a)(2) – Domination or Illegal Assistance in Support of Labor Organization.** One of the goals of the Act was to stamp out so-called "company unions." In the early years of the last century, companies would sometimes form a "union" and direct their employees to join it and then deal with that union exclusively on working conditions. The classic example of domination is a labor organization that is actually created and funded by the company but Section 8(a)(2) also prohibits "illegal assistance and support." This provision typically applies when more than one outside union is competing to represent a company's employees and a company wishes to tilt toward one or the other, perhaps feeling its negotiating position would be stronger. Any activity by the company to favor one or the other union is illegal.

The National Labor Relations Board's Basic Guide gives the following examples of Section 8(a)(2) Unfair Labor Practices:

> Taking an active part in organizing a union or a committee to represent employees.
>
> Bringing pressure on employees to support a union financially, except in the enforcement of a lawful union-security agreement.
>
> Allowing one of several unions, competing to represent employees, to solicit on company premises during working hours and denying other unions the same privilege.

 

> Soliciting and obtaining from employees and applicants for employment, during the hiring procedure, applications for union membership and signed authorizations for the check-off of union dues.

One might expect this to be the provision of Section 8 traditionally non-union companies are least likely to violate. In the late 80's and early 90's, however, unions brought a flurry of cases to stop the formation of "high performance work teams" and similar employee involvement groups. A series of 8(a)(2) cases followed, most of which involved non-union employers.

**Section 8(a)(3) – Discrimination Against Employees.** This section makes it an unfair labor practice for an employer to discriminate against employees because they wish to form (or have formed) a labor organization or (interestingly) because they do not wish to do so. This section will probably be the most familiar to lawyers who are otherwise experienced in typical employment law discrimination cases under Title VII. That is because the standard of review is quite similar. Employment lawyers who are well-accustomed to the McDonnell Douglas standard of review will find much that is familiar when introduced to the burden of proof in these cases, established in Wright Line, 251 NLRB 1083, 1089 (1980).

The Board must initially show, by a preponderance of the evidence, that an employee engaged in union or protected concerted activity, that the employer knew of the activity, and that the employer had animus towards the activity and the animus at least partially motivated some negative act toward the employee. If the Board is able to make such a showing, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

 

So the only adjustment required in the analysis is to include "union membership or interest" as a protected class along with sex, race, national origin, etc. It is also important to note that the Act specifically states that this section does not limit an employer's right to reassign employees or terminate them for genuine economic reasons or for such cause as disobedience, insubordination, poor work, or poor attendance. The following examples of Section 8(a)(3) Unfair Labor Practices again come from the Board's Basic Guide:

> Discharging employees because they urged other employees to join a union.
>
> Refusing to reinstate employees when jobs they are qualified for are open because they took part in a union's lawful strike.
>
> Granting of "superseniority" to those hired to replace employees engaged in a lawful strike.
>
> Demoting employees because they circulated a union petition among other employees asking the employer for an increase in pay.
>
> Discontinuing an operation at one plant and discharging the employees involved followed by opening the same operation at another plant with new employees because the employees at the first plant joined a union.
>
> Refusing to hire qualified applicants for jobs because they belong to a union. It would also be a violation if the qualified applicant were refused employment because they did not belong to a union, or because they belonged to one union rather than another.

A large class of unfair labor practice cases arises around the concept of "protected concerted activity." Generally speaking, employees acting as a group (even a very small one) for

 

purposes related to the Act are protected against termination or other negative job actions by this section. As the Board's comments make clear, "a banding together of employees, even in the absence of a formal organization, may constitute a labor organization for purposes of Section 8(a)(3)."

**Section 8(a)(4) – Discrimination for NLRB Activity.** This is a fairly straightforward section and is similar to the anti-retaliation rules of Workers Compensation Statutes and the Occupational Safety and Health Administration, among others. The Board gives the following examples of Section 8(a)(4) violations:

> Refusing to reinstate employees when jobs they are otherwise qualified for are open because they filed charges with the NLRB claiming their layoffs were based on union activity.
>
> Demoting employees because they testified at an NLRB hearing.

**Section 8(a)(5) – Refusal to Bargain in Good Faith.** This, at least, is not a section that will catch the corporate counsel off guard. Refusal to bargain in good faith only applies when a bargaining representative (a union) has been designated by a majority of the employees and a demand to bargain has been made and refused by the employer.

## IV. Applying the Law

With this brief outline of the provisions of the Act, we should be able to see labor law issues in the discussion scenarios that, perhaps, were not detected before:

 

A. The email newsletter. It should be apparent that the subject of the email includes "terms and conditions of employment." If the e-mail is addressed to, or purports to originate from, a group of employees then the basic requirements have been met for the Board to consider this to be "protected concerted activity." Remember that the Board interprets Section 7 rights to include the right to act in concert whether or not a formal union is involved. As always, the outcome is determined by the facts of the particular incident. Clearly the employer can punish communications that are obscene, profane, defamatory or malicious and can likewise punish genuine insubordination. What the employer cannot do is to use these legitimate reasons as an excuse (a "pretext" in Title VII parlance) to limit or suppress the employees' rights to act in concert to achieve legitimate workplace objectives. The range of outcomes is illustrated by two cases: National Labor Relations Board v. Honda of America Manufacturing, Inc., 73 Fed. Appx. 810; 203 U.S. App. LEXIS 17034; 174 L.R.R.M. 2992 (2003), illustrates a Board finding that the punishment of the employee under a written company policy constituted an unfair labor practice. On the other hand, very similar policy language was upheld as a reasonable workplace control measure in the D.C. Circuit case of Adtranz, et al. v. Machinist Automotive Trades District Lodge No. 190, et al., 346 U.S. App. D.C. 315; 253 F.3d 19 (D.C. Cir. 2001). In addition to providing helpful guidance on the issue of what type of procedure or handbook provision will be acceptable, Adtranz also provides a summary of other NLRB rulings on handbook procedures and policies in this area.

