Subtitle B—Regulations Relating to Labor
**CHAPTER I—NATIONAL LABOR RELATIONS BOARD**

<table>
<thead>
<tr>
<th>Part</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>Administrative regulations</td>
<td>7</td>
</tr>
<tr>
<td>101</td>
<td>Statements of procedures</td>
<td>20</td>
</tr>
<tr>
<td>102</td>
<td>Rules and regulations, Series 8</td>
<td>34</td>
</tr>
<tr>
<td>103</td>
<td>Other rules</td>
<td>126</td>
</tr>
<tr>
<td>104</td>
<td>Notification of employee rights; obligations of employers (effective date delayed indefinitely)</td>
<td>128</td>
</tr>
<tr>
<td>105–199</td>
<td>[Reserved]</td>
<td></td>
</tr>
</tbody>
</table>
PART 100—ADMINISTRATIVE REGULATIONS

Subpart A—Employee Responsibilities and Conduct

Sec. 100.101 Cross-reference to financial disclosure requirements and other conduct rules.

Subpart B—Cooperation in Audits and Investigations

100.201 Audits and investigations.

Subpart C—Employee Personal Property Loss Claims

[Reserved]

Subpart D—Claims Under the Federal Tort Claims Act

100.401 Claims under the Federal Tort Claims Act for loss of or damage to property or for personal injury or death.

Subpart E—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the National Labor Relations Board

100.501 Purpose.
100.502 Application.
100.503 Definitions.
100.504–100.509 [Reserved]
100.510 Self-evaluation.
100.511 Notice.
100.512–100.529 [Reserved]
100.530 General prohibitions against discrimination.
100.531–100.539 [Reserved]
100.540 Employment.
100.541–100.548 [Reserved]
100.549 Program accessibility: Discrimination prohibited.
100.550 Program accessibility: Existing facilities.
100.551 Program accessibility: New construction and alterations.
100.552–100.559 [Reserved]
100.560 Communications.
100.561–100.569 [Reserved]
100.570 Compliance procedures.
100.571–100.589 [Reserved]

Subpart F—Debt Collection Procedures

100.601 Purpose and scope.
100.602 Definitions.
100.603 Debts that are covered.
100.604 Monetary limitations on NLRB’s authority.
100.605 Information Collection Requirements: OMB Approval.
100.606 No private rights created.
100.607 Form of payment.

100.608 Subdivision of claims or debts.
100.609 Administrative collection of claims.
100.610 Written demand for payment.
100.611 Reporting claims or debts.
100.612 Disputed claims or debts.
100.613 Contracting for collection services.
100.614 Collection by administrative offset.
100.615 Authorities other than offset.
100.616 Payment collection.
100.617 Interest, penalties, and administrative costs.
100.618 Bankruptcy claims.
100.619 When a debt may be compromised.
100.620 Finality of a compromise.
100.621 When collection action may be terminated or suspended.
100.622 Termination of collection action.
100.623 Exception to termination.
100.624 Discharge of indebtedness; reporting requirements.
100.625 Referral of a claim to the Department of Justice.

AUTHORITY: Section 6, National Labor Relations Act, as amended (29 U.S.C. 141, 156).

Subpart A is also issued under 5 U.S.C. 7301.


Subpart E is also issued under 29 U.S.C. 794.


Subpart A—Employee Responsibilities and Conduct

§ 100.101 Cross-reference to financial disclosure requirements and other conduct rules.

Employees of the National Labor Relations Board (NLRB) should refer to the executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635; the NLRB’s regulations at 5 CFR part 7191, which supplement the executive branch-wide standards; the employee responsibilities and conduct regulations at 5 CFR part 735; and the executive branch financial disclosure regulations at 5 CFR part 2634.

Subpart B—Cooperation in Audits and Investigations

§ 100.201 Audits and investigations.

(a) Employees shall cooperate fully with any audit or investigation conducted by the Office of the Inspector General involving matters that fall within the jurisdiction and authority of the Inspector General, as defined in the Inspector General Act of 1978, as amended, or with any audit or investigation conducted by any Agency official or department, including, but not limited to, the Office of Equal Employment Opportunity, involving matters that relate to or have an effect on the official business of the Agency. Such cooperation shall include, among other things, responding to requests for information, providing statements under oath relating to such audits or investigations, and affording access to Agency records and/or any other Agency materials in an employee’s possession.

(b) The obstruction of an audit or investigation, concealment of information, intentional furnishing of false or misleading information, refusal to provide information and/or answer questions, or refusal to provide a statement under oath, by an employee to an auditor or investigator pursuant to any audit or investigation as described in paragraph (a) of this section, may result in disciplinary action against an employee. However, nothing herein shall be construed to deny, abridge, or otherwise restrict the rights, privileges, or other entitlements or protections afforded to Agency employees.

[59 FR 37158, July 21, 1994]

Subpart C—Employee Personal Property Loss Claims [Reserved]

Subpart D—Claims Under the Federal Tort Claims Act

§ 100.401 Claims under the Federal Tort Claims Act for loss of or damage to property or for personal injury or death.

(a) Filing of claims. Pursuant to 28 U.S.C. 2672, any claim under the Federal Tort Claims Act for money damages for loss of or injury to property, or for personal injury or death, caused by the negligent or wrongful act or omission of any employee of the National Labor Relations Board while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such loss, injury or death in accordance with the law of the place where the act or omission occurred, may be presented to the Director of Administration, 1099 Fourteenth Street, NW., Washington, DC 20570, or to any regional office of the National Labor Relations Board, at any time within 2 years after such claim has accrued. Such a claim may be presented by a person specified in 28 CFR 14.3, in the manner set out in 28 CFR 14.2 and 14.3, and shall be accompanied by as much of the appropriate information specified in 28 CFR 14.4 as may reasonably be obtained.

(b) Action on claims. The Director, Division of Administration, shall have the power to consider, ascertain, adjust, determine, compromise, and settle any claim referred to in, and presented in accordance with paragraph (a) of this section. The Chief, Security Staff, can process and adjust claims under $100 in accordance with delegated authority from the Director. Legal review is required by the General Counsel or designee for all claims in the amount of $5,000 or more, 28 CFR 14.5. Any exercise of such power shall be in accordance with 28 U.S.C. 2672 and 28 CFR part 14.

(c) Payment of awards. Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section will be paid by the Director of Administration out of appropriations available to the National Labor Relations Board. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section will be obtained in accordance with 28 CFR 14.10.

[59 FR 37159, July 21, 1994]
National Labor Relations Board

Subpart E—Enforcement of Non-discrimination on the Basis of Handicap in Programs or Activities Conducted by the National Labor Relations Board


§ 100.501 Purpose.
The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 100.502 Application.
This regulation (§§ 100.501–100.570) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 100.503 Definitions.
For purposes of this regulation, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD’s), interpreters, notetakers, written materials, and other similar services and devices.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Complete complaint means a written statement that contains the complainant’s name and address and describes the agency’s alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Complete complaint means a written statement that contains the complainant’s name and address and describes the agency’s alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

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sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) Major life activities includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment means—
   (i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;
   (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
   (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—
   (1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;
   (2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;
   (3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and
   (4) Qualified handicapped person as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by §100.540.


Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

[53 FR 25884 and 25885, July 8, 1988, Redesignated at 59 FR 37159, July 21, 1994, and amended at 60 FR 32267, June 23, 1995]

§§ 100.504–100.509 [Reserved]

§ 100.510 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:
   (1) A description of areas examined and any problems identified; and
   (2) A description of any modifications made.
§ 100.511 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 100.512–100.529 [Reserved]

§ 100.530 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to partici-
(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 100.531–100.539 [Reserved]

§ 100.540 Employment.
No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 100.541–100.548 [Reserved]

§ 100.549 Program accessibility: Discrimination prohibited.
Except as otherwise provided in §100.550, no qualified individual with handicaps shall, because the agency’s facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 100.550 Program accessibility: Existing facilities.
(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §100.550(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) Methods—(1) General. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements
§ 100.560  Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.


§ 100.551  Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 100.552–100.559 [Reserved]

§ 100.560  Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.


§ 100.551  Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 100.552–100.559 [Reserved]

§ 100.560  Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §100.560 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 100.561–100.569 [Reserved]

§ 100.570 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Director of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director of Administration, National Labor Relations Board, 1099 Fourteenth Street NW., Washington, DC 20570.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;
(2) A description of a remedy for each violation found; and
(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter.
required by §100.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.


§§ 100.571–100.599 [Reserved]

Subpart F—Debt Collection Procedures

SOURCE: 72 FR 40070, July 23, 2007, unless otherwise noted.

§ 100.601 Purpose and scope.

This part prescribes standards and procedures for officers and employees of the National Labor Relations Board (NLRB) who are responsible for the collection and disposition of certain debts owed to the United States, as further defined below. The authority for this part is the Federal Claims Collection Act of 1966; the Debt Collection Improvement Act of 1996; 31 U.S.C. 3711 and 3716 through 3719, as amended; The Federal Claims Collection Standards, 31 CFR chapter IX parts 900–904; and Office of Management and Budget Circular A–129. The activities covered include: the collection of claims of any amount; compromising claims; suspending or terminating the collection of claims; referring debts that are more than 180 days delinquent to the Department of the Treasury for collection action; and the referral of debts of more than $100,000 (exclusive of any interest and charges) to the Department of Justice for litigation.

§ 100.602 Definitions.

