

No. 20-1031

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

THE AMERICAN BOTTLING COMPANY d/b/a KEURIG DR PEPPER,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

AND

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 727,
Intervenor,

**PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT
OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD
[Not Yet Scheduled for Oral Argument]**

STATUTORY ADDENDUM

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Current through Public Law 116-145, approved June 17, 2020.

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§ 157. Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [[29 USCS § 158\(a\)\(3\)](#)].

History

HISTORY:

Act July 5, 1935, ch 372, § 7, [49 Stat. 452](#); June 23, 1947, ch 120, Title I, § 101, *61 Stat. 140*.

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29 USCS § 159, Part 1 of 3

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United States Code Service > TITLE 29. LABOR (Chs. 1 — 32) > CHAPTER 7. LABOR-MANAGEMENT RELATIONS (§§ 141 — 197) > NATIONAL LABOR RELATIONS (§§ 151 — 169)

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board. The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [[29 USCS §§ 151–158, 159–169](#)], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations.

(1)Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A)by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsec. (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsec. (a) of this section]; or

(B)by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [[29 USCS § 160\(c\)](#)].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [[29 USCS §§ 151–158](#), [159–169](#)] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballots receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript. Whenever an order of the Board made pursuant to section 10(c) [[29 USCS § 160\(c\)](#)], is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [[29 USCS § 160\(e\)](#) or (f)], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections.

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) [[29 USCS § 158\(a\)\(3\)](#)], of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

History

HISTORY:

Act July 5, 1935, ch 372, § 9, [49 Stat. 453](#); June 23, 1947, ch 120, Title I, § 101, [61 Stat. 143](#); Oct. 22, 1951, ch 534, § 1(c), (d), [65 Stat. 601](#); Sept. 14, 1959, [P. L. 86-257](#), Title II, § 201(d), Title VII, § 702, [73 Stat. 525](#), 542.

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United States Code Service > TITLE 29. LABOR (Chs. 1 — 32) > CHAPTER 7. LABOR-MANAGEMENT RELATIONS (§§ 141 — 197) > NATIONAL LABOR RELATIONS (§§ 151 — 169)

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [[29 USCS § 158](#)]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [[29 USCS §§ 151–158, 159–169](#)] or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States [[28 USCS Appx](#)] under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C) [[28 USCS § 2072](#)].

(c) Reduction of testimony to writing; findings and orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [[29 USCS §§ 151–158, 159–169](#)]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a

complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [[29 USCS § 158\(a\)\(1\)](#), or (2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners [administrative law judge or judges] thereof, such member, or such examiner or examiners [judge or judges], as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court. Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in [section 2112 of title 28, United States Code](#). Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the

Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in [section 2112 of title 28, United States Code](#). Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order. The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in [29 USCS §§ 101–110, 113–115](#). When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled “An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,” approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) [Repealed]

(j) Injunctions. The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the United States District Court for the District of Columbia) [United States district court], within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [[29 USCS § 158\(b\)\(4\)\(D\)](#)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7) [[29 USCS § 158\(b\)\(4\)\(A\)](#), (B), or (C), or (e), or (b)(7)], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the United States District Court for the District of Columbia) [United States district court] within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [[29 USCS § 158\(b\)\(7\)](#)] if a charge

against the employer under section 8(a)(2) [[29 USCS § 158\(a\)\(2\)](#)] has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) [[29 USCS § 158\(b\)\(4\)\(D\)](#)].

(m) Priority of cases. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 [[29 USCS § 158\(a\)\(3\)](#) or (b)(2)], such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

History

HISTORY:

Act July 5, 1935, ch 372, § 10, [49 Stat. 453](#); June 23, 1947, ch 120, Title I, § 101, *61 Stat. 146*; June 25, 1948, ch 646, § 32(a), (b), [62 Stat. 991](#); May 24, 1949, ch 139, § 127, [63 Stat. 107](#); Aug. 28, 1958, *P. L. 85-791*, § 13, [72 Stat. 945](#); Sept. 14, 1959, *P. L. 86-257*, Title VII, §§ 704(d), 706, [73 Stat. 544](#), 545; Nov. 8, 1984, *P. L. 98-620*, Title IV, Subtitle A, § 402(31), *98 Stat. 3360*.

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29 CFR 102.69

This document is current through the June 24, 2020 issue of the Federal Register with the exception of the amendment appearing at 85 FR 37785. Title 3 is current through June 5, 2020.