B. Discussion of Wages. Some companies have policies that restrict or prohibit discussions of wages and benefits either entirely or in certain areas of the business. The rationale for these rules is that the compensation decision is shaped by many factors which are difficult to

 

articulate to every single employee and knowledge of discrepancies in wages will create bad feeling that is not conducive to a harmonious work environment. The counter argument, of course, is that wages are the central part of the "terms and conditions of employment" and therefore are, by definition, a factor in the Section 7 rights of employees.

The National Labor Relations Board reviews cases involving "no discussion" policies or procedures by analyzing how much the policies restrain the exercise of Section 7 rights, when balanced against legitimate business considerations. This balance can be illustrated by the Board's holding in International Business Machines Corp., 265 NLRB 638 (1982), where an employee who received a confidential list of salaries, when it was mailed to him in error, proceeded to reprint and distribute the list to other employees. The Board held that the discharge of the offending employee was lawful. There was no question that the employee knew the document he had received was confidential, knew that he was not supposed to have it, and knew that he would violate a known company policy on protecting confidential business information by distributing it. The Board also found that employee's rights to discuss their wages were not adversely affected by the policy, particularly when viewed in light of the legitimate business reasons for keeping such information confidential from competitors. In contrast, the Board in CFS North American, Inc., 341 NLRB No. 44 (2004), found that a company confidentiality agreement which prohibited employees from discussing wages if they were using "specific, accurate numbers" was so broad and indiscriminate that it did restrict Section 7 rights unduly and constituted an unfair labor practice. Among other things, the confidentiality agreement did not distinguish between discussing managers or employees' salaries and because it included non-supervisory employees wages and salaries, it was unlawful. The case cites useful Board precedent.

 

The Board has recognized that there can be valid restrictions even on the discussion of non-supervisory employee wages if the restrictions are carefully limited to avoid disruption in the employer's business. Thus, there are numerous cases that retail employees can be restricted from discussing wages and employment on the sales floor and casino employees likewise can be restricted while they are on the casino floor itself. These restrictions are valid when strictly limited to areas where the employee is face to face with customers of the business. The restrictions are not valid when they are expanded to include other public areas of the business such as restaurants and restrooms. Double Eagle Hotel & Casino, 341 NLRB No. 17, 174 L.R.R.M. 1088 (2004)

C. Handbills, Bulletin Boards & Off-Site Meetings. It is probably obvious by now that communication issues are of tremendous importance in resolving labor law disputes. The right of employees to communicate in order to take concerted activity is at the very heart of the Section 7 rights granted by the Act. At the same time, the Board does try to balance the admitted rights of management to run business and to control company assets within legal boundaries.

The first issue raised by scenario C concerns bulletin board policies. There is a universally recognized principle that an employer has the right to control access to its bulletin boards. J.C. Penney, 123 F.3d at 97, 322 NLRB 238 (1996). The problem comes when an employer permits employees to use the bulletin board for some purposes but tries to restrict purposes related to the union. Permitting some uses while denying others obviously raises questions of discrimination and so implicates Section 8(a)(3). The Board's position is that if the employer allows employees to post notices relating to personal, non-work related matters such as cars for sale, birthday and thank you notices, fundraising for school activities, etc., then the

 

company cannot discriminate against notices of union meetings which have been posted by employees. (There would never be an argument that an outside party would have a right to post a notice on a company bulletin board). The Board's principle is stated in Benteler Industries, Inc., 323 NLRB 712 (1997).

Not all courts have been willing to follow the Board's policy quite so broadly. This paper does not attempt an exhaustive examination of the cases but the Seventh Circuit has viewed the issue much more narrowly and gives the employer much more discretion. In Guardian Industries Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995). The court ruled that if the employer's policy on access to the bulletin boards permitted employees to post purely personal announcements and for sale notices but did not permit group or organizational notices, then the company could forbid the posting of union or group meeting notices that had an employment nexus.

The second part of scenario C involved a handbill a supervisor had "lifted" from the workstation of an employee. Presumably this would be a much more obvious problem for in-house counsel from an employee privacy standpoint but the reason for including this scenario is to suggest that the manager may intend to attend the meeting himself, have a surrogate attend the meeting and report back to him, or simply drive by the location of the meeting, all in an effort to see which company employees attend. Any of these actions would constitute a Section 8(a)(1) violation based on spying. The use of a surrogate, if contemplated, raises an important point. It deserves to be stated, though it may seem obvious, that anything the company cannot do directly through its supervisors cannot be done by use of third parties or "loyal" employees. Supervisors are certainly free to listen closely to any information voluntarily disclosed to them by employees

 

(it would be a dereliction of their duties for them not to do so), but it is clearly a violation to encourage employees to report back or to require them to do so.

D. Employee Committees. We have seen that the Board protects concerted activity of employees even when no formal union organization is involved. In other words, a "labor organization" can be a loose aggregation of (very few) employees, so long as there is some general common purpose being pursued. It is also explicit in Section 8(a)(2) that the employer may not dominate or support a labor organization. Thus we see the rationale for the inclusion of Scenario D, above.