For the purpose of this subpart, the following definitions will apply:

Administrative Offset means withholding money payable by the United States Government (including money payable by the United States Government on behalf of a State Government) to, or held by the Government for, a person to satisfy a debt the person owes the United States Government.

Centralized Offset means the offset of Federal payments through the Treasury Offset Program to collect debts which creditor agencies have certified pursuant to 31 U.S.C. 3716(c), 3720A(a) and applicable regulations. The term “centralized offset” includes the Treasury Offset Program’s processing of offsets of Federal payments disbursed by disbursing officials other than the Department of the Treasury.

Claim or debt means an amount of money, funds, or property that has been determined by an agency official to be owed to the United States by a person, organization, or entity, except another Federal agency. For the purposes of administrative offset under 31 U.S.C. 3716, the terms claim and debt include an amount of money, funds, or property owed by a person to a State (including past-due support being enforced by a State), the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico.

Cross-servicing means that the Department of the Treasury or another debt collection center is taking appropriate debt collection action on behalf of one or more Federal agencies or a unit or sub-agency thereof.

Debtor means an individual, organization, group, association, partnership, or corporation indebted to the United States, or the person or entity with legal responsibility for assuming the debtor’s obligation.

Delinquent refers to the status of a debt and means a debt has not been paid by the date specified in the initial
§ 100.603 Debts that are covered.

(a) The procedures covered by this part generally apply to claims for payment or debts which
(1) Result from certain internal management activities of the NLRB; or
(2) Are referred to the NLRB for collection.
(b) The procedures covered by this part do not apply to
(1) A debt arising from, or ancillary to, any action undertaken by or on behalf of the NLRB or its General Counsel in furtherance of efforts to ensure compliance with the National Labor Relations Board Act, 29 U.S.C. 151, et seq., including but not limited to actions involving the collection of monies owed for back pay and/or other monetary remedies provided for in Board orders or ancillary court proceedings. (Regulations concerning the collection of these types of debts are found in 29 CFR part 102, subparts U and V.);
(2) A debt involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person having an interest in the claim;
(3) A debt based in whole or in part on conduct in violation of the antitrust laws;
(4) A debt under the Internal Revenue Code of 1986;
(5) A debt between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 (3 CFR, 1980 Comp., pp. 409–412);
(6) A debt once it becomes subject to salary offset under 5 U.S.C. 5514; or
(7) A debt involving bankruptcy which is covered by Title 11 of the United States Code.
(c) Debts involving criminal actions of fraud, false claims, misrepresentation, or which violate antitrust laws will be promptly referred to the Department of Justice. Only the Department of Justice has the authority to compromise, suspend, or terminate collection activity on such debts. However, at its discretion, the Department of Justice may return a debt to the NLRB for further handling.

§ 100.604 Monetary limitations on NLRB's authority.

The NLRB’s authority to compromise a debt or to suspend or terminate collection action on a debt covered by these procedures is limited by 31 U.S.C. 3711(a) to claims that:
(a) Have not been referred to another Federal Agency for further collection actions; and
(b) Do not exceed $100,000 (exclusive of any interest) or such higher amount as the Attorney General shall from time to time prescribe for purposes of compromise or suspension or termination of collection activity.

§ 100.605 Information collection requirements: OMB approval.

This part contains no information collection requirements, and, therefore, is not subject to the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

§ 100.606 No private rights created.

(a) The failure of the NLRB to include in this part any provision of the Federal Collections Claim Standards (FCCS), 31 CFR chapter IX parts 900–904, does not prevent the NLRB from applying these provisions.
(b) A debtor may not use the failure of the NLRB to comply with any provision of this part or of the FCCS as a defense.
§ 100.607 Form of payment.

These procedures are directed primarily at the recovery of money or, when a contractual basis exists, the NLRB may demand the return of specific property or the performance of specific services.

§ 100.608 Subdivision of claims or debts.

A debt may not be subdivided to avoid the monetary ceiling established by 31 U.S.C. 3711(a)(2) and 29 CFR 100.604.

§ 100.609 Administrative collection of claims.

The NLRB shall aggressively collect all claims or debts. These collection activities will be undertaken promptly and follow up action will be taken as appropriate in accordance with 31 CFR chapter IX §901.1.

§ 100.610 Written demand for payment.

(a) The NLRB will promptly make written demand upon the debtor for payment of money or the return of specific property. The written demand for payment will be consistent with the requirements of 31 CFR chapter IX §901.2. The date by which payment is due to avoid any late charges will be 60 days from the date that the demand letter is mailed or hand-delivered.

(b) The failure to state in a letter of demand a matter described in 31 CFR chapter IX §901.2 is not a defense for a debtor and does not prevent the NLRB from proceeding with respect to that matter.

(c) When necessary, to protect the Government's interest, written demand may be preceded by other appropriate action, including immediate referral for litigation. It may be appropriate to contact a debtor or his representative or guarantor by other means (telephone, in person, etc.) to discuss prompt payment, the debtor's ability to repay the debt, and to inform the debtor of his rights and the affect of nonpayment or delayed payment.

(d) When the NLRB learns that a bankruptcy petition has been filed with respect to a debtor, the NLRB will cease collection action immediately unless it has been determined that the automatic stay imposed at the time of filing pursuant to 11 U.S.C. 362 has been lifted or is no longer in effect.

§ 100.611 Reporting claims or debts.

(a) In addition to assessing interest, penalties, and administrative costs pursuant to 31 CFR chapter IX §901.9, the NLRB may report a debt that has been delinquent for 90 days to a consumer reporting agency in accordance with the requirements of 31 U.S.C. 3711(e).

(b) The information the NLRB discloses to a consumer reporting agency is limited to—

(1) Information necessary to establish the identity of the individual debtor, including name, address, and taxpayer identification number;

(2) The amount, status, and history of the debt; and

(3) The NLRB activity under which the debt arose.

§ 100.612 Disputed claims or debts.

(a) A debtor who disputes a debt should provide the NLRB with an explanation as to why the debt is incorrect within 60 days from the date the initial demand letter was mailed or hand-delivered. The debtor may support the explanation by affidavits, cancelled checks, or other relevant evidence.

(b) If the debtor's arguments appear to have merit, the NLRB may waive the interest period pursuant to 29 CFR 100.617(c) pending a final determination of the existence or the amount of the debt.

(c) The NLRB may investigate the facts concerning the dispute and, if it considers it necessary, arrange for a conference at which the debtor may present evidence and any arguments in support of the debtor's position.

§ 100.613 Contracting for collection services.

The NLRB may contract for collection services in order to recover delinquent debts only if the debts are not subject to the DCIA requirement to transfer claims or debts to Treasury for debt collection services, e.g., claims or debts of less than 180 days delinquent. However, the NLRB retains the authority to resolve disputes, compromise claims, suspend or terminate
§ 100.614 Collection by administrative offset.

(a) Application. (1) The NLRB may administratively undertake collection by centralized offset on each claim which is liquidated or certain in amount in accordance with the guidance and standards in 31 CFR parts 900–904 and 5 U.S.C. 5514.

(2) This section does not apply to those debts described in 31 CFR 901.3(a)(2).

(3) Unless otherwise provided for by contract or law, debts or payments that are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(4) Generally, administrative offset of payments under the authority of 31 U.S.C. 3716 may not be conducted more than 10 years after the Government’s right to collect the claim or debt first accrued.

(b) Mandatory centralized offset. (1) The NLRB is required to refer past due legally enforceable, nontax debts that are over 180 days delinquent to the Department of the Treasury for collection by centralized administrative offset. A debt is legally enforceable if there has been a final determination by the NLRB that the debt, in the amount stated, is due and there are no legal bars to collection action. Debts under this section will be referred and collected pursuant to procedures in 31 CFR 901.3(b).

(c) NLRB administrative offset. The NLRB, in order to refer a delinquent debt to the Department of the Treasury for administrative offset, adopts the administrative offset procedures as prescribed by 31 CFR 901.3.

(d) Non-centralized administrative offset. Generally, non-centralized administrative offsets are ad hoc case-by-case offsets that the NLRB would conduct at its own discretion, internally or in cooperation with the agency certifying or authorizing payments to the debtor. Non-centralized administrative offset is used when centralized administrative offset is not available or appropriate to collect past due legally enforceable, nontax delinquent debts. In these cases, the NLRB may make a request directly to a payment-authorizing agency to offset a payment due a debtor to collect a delinquent debt. The NLRB adopts the procedures in 31 CFR 901.3(c) so that it may request that the Department of the Treasury or any other payment authorizing agency to conduct a non-centralized administrative offset.

(e) Requests to OPM to offset a debtor’s anticipated or future benefit payments under the Civil Service Retirement and Disability Fund and the Federal Employees Retirement System. Upon providing OPM written certification that a debtor has been afforded the procedures provided for in this section, the NLRB will request that OPM offset a debtor’s anticipated or future benefit payments under the Civil Service Retirement and Disability Fund (Fund) in accordance with regulations codified at 5 CFR 831.1801–831.1808 and the Federal Employees Retirement System (System) in accordance with regulations codified at 5 CFR 845.401–845.408. Upon receipt of a request, OPM will identify and “flag” a debtor’s account in anticipation of the time when the debtor requests or becomes eligible for payments from the Fund or System. This will satisfy any requirement that offset be initiated prior to the expiration of the time limitations referenced in 29 CFR 100.614(a)(4).