Code of Federal Regulations > TITLE 29 -- LABOR > SUBTITLE B -- REGULATIONS RELATING TO LABOR > CHAPTER I -- NATIONAL LABOR RELATIONS BOARD > PART 102 -- RULES AND REGULATIONS > SUBPART D -- PROCEDURE UNDER SECTION 9(C) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES H2 AND FOR CLARIFICATION OF BARGAINING UNITS AND FOR AMENDMENT OF CERTIFICATIONS UNDER SECTION 9(B) OF THE ACT

Notice

 There are multiple versions of this document. To view a complete list of the versions of this section see Table of Contents.

§ 102.69 Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges. [Effective until May. 31, 2020.]

[PUBLISHER'S NOTE: 85 FR 17500, Mar. 30, 2020, revised this section , effective May. 31, 2020. [84 FR 69524, 69588](#), Dec. 18, 2019, delayed the effective date of the amendment appearing at 85 FR 17500, until May. 31, 2020. For the convenience of the user, revised this section has been set out twice below. The first version is effective until May. 31, 2020. The second version is effective May. 31, 2020.]

(a)Election procedure; tally; objections. Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the

objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i). The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b)Certification in the absence of objections, determinative challenges and runoff elections. If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.

(c)

(1)

(i)Decisions resolving objections and challenges without a hearing. If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

(ii)Notices of hearing on objections and challenges. If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a notice of hearing before a hearing officer at a place and time fixed therein. The regional director shall set the hearing for a date 21 days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the regional director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing a decision, sever the representation case and transfer it to the regional director for further processing.

(iii)Hearings; hearing officer reports; exceptions to regional director. The hearing on objections and challenges shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The hearing officer may rule on offers of proof. Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. Upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date

of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. Extra copies of electronically-filed papers need not be filed. The regional director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2)Regional director decisions and Board review. The decision of the regional director may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the regional director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

(d)

(1)

(i)Record in case with hearing. In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the Regional Director, any requests for review, and the record previously made as defined in § 102.68. Materials other than those set out above shall not be a part of the record.

(ii)Record in case with no hearing. In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2)Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3)In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the regional director and which were not included in the decision. Documentary evidence so appended shall

thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) Revised tally of ballots. In any case under this section in which the regional director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate with the same force and effect as if issued by the Board.

(f) Format of filings with regional director. All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) Extensions of time. Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Sections 1, 6, National Labor Relations Act ([29 U.S.C. 151](#), [156](#)). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended ([5 U.S.C. 552\(a\)\(4\)\(A\)](#)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 ([5 U.S.C. 552a\(j\)](#) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended ([5 U.S.C. 504\(c\)\(1\)](#)).

History

[38 FR 3961, Feb. 8, 1973, as amended at [46 FR 45923](#), Sept. 15, 1981; [47 FR 40772](#), Sept. 15, 1982; [47 FR 42569](#), Sept. 28, 1982; [51 FR 23747](#), July 1, 1986; [51 FR 32919](#), Sept. 17, 1986; [56 FR 49144](#), Sept. 27, 1991; [60 FR 56233](#), [56235](#), Nov. 8, 1995; [76 FR 80138](#), [80186](#), Dec. 22, 2011; [77 FR 25548](#), Apr. 30, 2012; [79 FR 3483](#), [3492](#), Jan. 22, 2014; [79 FR 74308](#), [74486](#), Dec. 15, 2014; [82 FR 43697](#), [43698](#), Sept. 19, 2017]

Annotations

Notes

[EFFECTIVE DATE NOTE:

[79 FR 74308, 74486](#), Dec. 15, 2014, revised this section, effective Apr. 14, 2015; [82 FR 43697, 43698](#), Sept. 19, 2017, revised paragraphs (a) and (d)(1)(ii), effective Sept. 19, 2017.]

LexisNexis® Notes

Labor & Employment Law : Collective Bargaining & Labor Relations

Labor & Employment Law : Collective Bargaining & Labor Relations : Judicial Review

Labor & Employment Law : Collective Bargaining & Labor Relations : Right to Organize

Labor & Employment Law : Collective Bargaining & Labor Relations

[Capay, Inc. v. NLRB, 2017 U.S. App. LEXIS 21968 \(9th Cir Nov. 2, 2017\)](#)

[Capay, Inc. v. NLRB, 2017 U.S. App. LEXIS 21968 \(9th Cir Nov. 2, 2017\)](#).