Work place enhancement teams and "high performance" work teams have been a feature of the American workplace since the late '80's. Beginning with the landmark Electromation decision (Electromation, Inc., 309 NLRB 990 (1992)) the Board has held that such committees made up of employees constitute labor organizations if they "deal with" management concerning compensation or working conditions. The definition of "deals with" is, as one might expect, very broad, so that an employer deals with such a committee when the committee suggests or makes proposals to management and management responds in any manner. If these committees are set up and directed by management to address topics such as pay rates, smoking, bonuses, attendance or safety and they do "deal with" management, they will be considered unlawful. Useful guidelines appear in E.I. DuPont, 311 NLRB at 894 (1993), and Grouse Mountain II, 333 NLRB No. 157 (2001). See, also, Webcor Packaging, 118 F.3d 1115 (6th Cir. 1997).

There are legal committees, of course. These may be ones that do not deal with terms and conditions of employment but rather deal with product quality, etc. There are also committees that are autonomous, in that they actually gather information and make decisions,

 

rather than dealing with management. These are probably rare but they are legal. Crown Cork and Seal Co., 334 NLRB No. 94 (2001)

## V. Conclusion

Labor law issues can arise in any workplace; no formal union presence is required since the National Labor Relations Act protects the rights of employees, not organizations per se. It is hoped that this brief introduction to the subject will help small law department practitioners to spot these issues and take measures to lower the risk of committing unfair labor practices inadvertently.

The discussion scenarios and the review of Board cases immediately suggest two useful steps for corporate counsel to consider.

First, review corporate handbooks and policies in the areas of access to company bulletin boards, use of e-mail, discussion of raises and similar communication topics to determine if any of those could be considered restrictive of Section 7 rights of employees. The cases cited above will provide examples of language that is problematic, as a guide to reviewing your own company's policies.

Second, include these issues in the training that is already provided to supervisors on EEOC and other employment discrimination and harassment topics. Since supervisors should already understand the dynamics of discrimination, they should quickly grasp that "union preference" is a category to be sensitive to, the same as age or national origin.

Taking these steps will help to protect your company from unexpected charges from the National Labor Relations Board.

 

# WHAT TO DO WHEN YOU THINK THAT YOUR EMPLOYEES WANT TO ORGANIZE

**ACC Presentation**

**October 2004**

**Frank W. Jackson, III** [1]

## POSITIVE CONDUCT

When a union seeks to organize an employer, it looks for weaknesses in the management's personnel relations program which it can exploit in propaganda directed to the employees.

The best time to act to keep a union out is before a union organizer ever walks in. From that moment on, management's freedom of action begins to dissipate.

When an employee problem exists, you can discover and overcome it, but only if you know the reasons behind it. Reasons may be real or imaginary. Imaginary reasons may be as grave as real ones, just as a psychosomatic illness will incapacitate a patient as much as a real illness.

Your supervisors should make their own analysis of the situation in their areas of responsibility. They should be frank with themselves about their own capacity as supervisors and the amount of effort they are putting into their jobs. They should put themselves in other person's shoes. The more realistic they are in evaluating themselves and the conditions in their departments, the better job they will do, not only in solving existing problems, but in preventing new problems from arising.

[1] This presentation is based upon the presenter's experience as a labor and employment attorney, and discussions with and legal memoranda from attorneys at the law firm of Kienbaum, Opperwall, Hardy & Pelton, P.L.C., Birmingham, Michigan.

 

Employee morale is inevitably a product of the organization as a whole. Policies, practices, and attitudes that produce good operating results are exactly the same as those that produce high morale over the long term. Sound organization and capable leadership come first; morale is a by-product.

Employees join unions because:

- ☒ They were not "sold" on their jobs in the first place.
- ☒ The work of "job selling" has not been continuous.
- ☒ Employee-supervisor communications are poor. They do not feel inclined to "talk to the boss."
- ☒ Department working conditions are poor.
- ☒ Wages and benefits are below standard, or they have an incomplete understanding of benefits.
- ☒ Employees feel they have reached the limits of opportunity.
- ☒ There is a feeling of job insecurity.
- ☒ There is a feeling of being "outside" and not belonging to the team.
- ☒ Employees perceive that complaints are ignored, minimized, or handled on a boss-employee basis rather than equal-to-equal.

A union sinks its first roots into an organization by getting employees involved in its activities.

Why do employees become involved at the outset of a union organizing effort?

- ☒ To retaliate against management for real or imagined wrongs.
- ☒ To satisfy an urge for prestige and gain a sense of self-importance among peers.
- ☒ To receive recognition from superiors and management.
- ☒ To combat a sense of frustration or boredom.
- ☒ To generate a sense of "belonging" that comes from secret planning.
- ☒ To create safety in numbers, perhaps coupled with a willingness to reserve judgment while "waiting to see what happens."

 

Note that the first four of these reasons apply primarily to persons with leadership qualities, while the remaining two apply to persons who are followers.

## HOW TO SOLVE PROBLEMS BEFORE THEY ARISE

***Supervisors are the key people to do this job in their departments***

| ***Things To Do*** | ***Suggestions For Getting Them Done*** |
|---|---|
| 1. Handle problems openly and immediately. | 1. Get to the root of the problem. Make the disputant parties aware of your employee relation procedures. Let them know at the outset that if the matter is beyond a supervisor's authority, the supervisor will pass it along to his or her supervisor or the personnel department for action. |
| 2. Squelch rumors openly and thoroughly. | 2. Get the facts. Be prepared to answer questions as well as giving the detailed truth. |
| 3. Maintain two-way voluntary communications with employees. | 3. Supervisors should make the usual practice to talk with every member of their departments, not an unusual event. They should talk about work in progress, individual performance, personal interest and ambitions. They should get to know employees -- part-time as well as full-time -- as individuals and what motivates them.<br><br>Supervisors should keep their managers and the personnel department informed of rumors and causes of dissatisfaction. |

 