(f) Review requirements. For purposes of this section, whenever the NLRB is required to afford a debtor a review within the Agency, the NLRB shall provide the debtor with a reasonable opportunity for a review of the record in accordance with 31 CFR 901.3(e). The NLRB will provide the debtor with the reasonable opportunity for an oral hearing in accordance with 31 CFR 285.11(f), when the debtor requests reconsideration of the debt, and the NLRB determines that the question of the indebtedness cannot be resolved by review of the written record, for example, when the validity of the debt turns on an issue of credibility or veracity.
§ 100.615 Authorities other than offset.

(a) Administrative Wage Garnishment. The NLRB is authorized to collect debts from a debtor’s wages by means of administrative wage garnishment in accordance with the requirements of 31 U.S.C. 3720D and 31 CFR 285.11. This section adopts and incorporates all of the provisions of 31 CFR 285.11 concerning administrative wage garnishment, including the hearing procedures described in 31 CFR 285.11(f). The NLRB may use administrative wage garnishment to collect a delinquent debt unless the debtor is making timely payments under an agreement to pay the debt in installments.

(b) This section does not apply to Federal salary offset, the process by which the NLRB collects debts from the salaries of Federal employees.

§ 100.616 Payment collection.

(a) The NLRB shall make every effort to collect a claim in full before it becomes delinquent, but will consider arranging for payment in regular installments consistent with 31 CFR 901.8, if the debtor furnishes satisfactory evidence that he is unable to pay the debt in one lump sum. Except for a claim described in 5 U.S.C. 5514, all installment payment arrangements must be in writing and require the payment of interest, penalties, and other administrative costs. If possible, the installment payments should be sufficient in size and frequency to liquidate the debt in three years or less.

(b) If a debt is paid in one lump sum after it becomes delinquent, the NLRB shall impose charges for interest, penalties, and administrative costs as specified in 31 CFR 901.9.

(c) Payment of a debt is made by check, electronic funds transfer, draft, or money order payable to the National Labor Relations Board. Payment should be made to the National Labor Relations Board, Finance Branch, 1099 14th Street NW., Washington, DC 20570, unless payment is—

(1) Made pursuant to arrangements with the Department of Justice;

(2) Ordered by a Court of the United States; or

(3) Otherwise directed in any other part of this chapter.

§ 100.617 Interest, penalties, and administrative costs.

(a) Pursuant to 31 U.S.C. 3717, the NLRB shall assess interest, penalties, and administrative costs on debts owed to the United States Government. Interest, penalties, and administrative costs will be assessed in accordance with the provisions contained in 31 CFR 901.9.

(b) The NLRB shall waive collection of interest on a debt or any portion of the debt which is paid in full within 30 days after the date on which the interest began to accrue.

(c) The NLRB may waive interest during a period a disputed debt is under investigation or review by the NLRB. However, this additional waiver is not automatic and must be requested before the expiration of the initial 30-day waiver period. The NLRB may grant the additional waiver only if it finds merit in the explanation the debtor has submitted.

(d) The NLRB may waive collection of interest, penalties, and administrative costs if it finds that one or more of the following conditions exist:

(1) The debtor is unable to pay any significant sum toward the debt within a reasonable period of time;

(2) Collection of interest, penalties, and administrative costs will jeopardize collection of the principal of the debt;

(3) The NLRB is unable to enforce collection in full within a reasonable period of time by enforced collection proceedings; or

(4) Collection is not in the best interest of the United States, including when an administrative offset or installment agreement is in effect.

(e) The NLRB is authorized to impose interest and related charges on debts not subject to 31 U.S.C. 3717, in accordance with common law.

§ 100.618 Bankruptcy claims.

When the NLRB learns that a bankruptcy petition has been filed by a debtor, before proceeding with further collection action, the NLRB will immediately seek legal advice from the NLRB’s Office of Special Counsel concerning the impact of the Bankruptcy Code on any pending or contemplated collection activities. After seeking
legal advice from the NLRB’s Office of Special Counsel, the NLRB will take any necessary action in accordance with the provisions of 31 CFR 901.2(h).

§ 100.619 When a debt may be compromised.

The NLRB may compromise a debt not in excess of the monetary limitation in accordance with 31 CFR part 902 if it has not been referred to the Department of Justice for litigation.

§ 100.620 Finality of a compromise.

An offer of compromise must be in writing and signed by the debtor. An offer of compromise which is accepted by the NLRB is final and conclusive on the debtor and on all officials, agencies, and courts of the United States, unless obtained by fraud, misrepresentation, the presentation of a false claim, or mutual mistake of fact.

§ 100.621 When collection action may be terminated or suspended.

The NLRB may suspend or terminate collection action on a claim not in excess of the monetary limitation of $100,000 or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any, in accordance with the standards and reasons set forth in 31 CFR part 903.

§ 100.622 Termination of collection action.

Before terminating collection activity, the NLRB will have pursued all appropriate means of collection and determined, based upon results of the collection activity, that the debt is uncollectible. Termination of collection activity ceases active collection of the debt. The termination of collection activity does not preclude the NLRB from retaining a record of the account for the purposes stated in 31 CFR 903.3(b) and (c).

§ 100.623 Exception to termination.

If a debt meets the exceptions described in 31 CFR 903.4, the NLRB may refer it for litigation even though termination of collection activity may otherwise be appropriate.

§ 100.624 Discharge of indebtedness; reporting requirements.

(a) Before discharging a delinquent debt (also referred to as close-out of a debt), the NLRB shall take all appropriate steps to collect the debt in accordance with 31 U.S.C. 3711(g), including, as applicable, administrative offset, tax refund offset, Federal salary offset, referral to Treasury or Treasury-designated collection centers or private collection contractors, credit bureau reporting, wage garnishment, litigation, and foreclosure. Discharge of indebtedness is distinct from termination or suspension of collection activity and is governed by the Internal Revenue Code. When the NLRB determines that it will discharge a debt, it will do so in accordance with the provisions of 31 CFR 903.5.

(b) [Reserved]

§ 100.625 Referral of a claim to the Department of Justice.

The NLRB shall promptly refer debts that are subject to aggressive collection activity and that cannot be compromised, or debts on which collection activity cannot be suspended or terminated, to the Department of Justice for litigation. Debts shall be referred as early as possible, consistent with the standards contained if 31 CFR parts 900–904 and, in any event, well within the period for initiating timely lawsuits against the debtors. The NLRB will make every effort to refer delinquent debts to the Department of Justice within one year of the date such debts became delinquent.
National Labor Relations Board

101.6 Dismissal of charges and appeals to the General Counsel.
101.7 Settlements.
101.8 Complaints.
101.9 Settlement after issuance of complaint.
101.10 Hearings.
101.11 Administrative law judge's decision.
101.12 Board decision and order.
101.13 Compliance with Board decision and order.
101.14 Judicial review of Board decision and order.
101.15 Compliance with court judgment.
101.16 Backpay proceedings.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

101.22 Initiation and investigation of a case under section 8(b)(7).
101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).
101.24 Final disposition of a charge which has been held pending investigation of the petition.
101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

101.26 Initiation of rescission of authority cases.
101.27 Investigation of petition; withdrawals and dismissals.
101.28 Consent agreements providing for election.
101.29 Procedure respecting election conducted without hearing.
101.30 Formal hearing and procedure respecting election conducted after hearing.

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

101.31 Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).
101.32 Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.
101.33 Initiation of formal action; settlement.
101.34 Hearing.
101.35 Procedure before the Board.
101.36 Compliance with determination; further proceedings.

§ 101.2

Subpart G—Procedure Under Section 10(j) and (l) of the Act

101.37 Application for temporary relief or restraining orders.
101.38 Change of circumstances.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

101.39 Initiation of advisory opinion case.
101.40 Proceedings following the filing of the petition.
101.41 Informal procedures for obtaining opinions on jurisdictional questions.
101.42 Procedures for obtaining declaratory orders of the Board.
101.43 Proceedings following the filing of the petition.

AUTHORITY: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub. L. 100-236, 28 U.S.C. 2112(a)(1).

SOURCE: 52 FR 23968, June 26, 1987, unless otherwise noted.

Subpart A—General Statement

§ 101.1 General statement.

The following statements of the general course and method by which the Board’s functions are channeled and determined are issued and published pursuant to 5 U.S.C. 552(a)(1)(B).

Subpart B—Unfair Labor Practice Cases Under Section 10 (a) to (i) of the Act and Telegraph Merger Act Cases

§ 101.2 Initiation of unfair labor practice cases.

The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of the persons’ knowledge and belief. The charge is filed with the Regional Director for the Region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the Regional Office upon request. The charge contains
the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

§ 101.3 [Reserved]

§ 101.4 Investigation of charges.

When the charge is received in the Regional Office it is filed, docketed, and assigned a case number. The Regional Director may cause a copy of the charge to be served on the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the Act is the exclusive responsibility of the charging party and not of the Regional Director. The Regional Director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charge, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violations of section 8(b)(4) (A), (B), and (C), charges alleging violations of section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief under section 10(1) of the Act, and charges alleging violations of section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violations of sections 8(a)(3) or 8(b)(2) are given priority over all other cases except cases of like character and cases under section 10(1) of the Act. The Regional Director may exercise discretion to dispense with any portion of the investigation described in this section as appears necessary in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

§ 101.5 Withdrawal of charges.

If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the Regional Director recommends withdrawal of the charge by the person who filed. Withdrawal may also be requested on the initiative of the complainant. If the complainant accepts the recommendation of the Regional Director or requests withdrawal, the respondent is immediately notified of the withdrawal of the charge.