Overview: *The employer's objections, even when viewed in the aggregate, failed to raise substantial and material factual issues necessary for a hearing, [29 U.S.C.S. § 160\(f\)](#). The election establishing the union's representation of the bargaining unit was not tainted.*

- A decision not to grant an evidentiary hearing on election objections is reviewed for an abuse of discretion. The National Labor Relations Board is required to grant an evidentiary hearing only when a party's objections raise substantial and material factual issues, [29 C.F.R. § 102.69\(c\) \(2017\)](#), and the objecting party supplies evidence establishing a prima facie case for disturbing the election results. [Go To Headnote](#)

[NLRB v. Vcncl, L.L.C., 2016 U.S. App. LEXIS 12892 \(5th Cir July 11, 2016\)](#).

Overview: *NLRB did not abuse its discretion in making its unit determination. Further, the NLRB did not abuse its discretion in overruling the employer's objection regarding the union representation election. It was not unlawful for the union to complain that a certain remark constituted intimidation. Court enforced the NLRB's order.*

- The court will remand for a hearing when the objecting party raises substantial and material factual issues supported by a specific proffer of evidence which, if true, would be sufficient to set aside the election; refer to [29 C.F.R. § 102.69\(c\)\(1\)\(ii\)](#). Where the National Labor Relations Board resolved an issue at summary judgment without conducting a hearing, the court must accept all allegations presented by the objecting party's evidence and make all reasonable inferences in a light most favorable to the objecting party. [Go To Headnote](#)

Labor & Employment Law : Collective Bargaining & Labor Relations : Judicial Review

[Capay, Inc. v. NLRB, 2017 U.S. App. LEXIS 21968 \(9th Cir Nov. 2, 2017\)](#)

[Capay, Inc. v. NLRB, 2017 U.S. App. LEXIS 21968 \(9th Cir Nov. 2, 2017\)](#).

Overview: *The employer's objections, even when viewed in the aggregate, failed to raise substantial and material factual issues necessary for a hearing, 29 U.S.C.S. § 160(f). The election establishing the union's representation of the bargaining unit was not tainted.*

- A decision not to grant an evidentiary hearing on election objections is reviewed for an abuse of discretion. The National Labor Relations Board is required to grant an evidentiary hearing only when a party's objections raise substantial and material factual issues, 29 C.F.R. § 102.69(c) (2017), and the objecting party supplies evidence establishing a prima facie case for disturbing the election results. [Go To Headnote](#)

[NLRB v. Vcncl, L.L.C., 2016 U.S. App. LEXIS 12892 \(5th Cir July 11, 2016\).](#)

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- The court will remand for a hearing when the objecting party raises substantial and material factual issues supported by a specific proffer of evidence which, if true, would be sufficient to set aside the election; refer to 29 C.F.R. § 102.69(c)(1)(ii). Where the National Labor Relations Board resolved an issue at summary judgment without conducting a hearing, the court must accept all allegations presented by the objecting party's evidence and make all reasonable inferences in a light most favorable to the objecting party. [Go To Headnote](#)

Labor & Employment Law : Collective Bargaining & Labor Relations : Right to Organize

[Xpo Logistics Freight, Inc. v. NLRB, 2018 U.S. App. LEXIS 14188 \(DC Cir May 25, 2018\)](#)

[Xpo Logistics Freight, Inc. v. NLRB, 2018 U.S. App. LEXIS 14188 \(DC Cir May 25, 2018\).](#)

Overview: *National Labor Relations Board permissibly found that an employer violated the National Labor Relations Act by refusing to bargain with a union, as the employer's objections to the representation election were properly overruled; the employer's allegations of harassment and intimidation by union supporters were insufficient.*

- As a procedural matter, a party does not have an automatic right to a hearing on its objections to a union representation election result. 29 C.F.R. § 102.69(c)(1). An evidentiary hearing is called for only when a party makes a prima facie showing of substantial and material issues of fact that, if true, would warrant setting aside the election. § 102.69(c)(1). A prima facie showing cannot be conclusory. Rather, it must point to specific events and specific people. Under the National Labor Relations Board's precedent, the mere allegation that a petitioner threatened, intimidated, and coerced employees constitutes a general conclusion devoid of any specific content or substance, which fails to satisfy the Board's requirement of reasonable specificity in the filing of objections. Such generalized allegations do not suffice to show misconduct that, when viewed objectively, created an environment of tension and coercion materially impeding the fairness of an election. [Go To Headnote](#)

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 102 Extension of Experimental Modifications, see: 61 FR 1281, Jan. 19, 1996.]

NOTES APPLICABLE TO ENTIRE SUBPART:

h2 Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D of this part.