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|---|---|
| 4. Keep the employees aware of their importance to the organization. Help them understand the complexity of your operation. | 4. No department works in a vacuum. Each is geared to the successful operation of your organization. Keep your people aware of this. Whenever a department achieves a special accomplishment, the supervisor should pass the credit along to everyone. |
| 5. Constantly repeat the importance of your clients and service, the advantage of a good reputation, and the relationship between the two. | 5. In daily contacts, in meetings and briefing sessions, supervisors should keep employees informed of your organization's growth, the security accruing to them from it, and the relationship between service and growth. |
| 6. Supervisors should be careful of their own personal habits, attitudes, and manners as they may affect other persons' self-respect and emotions, and their dignity in the eyes of others. | 6. Supervisors should act with faith, give the benefit of the doubt, and respond to persons without favoritism. They should act on matters quickly, but first be sure they have the fact, not opinion. They should praise in public but reprimand in private. |
| 7. Supervisors should curb any inclination to be patronizing. | 7. A supervisor's reputation and ability rests heavily upon being just and fair. Fairness in dealing with everyone puts them in competition to do a good job. A supervisor who tries to win popularity contests may be undermining his ability to supervise. |

 

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| 8. | Satisfy natural curiosity for information about expected work loads, changes in department or function, job security, etc. | 8. | You naturally will not discuss confidential information. Make it just as natural to pass along all other information. Do not let your people be surprised. Keep them informed. You will also be keeping open the lines of communication, squelching rumors, and promoting team spirit. |
| 9. | Promote your organization's "human personality." Build loyalty to the organization, its people and its goals. | 9. | Talk favorably about any aspect of the organization's procedures and operation that may come under discussion. Build up other staff members so that you encourage the vision of a "human personality" for the organization as a whole. |
| 10. | Prevent even the appearance of discrimination or segregation of any type. Even the mildest form of perceived discrimination or segregation may become a "flag waving" issue for a union. | 10. | Review the employees and their work <u>individually.</u> If you have a situation where the least desirable work is being done by members of a identifiable group, correct the situation at once. Either mix the crew or rotate the work.<br><br>De Facto segregation frequently grows of itself. Supervisors should be leaders in eliminating it in the cafeteria, during "breaks," and in the ordinary conversations and events that take place during the work day. |
| 11. | Squelch fears and suspicions because these breed feelings of unrest and will pit one group against another, cultivating fertile soil for union activity. | 11. | Fears and suspicions almost always result from lack of information or misinterpretation of available information. Prevent their growth. |

 

## PREVENTATIVE CONDUCT

As noted earlier, the focal point for resisting any union effort must be line supervisors and managers. They are the leaders of your employees and your employees look to them for guidance and advice. Employees expect them to be firm, but fair. It is only when employees for not get satisfaction from line supervisors and managers in correcting their grievances that they have an interest in asking a union for help.

To sum up, supervisors should listen to employees' grievances whether real or imaginary. They should explain your policies and, where a complaint has merit, do something about it. When supervisors do this, you will be in a much better position to successfully resist any union effort, and your organization will be better off in the long run. Follow these guidelines in relations with your employees:

- Be available. Encourage your employees to come to their immediate supervisors.
- Handle complaints promptly and only on an individual basis. Politely refuse to deal with intermediaries or groups.
- Listen and make sure you really understand the basis of the complaint.
- Take the necessary time to discuss the employee's problem.
- Consult with others when appropriate.
- Make decisions on a fair and equitable basis and explain it fully to the employee before taking any action.
- Give access to the normal appeals route if your decision does not satisfy.
- Let your supervisors or the personnel department know the problems that are bothering your employee over which you have no ultimate control.

 

## A. Symptoms Of A Union Organizing Campaign

There are common signs that a union organizing drive is in progress. If any of the following are observed, they should be reported immediately to higher management or the personnel department:

- Union authorization cards, handbills, or leaflets appear on the premises or in parking areas.
- Employees meet at times and places which are contrary to normal routine.
- Employees begin meeting and talking with union leaders.
- The nature of employee complaints change and the frequency decreases.
- Complaints are made by a delegation instead of individually.
- Organizers appear outside the plant and attempt to confer with groups of employees.
- Employees develop an unusual social consciousness or begin using a strange vocabulary, including terms like “concerned action,” “economic pressure,” “duty to bargain,” “right to representation,” and other terms normally associated with unionized companies.
- Employees or strangers show unusual curiosity about company affairs and policies.
- Telephone calls or registered letters are received from a union representative.

The early recognition of an organizing attempt and the initial reaction to such activity is a critical factor in resisting unionization of your employees. In the first few hours and days of a union campaign the most serious errors are normally made. These errors can result in litigation that is contrary to your organization’s best interests, and can even result in a union becoming the exclusive bargaining agent for your employees regardless of the outcome of any election.

If cards purportedly signed by your employees are presented to you by a pro-union employee or are received in the mail, do not examine them. Contact higher

 

management, the personnel department, or counsel. The same approach should be taken if a union organizer wants to talk to you. Tell him politely and firmly that you are not authorized to deal with him and that you will arrange to have someone contact him.

## B. Understanding Policy on Union Organization

The policy of your organization on unions for any group of your employees should be a simple one: You do not want a union and you feel your employees do not need one. Without a union, employees enjoy salaries, employee benefits, and job conditions and relationships which are every bit as good, and in most cases better, than those of unionized employees. Compensation and benefit levels for your employees have been improved over the years without being prodded by any union. These improvements have not cost your employees anything in union dues, initiation fees, fines or assessments. All this has occurred without crippling work stoppages and strikes which alienate clients and cost employees' wages.

Your employees and your organization, as well as the customers or clients you serve, are all better off without a union.