§ 101.6 Dismissal of charges and appeals to the General Counsel.

If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of this section, together with a simple statement of the grounds therefor, and the complainant’s right of appeal to the General Counsel in Washington, DC, within 14 days. If the complainant appeals to the General Counsel, the entire file in the case is sent to Washington, DC, where the case is fully reviewed by the General Counsel with staff assistance. Oral presentation of the appeal issues may be permitted a party on timely written request, in which event the other parties are notified and afforded a like opportunity at another appropriate time. Following such review, the General Counsel may sustain the Regional Director’s dismissal, stating the grounds of affirmance, or may direct the Regional Director to take further action.

§ 101.7 Settlements.

Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing
conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the Regional Director, provide for an appeal to the General Counsel, as described in §101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the Regional Director. Proof of compliance is obtained by the Regional Director before the case is closed. If the respondent fails to perform the obligations under the informal agreement, the Regional Director may determine to institute formal proceedings.

§ 101.9 Settlement after issuance of complaint.

(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or commenced, the attorney in charge of the case and the Regional Director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, DC. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent’s consent to the Board’s application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board’s order.

(2) In some cases, however, the Regional Director, who has authority to withdraw the complaint before the hearing (§102.18), may conclude that an informal settlement agreement of the type described in §101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of a complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the Regional Director, the respondent, and any other parties whose consent may be required, the Regional Director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 7 days after service of these documents, the charging party may file with the Regional Director a written statement of any objections to the proposed settlement. Such objections will be considered by the Regional Director in determining whether to approve the proposed settlement. If the settlement is approved by the Regional Director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the Regional Director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party’s objections and the Regional Director’s written statements are submitted to
§ 101.10 Hearings.

(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the Region where the charge originated. A duly designated administrative law judge presides over the hearing. The Government’s case is conducted by an attorney attached to the Board’s Regional Office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the General Counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpoena.

(b) The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. 557) are conducted in an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice. The Board’s attorney has the burden of proof of violations of section 8 of the National Labor Relations Act and section 222(f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act (5 U.S.C. 556):

(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence.
§ 101.13 Compliance with Board decision and order.

(a) Shortly after the Board's decision and order is issued the Director of the
§ 101.14 Judicial review of Board decision and order.

If the respondent does not comply with the Board’s order, or the Board deems it desirable to implement the order with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or, the respondent or any person aggrieved by a final order of the Board may petition the circuit court of appeals to review and set aside the Board’s order. If a petition for review is filed, the respondent or aggrieved person must ensure that the Board receives, by service upon its Deputy Associate General Counsel of the Appellate Court Branch, a court-stamped copy of the petition with the date of filing. Upon such review or enforcement proceedings, the court reviews the record and the Board’s findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board’s findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court’s judgment, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States. [53 FR 24440, June 29, 1988]

§ 101.15 Compliance with court judgment.

After a Board order has been enforced by a court judgment, the Board has the responsibility of obtaining compliance with that judgment. Investigation is made by the Regional Office of the respondent’s efforts to comply. If it finds that the respondent has failed to live up to the terms of the court’s judgment, the General Counsel may, on behalf of the Board, petition the court to hold the respondent in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

§ 101.16 Backpay proceedings.

(a) After a Board order directing the payment of backpay has been issued or after enforcement of such order by a court judgment, if informal efforts to dispose of the matter prove unsuccessful, the Regional Director then has discretion to issue a “backpay specification” in the name of the Board and a notice of hearing before an administrative law judge, both of which are served on the parties involved. The specification sets forth computations showing gross and net backpay due and any other pertinent information. The respondent must file an answer within 21 days of the receipt of the specification, setting forth a particularized statement of its defense.

(b) In the alternative, the Regional Director, under the circumstances specified above, may issue and serve on the parties a notice of hearing only, without a specification. Such notice contains, in addition to the time and place of hearing before an administrative law judge, a brief statement of the matters in controversy.

(c) The procedure before the administrative law judge or the Board, whether initiated by the “backpay specification” or by notice of hearing without backpay specification, is substantially the same as that described in §§101.10 to 101.14, inclusive.

Subpart C [Reserved]
Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

§ 101.22 Initiation and investigation of a case under section 8(b)(7).

(a) The investigation of an alleged violation of section 8(b)(7) of the Act is initiated by the filing of a charge. The manner of filing such charge and the contents thereof are the same as described in §101.2. In some cases, at the time of the investigation of the charge, there may be pending a representation petition involving the employees of the employer named in the charge. In those cases, the results of the investigation of the charge will determine the cause of the petition.

(b) The investigation of the charge is conducted in accordance with the provisions of §101.4, insofar as they are applicable. If the investigation reveals that there is merit in the charge, a complaint is issued as described in §101.8, and an application is made for an injunction under section 10(1) of the Act, as described in §101.37. If the investigation reveals that there is no merit in the charge, the Regional Director, absent a withdrawal of the charge, dismisses it, subject to appeal to the General Counsel. However, if the investigation reveals that issuance of a complaint may be warranted but for the pendency of a representation petition involving the employees of the employer named in the charge, action on the charge is suspended pending the investigation of the petition as provided in §101.23.

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that:

1 The manner of filing of such petition and the contents thereof are the same as described in 29 CFR 102.60 and 102.61 and the statement of the general course of proceedings under Section 9(c) of the Act published in the FEDERAL REGISTER, except that the Regional director’s rulings on any objections to the conduct of the election or challenged ballots are final and binding unless the Board, on an application by one of the parties, grants such party special permission to appeal from the

1 The employer’s operations affect commerce within the meaning of the Act;

2 Picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act;

3 Subparagraph (C) of that section of the Act is applicable to the picketing; and

4 The petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the regional director’s staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

(b) If, based on such investigation, the regional director determines that an election is warranted, the director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding. If it is determined that an election is not warranted, the director dismisses the petition or makes other disposition of the matter. Should the regional director conclude that an election is warranted, the director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in 29 CFR 102.69 and the statement of the general course of proceedings under Section 9(c) of the Act published in the FEDERAL REGISTER, except that the regional director’s rulings on any objections to the conduct of the election or challenged ballots are final and binding unless the Board, on an application by one of the parties, grants such party special permission to appeal from the
§ 101.24 Final disposition of a charge which has been held pending investigation of the petition.

(a) Upon the determination that the issuance of a direction of election is warranted on the petition, the Regional Director, absent withdrawal of the charge, dismisses it subject to an appeal to the General Counsel in Washington, DC.

(b) If, however, the petition is dismissed or withdrawn, the investigation of the charge is resumed, and the appropriate steps described in §101.22 are taken with respect to it.

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the regional director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the regional director advises the petitioner of the determination to process the petition under the procedures described in subpart C of 29 CFR part 102 and the statement of the general course. In either event, the regional director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the regional director’s action. Such party must request such review promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board, nor the Board's grant of such review operates as a stay of the action taken by the regional director, unless specifically so ordered by the Board.

[79 FR 74476, Dec. 15, 2014]

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

§ 101.26 Initiation of rescission of authority cases.

The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing
of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the Region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. The blank form, which is supplied by the Regional Office upon request or is available online, provides, among other things, for a description of the bargaining unit covered by the agreement, the approximate number of employees involved, the names of any other labor organizations which claim to represent the employees, the petitioner’s position on the type, date(s), time(s), and location(s) of the election sought, and the name of, and contact information for, the individual who will serve as the petitioner’s representative. The petition may be filed by facsimile or electronically. The petitioner must supply with the petition evidence of authorization from the employees.

(a) Upon receipt of the petition in the Regional Office, it is filed, docketed, and assigned to a member of the staff, usually a field examiner, for investigation. The field examiner conducts an investigation to ascertain:

(1) Whether the employer’s operations affect commerce within the meaning of the Act,

(2) Whether there is in effect an agreement requiring as a condition of employment membership in a labor organization,

(3) Whether the petitioner has been authorized by at least 30 percent of the employees to file such a petition, and

(4) Whether an election would effectuate the policies of the Act by providing for a free expression of choice by the employees.

The evidence of designation submitted by the petitioner, usually in the form of cards signed by individual employees authorizing the filing of such a petition, is checked to determine the proportion of employees who desire rescission.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that an election is inappropriate, because, among other possible reasons, the petitioner’s card-showing is insufficient to meet the 30-percent statutory requirement referred to in subsection (a) of this section.

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If the petitioner, despite the Regional Director’s recommendation, refuses to withdraw the petition, the Regional Director then dismisses the petition, stating the grounds for his dismissal and informing the petitioner of the right of appeal to the Board in Washington, DC. The petitioner may within 14 days appeal from the Regional Director’s dismissal by filing such request with the Board in Washington, DC. The request shall contain a complete statement setting forth the facts and reasons upon which the request is made. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds for its affirmance, or may direct the Regional Director to take further action.

(a) The Board makes available to the parties three types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are the consent election agreement with final regional director determinations of post-election disputes, the stipulated election agreement with discretionary Board review, and the full consent election agreement with final regional director determinations of pre- and post-election
§ 101.29 Procedure respecting election conducted without hearing.

If the regional director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the regional director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as is described in subpart C of 29 CFR part 102 and the statement of the general course in connection with similar agreements in representation cases under Section 9(c) of the Act, except that no provision is made for runoff elections.