[PUBLISHER'S NOTE: [82 FR 11748, 11754](#), Feb. 24, 2017, redesignated Subpart C of Part 102 as Subpart D of Part 102, and revised it, effective Mar. 6, 2017.]

LEXISNEXIS' CODE OF FEDERAL REGULATIONS

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NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

PART TWO

REPRESENTATION PROCEEDINGS



January 2017

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

11338.3 Challenge Procedure

When a voter is challenged, a small “c” is placed beside his/her name by the checking observer for the challenging party or, in the case of a Board challenge, by the Board agent.. The other observer(s) should make the usual check mark. (If the voter’s name does not appear on the list, it should be added to the list, and the “c” inserted.) The Board agent (at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope—the voter’s name, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger, and the agent’s initials. If time permits, the agent may elicit specific information surrounding the voter’s status, for insertion on the reverse side of the stub, which should be initialed by the voter.

The voter is then given a ballot and instructed to enter the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. The Board agent and the observers should make sure that when the challenged voter comes out of the booth, he/she goes to the voting table and does not drop the ballot in the box before placing it in the envelope. On return to the voting table, the voter should be required to display the ballot, without disclosing how it is marked. The voter is then given a challenged ballot envelope. The *voter* places the marked ballot in the challenged ballot envelope, seals the envelope and drops the envelope in the box.

11338.4 Notation of Potential Challenges

Observers may maintain lists of employees they intend to challenge; alternatively, the parties may note on the voter list, at the preelection check, the persons they intend to challenge. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election. Sec. 11312.3.

The observers may not keep a list of those who have or have not voted. Sec. 11322.1.

11338.5 Proper Time to Challenge

Challenges should be handled as they come up, if feasible. Challenged voters should not be told to return later; however, they may be permitted to remain at the polling place awaiting a slack period.

In the Board agent’s oral instructions to observers, the Board agent should urge the observers to challenge as the voter comes up to the checking table. Sec. 11318.2. Normally, a challenge should be made before the questioned voter receives a ballot. However, a challenge voiced at any time before the ballot is dropped into the ballot box should be honored.

11338.6 Merit of Challenge Not to be Argued

Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter the measures that will be taken to protect the secrecy of the challenged ballot.

11338.7 Specific Exclusions and Inclusions in Decision

Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge, unless there have been changed circumstances. The Board agent must exercise discretion in deciding whether to allow a vote under challenge when the person presents plausible reasons for being permitted to vote despite the exclusion or when there is some question as to whether the person is actually within the excluded group. In addition, if a motion is pending either for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence. In these circumstances, if the motion states with particularity that granting the motion will affect the eligibility to vote of specific employees, the Board agent has discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election. The Board agent also has discretion to challenge or permit the moving party to challenge the ballots of such employees, even if they are specifically included in the direction of election.

Persons in job classifications specifically included by the Decision and Direction of Election should be given a ballot and permitted to vote without challenge based upon classification, unless there have been changed circumstances. Allegations of changed circumstances by the person seeking to challenge the employee should be reviewed by the Board agent. Unless plausible reasons are given for the challenge, the person specifically included should be permitted to vote without casting a challenged ballot. In all situations where reasonable doubt exists concerning whether the prospective voter falls within an included or excluded category or whether changed circumstances have altered the voter's eligibility status, the challenged ballot procedure should be used.

11338.8 Voters Challenged/Ballots Impounded, Pending Board Ruling on Request for Review

Where a request for review has been filed and the Board has ordered the impoundment of one or more ballots, the Board agent conducting the election should ensure that individuals in the disputed classification(s) who appear at the polls to vote do so by challenged ballot. Sec. 11338.2(b).

11338.9 Mail Ballots Challenged

Challenged mail ballots need not be placed in challenge envelopes. "Challenged" should be written across the face of the yellow outer return envelope and the information otherwise entered on a challenge envelope should be inserted on the reverse side of the envelope. Sec. 11336.5(b).

11338.10 Treatment of Challenged Ballots

With respect to the treatment of challenged ballots after the close of voting, see Sec. 11340.3, Clearing Challenges.

With respect to the handling of challenged ballots after the tally of ballots has been completed, see Secs. 11340.9 and 11344.

NOTE: See Sec. 11340.8(b) NOTE concerning disputed classifications permitted to vote subject to challenge (Sec. 11338.8), where the Board or the regional director did not rule on eligibility or unit placement prior to an election.

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 29, 2020.

Respectfully submitted,

FORD & HARRISON LLP

Attorney for The American Bottling Company

By: /s/Corey L. Franklin

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