There are several things that you and your employees should know about unions and how they operate in order to fully appreciate this policy. Here are some of them:

1. Union membership costs an employee money. There are many costs:

   - Initiation fees
   - Monthly dues
   - Special assessments and fines which can be of any amount
   - Strike losses in wages and maybe jobs

2. Unions take freedom away from employees. A third party is in the picture when there is a union. Unorganized employees who enjoy the privilege of talking things over with their supervisors, and getting their complaints

 

adjusted for themselves, have a rude awakening when a union comes into an organization. They discover they cannot take things up directly with the supervisor without checking first with a union steward. If the steward thinks it is not politically expedient to pursue the complaint or grievance, the employee is forestalled from doing anything about it.

If the employee tries to go ahead without the blessing of the union, he or she may be frowned upon and regarded as a recalcitrant member. Generally speaking, the employee finds that there has been a loss of the ability to think and act freely and for oneself and is forced to act and think according to union policy.

3. Unions will change the climate. In almost all cases, friendly employment relations end when a union comes in. It is sometimes politically expedient for the union to promote discord – i.e., to cultivate the idea that the employee and management have separate and incompatible interests. This is necessary in order to justify the existence of the union and its cost to either employees. If the union cannot promote the idea that employees are being exploited by management, it cannot sell the idea that employees need the union as a "protector."

## C. Union Solicitation Of Employees

There are bound to be times during a union organizing campaign when people are just standing around and chatting. They have the legal right to talk about the union, to debate with each other, and to solicit others to sign union authorizations cases during non-working time – i.e., during lunch periods and coffee breaks, and before and after work. You cannot forbid such discussions during these times. However, you can and should prohibit such discussions during working time. In addition, distribution of union literature can and should be prohibited at all times in working areas. Also, non-employee solicitors should be prohibited from entering the premises at all times.

 

A pro-union employee or union representative may approach you to solicit support and to get recognition of their demands. Do not overreact. Remember that there are certain things you must not do under these circumstances:

- ☒ Do not look at any petitions or lists of employees.
- ☒ Do not look at any cards with employees' names on them.
- ☒ Do not agree to discuss with a pro-union representative alleged complaints regarding employee grievances or other employee matters.
- ☒ Do not state that you (or your organization) will never recognize the union.
- ☒ Do not ask questions about the degree of support among employees.
- ☒ Do not review or comment upon any offered document.

Any approach or incident of this nature should be reported without delay to higher management or the personnel department.

## MANAGEMENT RIGHTS AND RESPONSIBILITIES DURING AN ORGANIZING CAMPAIGN

### A. Conduct During An Organizing Campaign

The basic law governing employer-employee relations in this field is the National Labor Relations Act. This Act and its amendments create a structure within which unions can petition the National Labor Relations Board (NLRB) for an election to determine if employees, as a group, desire to be represented by a labor union for purpose of collective bargaining over wages, hours, and terms and conditions of employment.

In addition, the National Labor Relations Act and NLRB decisions set forth a number of rules of conduct, the violation of which are called "unfair labor practices," which employers and employees must follow. These rules are enforced by the NLRB.

 

The NLRB has consistently held that, for the purpose of the rules which an employer must follow, each supervisor is an "agent" of the employer. The conduct of each supervisor will therefore bind your organization for purposes of committing unfair labor practices.

The consequences of an employer's unfair labor practice during a union organizing campaign varies with the severity of the offense. If improper action it taken to discharge an employee, the employee may be reinstated with back pay. If improper remarks are made by a supervisor, an election in which the employees vote against union representation may be set aside and a new election ordered. If a supervisor's conduct constitutes a serious enough violation, an election can be set aside and the union awarded the automatic right to represent the employees regardless of the union's failure to obtain a majority of those voting.

During a campaign in which a union seeks to organize a group of employees, the employer is entitled to "free speech" and is therefore permitted to give its views on unionization and tell its side of the story. In doing so, however, it cannot make any statement which contains a threat of reprisal or a promise of future benefits. You are prohibited from directly or indirectly threatening an employee or promising an employee anything in order to persuade him or her to vote against the union.

The NLRB has gone even further and emphasized that the employer's conduct as a whole must not create an atmosphere that "renders improbable a free choice" by the employees. This is a rather vague standard, but what it amounts to is that you can express yourself freely if you do it fairly, truthfully, and do not go too far. Steer clear of any high pressure sales pitches. The "soft sell" is always safer and more effective than the "hard sell."

## B. What You May Do

1. You may tell employees they have a right not to join a union and may not be threatened or coerced into joining one, signing a union authorization

 

card, etc. If someone threatens them, they should inform you immediately.

2. You may tell employees that the company neither wants nor needs a union and will attempt by all legal and proper means to preserve the personal relationships and individual treatment which employees now enjoy.

3. You may tell employees of the many attractive and highly competitive benefits they now have without the presence of a union and without the payment of union dues. You may compare our benefits with those in other unionized or non-unionized companies.

4. You may assure your employees you are always available to discuss their conditions of employment or any problems they may have. With a union they may have to bring their grievances to a steward or other "third party" instead of dealing directly with you as in the past.

5. You may tell your employees of the factual disadvantages of belonging to a union such as the payment of dues, initiation fees, loss of income due to strikes, and possible fines or assessments. You may tell them that in the event of an economic strike, they may be permanently replaced.

6. You may tell your employees that unions may promise many things, cut cannot guarantee any of them. All union demands are subject to the collective bargaining process. The only things they can guarantee are that the union will assess dues and fees and that a union can obtain nothing more than a company is able and willing to give.

8. You may tell employees that a union cannot provide job security and you may give factual examples.

 

9. You may inform employees of any untrue or misleading statements made by union organizers and give employees the correct facts.