[79 FR 74477, Dec. 15, 2014]

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course respecting representation cases arising under Section 9(c) of the Act insofar as applicable. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by regional director decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is non-adversary in character, is part of the investigation in which the primary interest of the Board’s agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions that are relevant to the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that such authority be rescinded. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the regional director, together with an informal analysis by the hearing officer of the issues and the
evidence but without recommendations. Post-hearing briefs are filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as is described in connection with the postelection procedures in representation cases under Section 9(c) of the Act.

[79 FR 74477, Dec. 15, 2014]

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

§ 101.31 Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).

The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in §101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the Regional Director serves on the parties a copy of the charge together with a notice of the filing of such charge.

§ 101.32 Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.

These matters are handled as described in §§101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the Act are given priority over all other cases in the office except other cases under section 10(l) of the Act and cases of like character.

§ 101.33 Initiation of formal action; settlement.

If, after investigation, it appears that the Board should determine the dispute under section 10(k) of the Act, the Regional Director issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the Regional Director satisfactory evidence that they have adjusted the dispute, the Regional Director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the Regional Director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the Regional Director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the Act, or any other satisfactory method to resolve the dispute. If the agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the Regional Director dismisses the charge against that union irrespective of whether the employer complies with that determination.

§ 101.34 Hearing.

If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is non-adversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.
§ 101.35 Procedure before the Board.

The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer’s analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

§ 101.36 Compliance with determination; further proceedings.

After the issuance of determination by the Board, the Regional Director in the Region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If satisfied that the parties are complying with the determination, the Regional Director dismisses the charge. If not satisfied that the parties are complying, the Regional Director issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D), the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business, except that such officer or regional attorney will not apply for injunctive relief under section 10(l) with respect to an alleged violation of section 8(b)(7) if a charge under section 8(a)(2) has been filed and, after preliminary investigation, there is reasonable cause to believe that such charge is true and a complaint should issue.

§ 101.37 Application for temporary relief or restraining orders.

Whenever it is deemed advisable to seek temporary injunctive relief under section 10(j) or whenever it is determined that a complaint should issue alleging violation of section 8(b)(4) (A), (B), or (C), or section 8(e), or section 8(b)(7), or whenever it is appropriate to seek temporary injunctive relief for a violation of section 8(b)(4)(D), the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business, except that such officer or regional attorney will not apply for injunctive relief under section 10(l) with respect to an alleged violation of section 8(b)(7) if a charge under section 8(a)(2) has been filed and, after preliminary investigation, there is reasonable cause to believe that such charge is true and a complaint should issue.

§ 101.38 Change of circumstances.

Whenever a temporary injunction has been obtained pursuant to section 10(j) and thereafter the administrative law judge hearing the complaint, upon which the determination to seek such injunction was predicated, recommends dismissal of such complaint, in whole or in part, the officer or regional attorney handling the case for the Board suggests to the district court which issued the temporary injunction the possible change in circumstances arising out of the findings and recommendations of the administrative law judge.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

§ 101.29 Initiation of advisory opinion case.

(a) The question of whether the Board will assert jurisdiction over a
labor dispute which is the subject of a proceeding in an agency or court of a State or territory is initiated by the filing of a petition with the Board. This petition may be filed only if:

(1) A proceeding is currently pending before such agency or court;
(2) The petitioner is the agency or court itself; and
(3) The relevant facts are undisputed or the agency or court has already made the relevant factual findings.

(b) The petition must be in writing and signed. It is filed with the Executive Secretary of the Board in Washington, DC. No particular form is required, but the petition must be properly captioned and must contain the allegations required by section 102.99 of the Board’s Rules and Regulations. None of the information sought may relate to the merits of the dispute. The petition may be withdrawn at any time before the Board issues its advisory opinion determining whether it would or would not assert jurisdiction on the basis of the facts before it.

§ 101.41 Informal procedures for obtaining opinions on jurisdictional questions.

Although a formal petition is necessary to obtain an advisory opinion from the Board, other avenues are available to persons seeking informal and, in most cases, speedy opinions on jurisdictional issues. In discussion of jurisdictional questions informally with Regional Office personnel, information and advice concerning the Board’s jurisdictional standards may be obtained. Such practices are not intended to be discouraged by the rules providing for formal advisory opinions by the Board, although the opinions expressed by such personnel are not to be regarded as binding upon the Board or the General Counsel.

§ 101.42 Procedures for obtaining declaratory orders of the Board.

(a) When both an unfair labor practice charge and a representation petition are pending concurrently in a Regional Office, appeals from a Regional Director’s dismissals thereof do not follow the same course. Appeal from the dismissal of a charge must be made to the General Counsel, while appeal from dismissal of a representation petition may be made to the Board. To obtain uniformity in disposing of such cases on jurisdictional grounds at the same stage of each proceeding, the General Counsel may file a petition for a declaratory order of the Board. Such order is intended only to remove uncertainty with respect to the question of whether the Board would assert jurisdiction over the labor dispute.

(b) A petition to obtain a declaratory Board order may be filed only by the General Counsel. It must be in writing and signed. It is filed with the Executive Secretary of the Board in Washington, DC. No particular form is required, but the petition must be properly captioned and must contain the allegations required by §102.106 of the Board’s Rules and Regulations. None of the information sought relates to the merits of the dispute. The petition may be withdrawn any time before the Board issues its declaratory order deciding whether it would or would not assert jurisdiction over the cases.
§ 101.43 Proceedings following the filing of the petition.

(a) A copy of the petition is served on all other parties.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted at the discretion of the Board.

(c) All other parties may reply to the petition in writing.

(d) Briefs may be filed.

(e) After review of the record, the Board issues a declaratory order as to whether it will assert jurisdiction over the cases, but it will not render a decision on the merits at this stage of the cases.

(f) The declaratory Board order will be binding on the parties in both cases.

PART 102—RULES AND REGULATIONS, SERIES 8

Subpart A—Definitions

Sec. 102.1 Terms defined in section 2 of the Act.
102.2 Act; Board; Board agent.
102.3 General counsel.
102.4 Region; subregion.
102.5 Regional director; officer-in-charge, regional attorney.
102.6 Administrative law judge; hearing officer.
102.7 State.
102.8 Party.

Subpart B—Procedure Under Section 10(a) to (i) of the Act for the Prevention of Unfair Labor Practices

CHARIT

102.9 Who may file; withdrawal and dismissal.
102.10 Where to file.
102.11 Forms; jurat; or declaration.
102.12 Contents.
102.13 (Reserved)
102.14 Service of charge.

COMPLAINT

102.15 When and by whom issued; contents; service.
102.16 Hearing; change of date or place.
102.17 Amendment.
102.18 Withdrawal.
102.19 Appeal to the general counsel from refusal to issue or reissue.

ANSWER

102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.
102.21 Where to file; service upon the parties; form.
102.22 Extension of time for filing.
102.23 Amendment.

MOTIONS

102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.
102.25 Ruling on motions.
102.26 Motions, rulings, and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.
102.27 Review of granting of motion to dismiss entire complaint; reopening of the record.
102.28 Filing of answer or other participation in proceedings not a waiver of rights.

INTERVENTION

102.29 Intervention; requisites; rulings on motions to intervene.

WITNESSES, DEPOSITIONS, AND SUBPOENAS

102.30 Examination of witnesses; deposition.
102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect and copy data.
102.32 Payment of witness fees and mileage; fees of persons taking depositions.

TRANSFER, CONSOLIDATION, AND SEVERANCE

102.33 Transfer of charge and proceeding from region to region; consolidation of proceedings in same region; severance.

HEARINGS

102.34 Who shall conduct; to be public unless otherwise ordered.
102.35 Duties and powers of administrative law judges; stipulations of cases to administrative law judges or to the Board; assignment and powers of settlement judges.
102.36 Unavailability of administrative law judge.
102.37 Disqualification of administrative law judge.
102.38 Rights of parties.
102.39 Rules of evidence controlling so far as practicable.
102.40 Stipulations of fact admissible.
102.41 Objection to conduct of hearing; how made; objections not waived by further participation.
102.42 Filings of briefs and proposed findings with the administrative law judge and oral argument at the hearing.

102.43 Continuance and adjournment.

102.45 Administrative law judge’s decision; contents; service; transfer of the case to the Board; contents of record in case.

102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

102.47 Filing of motion after transfer of case to Board.

102.48 Action of the Board upon expiration of time to file exceptions to the administrative law judge’s decision; decisions by the Board; extraordinary postdecisional motions.

102.49 Modification or setting aside of order of Board before record filed in court; action thereafter.

102.50 Hearings before Board or member thereof.

102.51 Settlement or adjustment of issues.

102.52 Compliance with Board order; notification of compliance determination.

102.53 Review by the General Counsel of compliance determination; appeal to the Board of the General Counsel’s decision.

102.54 Initiation of formal compliance proceedings; issuance of compliance specification and notice of hearing.

102.55 Contents of compliance specification.

102.56 Answer to compliance specification.

102.57 Extension of date of hearing.

102.58 Withdrawal.

102.59 Hearing; posthearing procedure.

102.60 Petitions.

102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

102.62 Election agreements; voter list; Notice of Election.

102.63 Investigation of petition by regional director; notice of hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of notice of hearing.

102.64 Conduct of hearing.

102.65 Motions; intervention; appeals of hearing officer’s rulings.

102.66 Introduction of evidence; rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

102.67 Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

102.68 Record in pre-election proceeding; what constitutes; transmission to Board.

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.

102.70 Runoff election.

102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the regional director.