10. You may tell employees they do not have to sign union authorization cards and that signing one is like signing a blank check, because cards are broad authorizations and are not just for getting an election. You may also tell them that even if they sign authorization cards they may vote according to their consciences in the event of an election (which is by secret ballot). If they did sign cards and changed their minds, they may ask the person to whom they gave the card to give it back, or may write a letter to the NLRB revoking the card.

11. You may continue to supervise your employees in your normal manner, according to the policies and practices of the company, including the disciplining of employees when justified.

12. You may keep outside union organizers off your premises, and apply rules restricting employee solicitation or distribution to non-working time and non-working areas.

## C. What You May Not Do

1. You cannot threaten employees directly (or indirectly through a third party) with loss of jobs or reduction in wages, or use threatening language to influence an employee exercising his right to belong or refrain from belonging to a union.

2. You must continue to treat employees equally and cannot discriminate against an employee for taking part in union activities.

 

3. You cannot promise employees betterment of any of their working conditions or the granting of special favors if they stay out of the union or vote against it.

4. You may not threaten to or actually discipline an employee for soliciting other employees regarding the union during non-working time or in non-working areas. They may not, however, solicit other employees who are working.

5. You may not spy on employees attending union meetings or give the impression that you are watching their activities. You also may not visit employees' homes to urge them to reject a union.

6. You cannot question employees (or applicants) as to how they would vote, their prior or present union affiliation, any information about the union itself, their personal opinions about the union or its officials, or their feelings of the affiliations of other employees. However, it employees volunteer information to you, you have the privilege to listen to it. You should be cautious not to initiate such conversations.

7. If communication concerning unionization is initiated by an employee, you may express your opinion that the company does not need and would not benefit from unionization, but express this as an opinion. After expressing your opinion with regard to unionization, make it clear to the employee that the company understands that employees have the right to organize or not to organize and the company will not interferer with the decision concerning this matter, which must be made by each individual employee.

8. If a lengthy discussion between you and an employee concerning unionization occurs, about which you believe an issue may be made later, make a written memorandum of the substance of the conversation.

 

9. Avoid expressing to employees your understanding of the law governing organizational drives. You might be wrong and what you have said could have some effect on an election or on an employee's view of unionization.

10. You cannot assemble a group or employees within 24 hours of the beginning of an election for a "captive audience" speech on the subject of unionization.

11. You should avoid changes in policies, pay, office procedures, staffing levels, etc., unless planned prior to the organizing drive or part of a periodically changing system. In other words, you should maintain the "status quo" until the union question is resolved.

12. Whenever in doubt, seek guidance from labor specialist.

 

## Session: 806 - Labor Law Issues Affecting the Nonunion Employer

## THE NLRB PROCESS

A. The Petition.

(1) Types of Petitions.

(a) Individual Petitions – An individual need only show that his petition is supported by at least 30 percent of the employees in the proposed bargaining unit and that the representative status is being sought for the purpose of collective bargaining.

(b) Employer Petitions - An employer may file a petition when there is no currently certified or recognized incumbent union and one or more individuals or labor organizations present a claim to be recognized. NLRA § 9(c)(1)(B). The union, however, must claim to represent a majority of the unit employees.

(c) Union Petitions – A labor organization may petition for an election where the employer has not recognized it as an exclusive bargaining representative, and the union seeks such recognition.

(2) Timeliness of Petition.

(a) Statutory Bar – The Board will not conduct an election in a unit or subdivision of a unit in which a valid election has been held in the preceding 12 months. NLRA § 9(c)(3).

(b) Certification Bar – Where a union is certified as the bargaining representative after winning a Board election, the parties are given a full year within which to negotiate an initial agreement. During that period, a union is irrebuttably presumed to enjoy the support of the majority of its unit employees. Thus, during the certification year, petitions for election are barred and the employer must continue to bargain in good faith even in the face of objective evidence that the union has lost its majority status.

(c) Voluntary Recognition Bar – Voluntary recognition agreements entered into by an employer and a union may bar an intervening election petition for "a reasonable time." The recognition agreement may be oral or written, but the union must have the support of a majority of the employees in the unit.

(d) Bargaining Order Bar – Where a bargaining order is issued against an employer as a remedy for serious unfair labor practices, the parties are required to bargain in good faith for a reasonable period of time. During

 

the period of compliance bargaining, a petition for an election will be dismissed as untimely.

(e) Contract Bar – The Board generally will not direct an election where there is a valid collective bargaining agreement in existence. This rule is not statutory and may be waived by the Board as circumstances require. In order to bar an election petition, a contract must have a reasonable and definite duration.

(3) Filing of Petition.

(a) Where to File – A petition is filed in the NLRB regional office in the region in which the bargaining unit is located.

(b) Showing of Interest – The Board has administratively imposed showing-of-interest requirement to limit election to those situations where there is sufficient employee interest in an election to justify expenditure of the Board's resources.

i. Extent of Interest Required by Petitioners:

a. "RC" Petition – Filed by an employee, a group of employees, or a labor organization and where the petitioner is not a party to a current or recently expired contract, and must be accompanied by a showing of interest by at least 30% of the employees in the bargaining unit the petitioner claims is appropriate. NLRB Statements of Procedure § 101.18

b. "RM" Petition – When a petition is filed by an employer in response to a claim for recognition by one or more unions, no showing of interest is required. NLRA § 9(c)(1)(b).

ii. Validity of Showing of Interest – Authorization cards are the most frequently submitted evidence of interest.

iii. Attack on Showing of Interest – Parties may not, as a matter of right, attack a petitioner's showing of interest. However, the NLRB has procedures for investigating allegations of fraud, misconduct, supervisory taint, or forgery. NLRB Casehandling Manual ¶ 11028.

B. Pre-Hearing Handling Of The Election Petition.

(1) Board Agent Preliminary Investigation.

 

(a) Notification to the Parties – Immediately upon docketing of a petition for a representation election, a written notification of its filing is sent by the regional director to all interested parties. NLRB Casehandling Manual ¶ 11008. The parties may be asked to submit certain information, including copies of any existing or recently expired contracts, documentary material such as letters bearing on the question of representation, and the names of other interested persons who should be informed of the proceedings. NLRB Casehandling Manual ¶ 11008.4

(b) The Board Agent's Investigation – Promptly after the petition and notification are sent to the parties, the Board agent will begin a preliminary investigation. NLRB Casehandling Manual ¶ 11010. This investigation is designed to determine whether the Board has jurisdiction, whether the petition has been properly filed, and whether there is any possibility that the parties will be able to consent to an election. NLRB Statements of Procedure § 101.18(a).

(2) Informal Disposition of Petitions (Petition disposed of before a formal hearing).

(a) Withdrawal of Petition – At any time prior to the close of a hearing, the petitioner may withdraw the petition, or the Board agent may request withdrawal because, among other possible reasons, the desired unit is not appropriate, the petition is untimely under the contract bar or related doctrines, the petition is not supported by an adequate showing of interest, or further processing of the petition is blocked by unresolved unfair labor practice charges. NLRB Statements of Procedure § 101.18(b). After the close of the formal hearing, a petition may be withdrawn only with the consent of the regional director. NLRB Rules and Regulations § 102.60.

(b) Dismissal of Petition – If a petition is not withdrawn as requested, generally it will be dismissed by the regional director. NLRB Statement of Procedures § 101.18(c); NLRB Casehandling Manual ¶¶ 11100-11104. Any party has 14 days from service of the regional director's letter in which to appeal the dismissal. NLRB Rules and Regulations § 102.71(c).

(c) Disclaimer of Interest – An election petition may be resolved informally on the basis of a claim by the union that it does not with to represent the employees. NLRB Casehandling Manual ¶¶ 11120-11124.

(d) Voluntary Election Agreements – The parties may voluntarily consent to an election and agree to waive their rights to a representation hearing.

C. The Representation Hearing.

(1) Prehearing Procedures.

 

(a) Notice of Hearing-The Board generally gives at least five days' notice of the hearing. A number of regions automatically schedule the hearing date for the first business day after 10 calendar days from the petition's filing date.

(b) Prehearing Motions – The motion should state briefly the action requested and the grounds for the request. Motions to amend the notice of hearing or to dismiss the petition usually are ruled upon by the regional director, while most other motions are referred to the hearing officer. NLRB Casehandling Manual ¶ 11141.

(2) Conduct of the Hearing. The purpose of the representation hearing is to gather factual information necessary for the regional director or the Board to rule upon a question concerning representation.

(a) Role of the Hearing Officer – Normally, the officer presiding over the hearing is the Board attorney or field examiner from the region in which the hearing is held. The hearing officer has the authority to call, to examine, and to cross-examine witnesses, and to request that documentary evidence be introduced into the record. NLRB Casehandling Manual ¶ 11188. The hearing officer is required to rule on all motions (except motions to dismiss the petition which must be referred by the hearing officer to the regional director or to the Board).

(b) Role of the Parties – Any party has the right to appear at a hearing in person or to be represented by counsel or other representative. Parties are not required to be represented by attorneys. NLRB Rules and Regulations § 102.38. Each party has the power to call, to examine, and to cross-examine witnesses. NLRB and Rules & Regulations § 102.66(a).

(c) Rules of Evidence – Rules of evidence prevailing in the courts are not controlling. NLRB Rules and Regulations § 102.66(a).

(3) Close of the Hearing.

(a) Oral Argument and Briefs – Hearing officers will encourage parties to argue orally rather than to file briefs. NLRB Rules and Regulations § 102.66(d). Parties also have the right to file briefs with the regional director or the Board within seven days after the close of the hearing. NLRB Rules and Regulations § 102.66(d).

(b) The Hearing Officer's Report – After the hearing, the hearing officer submits a report to the regional director or to the Board. NLRB Rules and Regulations § 102.66(e). The report is not available for inspection by any of the parties.

 

D. Post-Hearing Procedures.

(1) Procedures Before the Regional Director.

(a) Transmittal of Record and Filing of Briefs – After the close of the hearing, the entire record in the case is forwarded to the regional director or, upon the regional director's issuance of an order transferring the case, to the Board in Washington D.C. NLRB Rules and Regulations § 102.67(h).

(b) Post-Hearing Motions – All motions filed after the close of the case must be filed directly with the regional director or, if the case has been transferred, to the Board. Motions for reconsideration or hearing must be filed within 14 days. Motions for reconsideration will not be granted for any matter that could have been but was not raised at the hearing.

(c) Oral Argument – Any party desiring to supplement the briefs with oral argument may file a request with the regional director to the Board within seven days of the closing of the hearing and before the issuance of the decision. NLRB Rules and Regulations § 102.67(a).

(d) Decision of the Regional Director or the Board – In most cases, the regional director or the Board will either dismiss the petition or direct an election.

(e) Appropriate Bargaining Unit – The most common issue in a representation case. The Board has not developed strict rules for defining bargaining units. An appropriate bargaining unit must, at a minimum, be composed of "employees" as defined by the NLRA. The guiding principle is that employees in a bargaining unit should share a "community of interest." Such a community of interest typically is found in similarity of wages and hours, common supervision, frequent interchange or functional integration with other employees, and area of practice and bargaining history.