102.72 Filing petition with general counsel; investigation upon motion of general counsel; transfer of petition and proceeding from region to general counsel or to another region; consolidation of proceedings in same region; severance; procedure before general counsel in cases over which he has assumed jurisdiction.

102.73 Initiation of proceedings.

102.74 Complaint and formal proceedings.

102.75 Suspension of proceedings on the charge where timely petition is filed.

102.76 Petition; who may file; where to file; contents.

102.77 Investigation of petition by regional director; directed election.

102.78 Election procedure; method of conducting balloting; postballoting procedure.

102.79 Consent-election agreements.

102.80 Dismissal of petition; refusal to proceed with petition; resumption of proceedings upon charge held during pendency of petition; review by the regional director; elected director.

102.81 Election procedure; method of conducting balloting; postballoting procedure.

102.82 Transfer, consolidation, and severance.
Subpart E—Procedure for Referendum Under Section 9(e) of the Act

102.83 Petition for referendum under section 9(e)(1) of the Act; who may file; where to file; withdrawal.

102.84 Contents of petition to rescind authority.

102.85 Investigation of petition by regional director; consent referendum; directed referendum.

102.86 Hearing; posthearing procedure.

102.87 Method of conducting ballot; postballoting procedure.

102.88 Refusal to conduct referendum; appeal to Board.

Subpart F—Procedure To Hear and Determine Disputes Under Section 10(k) of the Act

102.89 Initiation of proceedings.

102.90 Notice of filing of charge; notice of hearing; proceeding before the Board; briefs; determination of dispute.

102.91 Compliance with determination; further proceedings.

102.92 Review of determination.

102.93 Alternative procedure.

Subpart G—Procedure in Cases Under Section 10(j), (l), and (m) of the Act

102.94 Expedited processing of section 10(j) cases.

102.95 Priority of cases pursuant to section 10(l) and (m) of the Act.

102.96 Issuance of complaint promptly.

102.97 Expedited processing of section 10(l) and (m) cases in successive stages.

Subpart H—Declaratory Orders and Advisory Opinions Regarding Board Jurisdiction

102.98 Petition for advisory opinion; who may file; where to file.

102.99 Contents of petition for advisory opinion; contents of request for administrative advice.

102.100 Notice of petition; service of petition.

102.101 Response to petition; service of response.

102.102 Intervention.

102.103 Proceedings before the Board; briefs; advisory opinions.

102.104 Withdrawal of petition.

102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.

102.106 Contents of petition for declaratory order.

102.107 Notice of petition; service of petition.

102.108 Response to petition; service of response.

102.109 Intervention.

Subpart I—Service and Filing of Papers

102.110 Proceedings before the Board; briefs; declaratory orders.

Subpart J—Certification and Signature of Documents

102.115 Certification of papers and documents.

102.116 Signature of orders.

Subpart K—Records and Information

102.117 Freedom of Information Act Regulations: Board materials and formal documents available for public inspection and copying; requests for described records; time limits for response; fees for document search and duplication; files and records not subject to inspection.

102.118 Present and former Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.

102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

Subpart L—Post-employment Restrictions on Activities by Former Officers and Employees

102.120 Post-employee restrictions on activities by former Officers and employees.

Subpart M—Construction of Rules

102.121 Rules to be liberally construed.

Subpart N—Enforcement of Rights, Privileges, and Immunities Granted or Guaranteed Under Section 222(f), Communications Act of 1934, as Amended, to Employees of Merged Telegraph Carriers

102.122 Enforcement.
Subpart O—Amendments

102.123 Amendment of rescission of rules.

Subpart P—Ex Parte Communications

102.126 Unauthorized communications.
102.127 Definitions.
102.128 Types of on-the-record proceedings; categories of Board agents; and duration of prohibition.
102.129 Communications prohibited.
102.130 Communications not prohibited.
102.131 Solicitation of prohibited communications.
102.132 Reporting of prohibited communications; penalties.
102.133 Penalties and enforcement.

Subpart Q—Procedure Governing Manners Affecting Employment-Management Agreements Under the Postal Reorganization Act

102.135 Employment-management agreements.

Subpart R—Advisory Committees

102.136 Establishment and utilization of advisory committees.

Subpart S—Open Meetings

102.137 Public observation of Board meetings.
102.138 Definition of meeting.
102.139 Closing of meetings; reasons therefor.
102.140 Action necessary to close meetings; record of votes.
102.141 Notice of meetings; public announcement and publication.
102.142 Transcripts, recordings or minutes of closed meetings; public availability; retention.

Subpart T—Awards of Fees and Other Expenses

102.143 "Adversary adjudication" defined; entitlement to award; eligibility for award.
102.144 Standards for awards.
102.145 Allowable fees and expenses.
102.146 Rulemaking on maximum rates for attorney or agent fees.
102.147 Contents of application; net worth exhibit; documentation of fees and expenses.
102.148 When an application may be filed; place of filing; service; referral to administrative law judge; stay of proceeding.
102.149 Filing of documents; service of documents; motions for extension of time.
102.150 Answer to application; reply to answer; comments by other parties.
102.151 Settlement.
102.152 Further proceedings.
102.153 Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case.
102.154 Exceptions to administrative law judge's decision; briefs; action of Board.
102.155 Payment of award.

Subpart U—Debt Collection Procedures by Administrative Offset

102.156 Administrative offset; purpose and scope.
102.157 Definitions.
102.158 Agency requests for administrative offsets and cooperation with other Federal agencies.
102.159 Exclusions.
102.160 Agency responsibilities.
102.161 Notification.
102.162 Examination and copying of records related to the claim; opportunity for full explanation of the claim.
102.163 Opportunity for repayment.
102.164 Review of the obligation.
102.165 Cost shifting.
102.166 Additional administrative collection action.
102.167 Prior provision of rights with respect to debt.

Subpart V—Debt Collection Procedures by Federal Income Tax Refund Offset

102.168 Federal income tax refund offset; purpose and scope.
102.169 Definitions.
102.170 Agency referral to IRS for tax referral effect; Agency responsibilities.
102.171 Cost shifting.
102.172 Minimum referral amount.
102.173 Relation to other collection efforts.
102.174 Debtor notification.
102.175 Agency review of the obligation.
102.176 Prior provision of rights with respect to debt.

Subpart W—Misconduct by Attorneys or Party Representatives

102.177 Exclusion from hearings; Refusal of witness to answer questions; Misconduct by attorneys and party representatives before the Agency; Procedures for processing misconduct allegations.

Subpart X—Special Procedures When the Board Lacks a Quorum

102.178 Normal operations should continue.
§ 102.1 Terms defined in section 2 of the Act.

The terms person, employer, employee, representative, labor organization, commerce, affecting commerce, and unfair labor practice, as used herein, shall have the meanings set forth in section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

§ 102.2 Act; Board; Board agent.

The term Act as used herein shall mean the National Labor Relations Act, as amended. The term Board shall mean the National Labor Relations Board and shall include any group of three or more members designated pursuant to section 3(b) of the Act. The term Board agent shall mean any member, agent, or agency of the Board, including its general counsel.

§ 102.3 General counsel.

The term general counsel as used herein shall mean the general counsel under section 3(d) of the Act.

§ 102.4 Region; subregion.

The term region as used herein shall mean that part of the United States or any Territory thereof fixed by the Board as a particular region. The term subregion shall mean that area within a region fixed by the Board as a particular subregion.

[29 FR 15918, Nov. 28, 1964]

§ 102.5 Regional director; officer-in-charge; regional attorney.

The term regional director as used herein shall mean the agent designated by the Board as the regional director for a particular region, and shall also include any agent designated by the Board as officer-in-charge of a subregional office, but the officer-in-charge shall have only such powers, duties, and functions appertaining to regional directors as shall have been duly delegated to such officer-in-charge. The term regional attorney as used herein shall mean the attorney designated as regional attorney for a particular region.

[29 FR 15919, Nov. 28, 1964]

§ 102.6 Administrative law judge; hearing officer.

The term administrative law judge as used herein shall mean the agent of the Board conducting the hearing in an unfair labor practice or Telegraph Merger Act proceeding. The term hearing officer as used herein shall mean the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10(k) of the Act.

§ 102.7 State.

The term State as used herein shall include the District of Columbia and all States, Territories, and possessions of the United States.

§ 102.8 Party.

The term party as used herein shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated,
§ 102.14 Service of charge.

(a) Charging party’s obligation to serve; methods of service. Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. Service may be made personally, or by registered mail, certified mail, regular mail, or private delivery service. With the permission of the person receiving the charge, service may be made by facsimile transmission or by any other agreed-upon method.

(b) Service as courtesy by Regional Director. The Regional Director will, as a matter of courtesy, cause a copy of such charge to be served by regular mail on the person against whom the charge is made. Such charges may, with the permission of the person receiving the charge, be served by the
§ 102.15 When and by whom issued; contents; service.

After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 14 days after the service of the complaint. The complaint shall contain:

(a) A clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and
(b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed.

§ 102.16 Hearing; change of date or place.

(a) Upon his own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may extend the date of such hearing or may change the place at which it is to be held, except that the authority of the Regional Director to extend the date of a hearing shall be limited to the following circumstances:

(1) Where all parties agree or no party objects to extension of the date of hearing;

(2) Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation with the pending complaint;

(3) Where negotiations which could lead to settlement of all or a portion of the complaint are in progress;

(4) Where issues related to the complaint are pending before the General Counsel’s Division of Advice or Office of Appeals; or

(5) Where more than 21 days remain before the scheduled date of hearing.

(b) In circumstances other than those set forth in subsection (a) of this section, motions to reschedule the hearing should be filed with the Division of Judges in accordance with §102.24(a).

When a motion to reschedule has been granted, the Regional Director issuing the complaint shall retain the authority to order a new date for hearing and retain the responsibility to make the necessary arrangements for conducting such hearing, including its location and the transcription of the proceedings.

§ 102.17 Amendment.

Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to §102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

§ 102.18 Withdrawal.

Any such complaint may be withdrawn before the hearing by the regional director on his own motion.
§ 102.19 Appeal to the general counsel from refusal to issue or reissue.

(a) If, after the charge has been filed, the Regional Director declines to issue a complaint or, having withdrawn a complaint pursuant to § 102.18, refuses to reissue it, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing the "Appeal Form" with the General Counsel in Washington, DC, and filing a copy of such Appeal Form" with the Regional Director, within 14 days from the service of the notice of such refusal to issue or reissue by the Regional Director, except as a shorter period is provided by § 102.81. If an appeal is taken the person doing so should notify all other parties of his action, but any failure to give such notice shall not affect the validity of the appeal. The person may also file a statement setting forth the facts and reasons upon which the appeal is based. If such a statement is timely filed, the separate "Appeal Form" need not be served. A request for extension of time to file an appeal shall be in writing and be received by the office of General Counsel, and a copy of such request filed with the Regional Director, prior to the expiration of the filing period. Copies of the acknowledgement of the filing of an appeal and of any ruling on a request for an extension of time for filing the appeal shall be served on all parties. Consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown.

(b) Oral presentation in Washington, DC, of the appeal issues may be permitted a party on written request made within 4 days after service of acknowledgment of the filing of an appeal. In the event such request is granted, the other parties shall be notified and afforded, without additional request, a like opportunity at another appropriate time.

(c) The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties.

A motion for reconsideration of the decision must be filed within 14 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.


ANSWER

§ 102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.

The respondent shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

[51 FR 23746, July 1, 1986]

§ 102.21 Where to file; service upon the parties; form.

An original and four copies of the answer shall be filed with the Regional Director issuing the complaint. Immediately upon the filing of his answer, respondent shall serve a copy thereof on the other parties. An answer of a party represented by counsel or non-attorney representative shall be signed by at least one such attorney or non-attorney representative of record in his/her individual name, whose address
§ 102.22 Extension of time for filing.

Upon his own motion or upon proper cause shown by any other party the regional director issuing the complaint may by written order extend the time within which the answer shall be filed.

§ 102.23 Amendment.

The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the administrative law judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the administrative law judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the administrative law judge or the Board.

MOTIONS


§ 102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.

(a) All motions under §§102.22 and 102.29 made prior to the hearing shall be filed in writing with the Regional Director issuing the complaint. All motions for default judgment, summary judgment, or dismissal made prior to the hearing shall be filed in writing with the Board pursuant to the provisions of §102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in §102.16(a), shall be filed in writing with the chief administrative law judge in Washington, DC, with the associate chief judge in San Francisco, California, with the associate chief judge in New York, New York, or with the associate chief judge in Atlanta, Georgia, as the case may be. All motions at the hearing shall be made in writing to the administrative law judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to §102.45, shall be filed with the administrative law judge in Washington, DC, the deputy chief judge in San Francisco, California, the associate chief judge in New York, New York, or the associate chief judge in Atlanta, Georgia, as the case may be. Motions shall briefly state the order or relief applied for and the grounds therefor. All motions filed with a Regional Director or an administrative law judge as set forth in this paragraph shall be filed therewith by transmitting three copies thereof together with an affidavit of service on the parties. All motions filed with the Board, including motions for default judgment, summary judgment, or dismissal, shall be filed with the Executive Secretary of the Board in Washington, DC, by transmitting eight copies thereof together with an affidavit of service on the parties. Unless otherwise provided in 29 CFR part 102, motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding.
§ 102.26 Motions, rulings, and orders

(b) All motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing. Where no hearing is scheduled, or where the hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, the motion shall be filed promptly. Upon receipt of a motion for default judgment, summary judgment, or dismissal, the Board may deny the motion or issue a notice to show cause why the motion should not be granted. If a notice to show cause is issued, the hearing, if scheduled, will normally be postponed indefinitely. If a party desires to file an opposition to the motion prior to issuance of the notice to show cause in order to prevent postponement of the hearing, it may do so; Provided however, That any such opposition shall be filed no later than 21 days prior to the hearing. If a notice to show cause is issued, an opposing party may file a response thereto notwithstanding any opposition it may have filed prior to issuance of the notice. The time for filing the response shall be fixed in the notice to show cause. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party’s pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, shall be entered.

(69 FR 1676, Jan. 12, 2004)

§ 102.25 Ruling on motions.

An administrative law judge designated by the chief administrative law judge, by the associate chief judge in San Francisco, California, by the associate chief judge in New York, New York, or by the associate chief judge in Atlanta, Georgia, as the case may be, shall rule on all prehearing motions (except as provided in §§102.16, 102.22, 102.29, and 102.50), and all such rulings and orders shall be issued in writing and a copy served on each of the parties. The administrative law judge designated to conduct the hearing shall rule on all motions after opening of the hearing (except as provided in §102.47), and any orders in connection therewith, if announced at the hearing, shall be stated orally on the record; in all other cases the administrative law judge shall issue such rulings and orders in writing and shall cause a copy of the same to be served on each of the parties, or shall make his ruling in his decision. Whenever the administrative law judge has reserved his ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to §102.50, the Board shall rule on such motion.


§ 102.27

be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and, if the request involves a ruling by an administrative law judge, on the administrative law judge. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the administrative law judge, if any. If the Board grants the request for special permission to appeal, it may proceed forthwith to rule on the appeal.

[47 FR 40770, Sept. 15, 1982]

§ 102.27. Review of granting of motion to dismiss entire complaint; reopening of the record.

If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the administrative law judge before filing his decision, any party may obtain a review of such action by filing a request therefor with the Board in Washington, DC, stating the grounds for review, and immediately on such filing shall serve a copy thereof on the regional director and on the other parties. Unless such request for review is filed within 28 days from the date of the order of dismissal, the case shall be closed.

[51 FR 23746, July 1, 1986]

§ 102.28. Filing of answer or other participation in proceedings not a waiver of rights.

The right to make motions or to make objections to rulings upon motions shall not be deemed waived by the filing of an answer or by other participation in the proceedings before the administrative law judge or the Board.

[45 FR 51192, Aug. 1, 1980]

§ 102.29. Intervention; requisites; rulings on motions to intervene.

Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the regional director issuing the complaint; during the hearing such motion shall be made to the administrative law judge. An original and four copies of written motions shall be filed. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties. The regional director shall rule upon all such motions filed prior to the hearing, and shall cause a copy of said rulings to be served upon each of the other parties, or may refer the motion to the administrative law judge for ruling. The administrative law judge shall rule upon all such motions made at the hearing or referred to him by the regional director, in the manner set forth in §102.25. The regional director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

WITNESSES, DEPOSITIONS, AND SUBPOENAS

§ 102.30 Examination of witnesses; deposition.

Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the “officer”). Such application shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to §102.45 or §102.50. Such application shall be served upon the regional
§ 102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect and copy data.

(a) The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents,
in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Applications for subpoenas, if filed prior to the hearing, shall be filed with the Regional Director. Applications for subpoenas filed during the hearing shall be filed with the administrative law judge. Either the Regional Director or the administrative law judge, as the case may be, shall grant the application on behalf of the Board or any Member thereof. Applications for subpoenas may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. All petitions to revoke subpoenas shall be served upon the party at whose request the subpoena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the administrative law judge for ruling. Petitions to revoke subpoenas filed during the hearing shall be filed with the administrative law judge. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the administrative law judge, except that requests for permission to appeal in this instance shall be filed within 24 hours of the administrative law judge’s ruling. If no appeal is sought within such time, or the appeal is denied, the ruling of the administrative law judge shall become final and his decision shall become the ruling of the Board. If the administrative law judge deems the request appropriate, he shall recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board shall take such action on the administrative law judge’s recommendation as it deems appropriate. Until the Board has issued the requested order no individual who
§ 102.33

Transfer of charge and proceeding from region to region; consolidation of proceedings in same region; severance.

(a) Whenever the general counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, he may permit a charge to be filed with him in Washington, DC, or may, at any time after a charge has been filed with a regional director pursuant to §102.10, order that such charge and any proceeding which may have been initiated with respect thereto:

(1) Be transferred to and continued before him for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a regional office or with him; or

(2) Be consolidated with any other proceeding which may have been instituted in the same region; or

(3) Be transferred to and continued in any other region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region; or

(4) Be severed from any other proceeding with which it may have been consolidated pursuant to this section.

(b) The provisions of §§102.9 to 102.32, inclusive, shall, insofar as applicable, govern proceedings before the general counsel pursuant to this section, and the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any charge and any proceeding which may have been instituted with respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern proceedings before the general counsel in the region to which the transfer is made.

(c) The regional director may, prior to hearing, exercise the powers in paragraph (a)(2) and (4) of this section with respect to proceedings pending in his region.

§ 102.32 Payment of witness fees and mileage; fees of persons taking depositions.