(f) Voter Eligibility – Two General Factors: (1) whether the person was an "employee" during the eligibility period and on the election date; and (2) whether the employee is "sufficiently identified with the bargaining unit to have a community of interest with its other members."

(2) Procedures Before the Board.

(a) Cases Transferred From the Regional Director – A regional director may issue an order transferring a case to the Board for decision. NLRB Rules and Regulations § 102.67 (h)

 

(b) Request for Review of the Regional Director's Decision – Where the regional director issues a decision on the merits, the parties may file a request for review with the Board. NLRB Rules and Regulations § 102.67(b). The Board will grant such requests only where "compelling reasons" exist. Such request must be based on one of the following grounds:

i. That a substantial question of law or policy is raised because of the absence of or departure from officially reported Board precedent;

ii. That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;

iii. That the conduct of the hearing or any ruling made in connection with the proceedings has resulted in prejudicial error; or

iv. That there are compelling reasons for reconsideration of an important Board rule or policy. NLRB Rules and Regulations § 102.67(c).

(3) Motions for Reconsideration, Rehearing, and Reopening the record – After the close of a hearing, a party may, because of extraordinary circumstances, move to reopen the record. In addition, following issuance of the regional director's decision or report, a party may request reconsideration, a rehearing, or the reopening, of the record. NLRB Rules and Regulations § 102.65(e)(1).

E. The Election.

(1) Pre-Election Matters.

(a) The Excelsior List – Within seven days after an election agreement has been approved, or after an election has been directed, the employer must file with the regional director a list containing the full names and addresses of all potentially eligible voters. Excelsior Underwear, Inc., 156 NLRB 1236 (1966).

(b) Pre-Election Conference and Voter Eligibility – After the direction of an election, the regional director may arrange an informal conference of all the parties to settle the details of the election by obtaining the parties' agreement on such matters as voting time and location, voter eligibility, and election observers. NLRB Statements of Procedure § 101.19(a)(1).

(c) Date, Hours, and Location of Election – Should be aimed at maximizing the opportunity for voter participation.

 

(d) The Ballot – May be handled only by Board agents and by the individual voter. NLRB Casehandling Manual ¶ 11306.5.

(e) The Election Notice – Standard "notice of election" forms will be furnished by the NLRB agent so that eligible voters can be informed of the election details. NLRB Casehandling Manual ¶ 11306.5. At least one copy of the notice and any approved supplements are provided for each location at the workplace where employee notices customarily are posted.

(2) Election Procedures.

(a) Role of Board Personnel – One of more agents of the regional office will conduct the election.

(b) Election Observers – Each party to the election may be represented at the polls by an equal, predesignated number of observers chosen to assist in the conduct of the election. NLRB Rules and Regulations § 102.69(a). All observers must be non-supervisory employees of the employer and cannot be representatives of "no-union" groups. NLRB Casehandling Manual ¶ 11310.

(c) Mechanics of the Election – The actual voting is always conducted and supervised by Board agents. NLRB Statements of Procedure § 101.19(a)(2). Employees will vote "yes" or "no" on whether they wish to be represented by the union.

(d) Challenging a Voter – Any Board agent or authorized election observer has the right to challenge a voter's eligibility to participate in the election. NLRB Rules and Regulations §102.69(a). The challenge procedure permits the questioning of a voter's eligibility and the impoundment of the challenged voter's marked ballot pending a determination of the eligibility question.

(e) Impound of Ballots – When the Board has not yet ruled on a pending request for review of eligibility or other issues by the time of a scheduled election, the regional director is to proceed with the election and to segregate and impound the ballots in question unless the Board has specifically directed otherwise. NLRB Rules and Regulations § 102.67 (b).

(f) Mail Balloting – Elections as a general rule are to be conducted manually. However, mail ballots may be used where the "circumstances ... tend to make it difficult for eligible employees to vote in a manual election."

 

(g) Counting the Ballots – The count is typically made at the polling place or at some other central location shortly after the election is complete. NLRB Casehandling Manual ¶ 11340.1.

(h) Determining the Validity of Disputed Ballots – The Board agent will rule on the validity of each ballot during the count and will, if possible, determine the voter's intention if the ballot bears unorthodox marking. When one of the parties seriously question the agent's interpretation of a ballot, it will be segregated and treated as a changed ballot. NLRB Casehandling Manual ¶ 11340.7(a).

(i) Tally of Ballots – After the ballots have been counted, the Board agent will prepare an official tally of ballots, which lists the approximate number of eligible voters, the number of void ballots, and the number of votes cast for and against the union. NLRB Casehandling Manual ¶ 11340.8.

(j) Majority Rule and the Representative Character of the Vote – A majority of the valid votes cast in an election will determine the outcome. NLRA § 9(a).

F. Post-Election Procedures.

(1) Filing of Challenges and Objections – Challenges to voters must be made before the challenged ballot is placed in the box. NLRB Rules and Regulations § 102.69(a). There are two types of post-election objections: (1) those that relate to the manner in which the election itself was conducted; and (2) those that relate to conduct that affected the results of the election. NLRB Rules and Regulations § 102.69(a). Objections must be filed by the close of business on the seventh day after the tally of ballots has been prepared. NLRB Rules and Regulations § 102.69(a).

(2) Obligation to Furnish Supporting Documentation – Parties must submit a short but specific statement of the underlying reasons for the objections filed. NLRB Rules and Regulations § 102.69(a).

G. Investigation of Challenges and Objections – If the challenged ballots are sufficient in number to affect the results of the election, or if timely objections have been filed, the regional director is authorized to process those matters through either an investigative procedure or a hearing, or a combination of both. NLRB Rules and Regulations § 102.69(d).

 