Witnesses summoned before the trial examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.
§ 102.34

(d) Motions to consolidate or sever proceedings after issuance of complaint shall be filed as provided in §102.24 and ruled upon as provided in §102.25, except that the regional director may consolidate or sever proceedings prior to hearing upon his own motion. Rulings by the administrative law judge upon motions to consolidate or sever may be appealed to the Board as provided in §102.26.

(32 FR 9549, July 1, 1967, as amended at 36 FR 9132, May 20, 1971)

§ 102.35 Duties and powers of administrative law judges; stipulations of cases to administrative law judges or to the Board; assignment and powers of settlement judges.

(a) It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The administrative law judge shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:

(1) To administer oaths and affirmations;
(2) To grant applications for subpoenas;
(3) To rule upon petitions to revoke subpoenas;
(4) To rule upon offers of proof and receive relevant evidence;
(5) To take or cause depositions to be taken whenever the ends of justice would be served thereby;
(6) To regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;
(7) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;
(8) To dispose of procedural requests, motions, or similar matters, including motions referred to the administrative law judge by the Regional Director and motions for default judgment, summary judgment, or to amend pleadings; also to dismiss complaints or portions thereof; to order hearings reopened; and upon motion order proceedings consolidated or severed prior to issuance of administrative law judge decisions;
(9) To approve stipulations, including stipulations of facts that waive a hearing and provide for a decision by the administrative law judge. Alternatively, the parties may agree to waive a hearing and decision by an administrative law judge and submit directly to the Executive Secretary a stipulation of facts, which, if approved, provides for a decision by the Board. A statement of the issues presented should be set forth in the stipulation of facts and each party should also submit a short statement (no more than three pages) of its position on the issues. If the administrative law judge (or the Board) approves the stipulation, the administrative law judge (or the Board) will set a time for the filing of briefs. In proceedings before an administrative law judge, no further briefs shall be filed except by special leave of
the administrative law judge. In proceedings before the Board, answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs shall be filed except by special leave of the Board. At the conclusion of the briefing schedule, the judge (or the Board) will decide the case or make other disposition of it.

(10) To make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral argument, in conformity with Public Law 89–554, 5 U.S.C. 557;

(11) To call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence;

(12) To request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(13) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

(b) Upon the request of any party or the judge assigned to hear a case, or on his or her own motion, the chief administrative law judge in Washington, D.C., the associate chief judge in San Francisco, California, the associate chief judge in Atlanta, Georgia, or the associate chief judge in New York, New York may assign a judge who shall be other than the trial judge to conduct settlement negotiations. In exercising his or her discretion, the chief or associate chief judge making the assignment will consider, among other factors, whether there is reason to believe that resolution of the dispute is likely, the request for assignment of a settlement judge is made in good faith, and the assignment is otherwise feasible. Provided, however, that no such assignment shall be made absent the agreement of all parties to the use of this procedure.

(1) The settlement judge shall convene and preside over conferences and settlement negotiations between the parties, assess the practicalities of a potential settlement, and report to the chief or associate the status of settlement negotiations, recommending continuation or termination of the settlement negotiations. Where feasible settlement conferences shall be held in person.

(2) The settlement judge may require that the attorney or other representative for each party be present at settlement conferences and that the parties or agents with full settlement authority also be present or available by telephone.

(3) Participation of the settlement judge shall terminate upon the order of the chief or associates issued after consultation with the settlement judge. The conduct of settlement negotiations shall not unduly delay the hearing.

(4) All discussions between the parties and the settlement judge shall be confidential. The settlement judge shall not discuss any aspect of the case with the trial judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement judge shall be admissible in any proceeding before the Board, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless voluntarily produced or obtained pursuant to subpoena.

(5) No decision of a chief or associate concerning the assignment of a settlement judge or the termination of a settlement judge’s assignment shall be appealable to the Board.

(6) Any settlement reached under the auspices of a settlement judge shall be subject to approval in accordance with the provisions of §101.9 of the Board’s Statements of Procedure.

§ 102.36 Unavailability of administrative law judge.

In the event the administrative law judge designated to conduct the hearing becomes unavailable to the Board after the hearing has been opened, the chief administrative law judge, in Washington, DC, the associate chief judge, in San Francisco, California, the associate chief judge in New York, New York, or the associate chief judge in Atlanta, Georgia, as the case may be, may designate another administrative
§ 102.37 Disqualification of administrative law judge.

An administrative law judge may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the administrative law judge, at any time following his designation and before filing of his decision, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the administrative law judge, such affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If the administrative law judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and proceed with the hearing, or, if the hearing has closed, he shall proceed with issuance of his decision, and the provisions of § 102.26, with respect to review of rulings of administrative law judges, shall thereupon apply.


[45 FR 51193, Aug. 1, 1980]

§ 102.38 Rights of parties.

Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the administrative law judge: And provided further, That documentary evidence shall be submitted in duplicate.


[45 FR 51193, Aug. 1, 1980]
associate chief judge in Atlanta, Georgia, as the case may be. Notice of the request for any extension shall be immediately served on all other parties, and proof of service shall be furnished. Three copies of the brief or proposed findings and conclusions shall be filed with the administrative law judge, and copies shall be served on the other parties, and a statement of such service shall be furnished. In any case in which the administrative law judge believes that written briefs or proposed findings of fact and conclusions may not be necessary, he or she shall notify the parties at the opening of the hearing or as soon thereafter as practicable that he or she may wish to hear oral argument in lieu of briefs.

§ 102.43 Continuance and adjournment.

In the discretion of the administrative law judge, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearings by the administrative law judge, or by other appropriate notice.

ADMINISTRATIVE LAW JUDGE’S DECISION AND TRANSFER OF CASE TO THE BOARD

§ 102.45 Administrative law judge’s decision; contents; service; transfer of case to the Board; contents of record in case.

(a) After hearing for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision. Such decision shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the Act. The administrative law judge shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. If the administrative law judge delivers a bench decision, promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision; and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties. Service of the administrative law judge’s decision and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge’s decision and exceptions, and any cross-exceptions or answering briefs as provided in §102.46, shall constitute the record in the case.

§ 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may file with the Board in Washington, DC, exceptions to the administrative law judge’s decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative
law judge’s decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge’s decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall be subject to the 50-page limit as for briefs set forth in §102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

(d)(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of paragraph (j) of this section.

(2) The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge’s finding.

(3) Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties.

(e) Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge’s decision, together with a supporting brief, in accordance with the provisions of paragraphs (b) and (j) of this section.

(f)(1) Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions.

(2) Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties.

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

(h) Within 14 days from the last date on which an answering brief may be filed pursuant to paragraph (d) or (f) of this section, any party may file a reply brief to any such answering brief. Any
reply brief filed pursuant to this sub-
section shall be limited to matters
raised in the brief to which it is reply-
ing, and shall not exceed 10 pages. No
extensions of time shall be granted for
the filing of reply briefs, nor shall per-
mission be granted to exceed the 10
page length limitation. Eight copies of
any reply brief shall be filed with the
Board, copies shall be served on the
other parties, and a statement of such
service shall be furnished. No further
briefs shall be filed except by special
leave of the Board. Requests for such
leave shall be in writing and copies
thereof shall be served promptly on the
other parties.

(i) Should any party desire permis-
sion to argue orally before the Board,
request therefor must be made in writ-
ting to the Board simultaneously with
the statement of any exceptions or
cross-exceptions filed pursuant to the
provisions of this section with a state-
ment of service on the other parties.
The Board shall notify the parties of
the time and place of oral argument, if
such permission is granted. Oral argu-
ments are limited to 30 minutes for
each party entitled to participate. No
request for additional time will be
granted unless timely application is
made in advance of oral argument.

(j) Exceptions to administrative law
judges’ decisions, or to the record, and
briefs shall be printed or otherwise leg-
ibly duplicated: Provided, however,
That carbon copies of typewritten mat-
ter shall not be filed and if submitted
will not be accepted.

§ 102.47  Filing of motion after transfer
of case to Board.

All motions filed after the case has
been transferred to the Board pursuant
to §102.45 shall be filed with the Board
in Washington, DC, by transmitting
eight copies thereof, together with an
affidavit of service on the parties. Such
motions shall be printed or otherwise legibly duplicated: Provided, however,
That carbon copies of typewritten mat-
ter shall not be filed and if submitted
will not be accepted.

§ 102.48  Action of the Board upon expi-
reration of time to file exceptions to
the administrative law judge’s deci-
sion; decisions by the Board; ex-
traordinary postdecisional motions.

(a) In the event no timely or proper
exceptions are filed as herein provided,
the findings, conclusions, and rec-
ommendations of the administrative
law judge as contained in his decision
shall, pursuant to section 10(c) of the
Act, automatically become the deci-
sion and order of the Board and become
its findings, conclusions, and order,
and all objections and exceptions
thereto shall be deemed waived for all
purposes.

(b) Upon the filing of timely and
proper exceptions, and any cross-excep-
tions, or answering briefs, as provided
in §102.46, the Board may decide the
matter forthwith upon the record, or
after oral argument, or may reopen the
record and receive further evidence be-
fore a member of the Board or other
Board agent or agency, or may make
other disposition of the case.

(c) Where exception is taken to a fac-
tual finding of the administrative law
judge, the Board, in determining
whether the finding is contrary to a
preponderance of the evidence, may
limit its consideration to such portions
of the record as are specified in the ex-
ceptions, the supporting brief, and the
answering brief.
(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board’s decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

(3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies.

§ 102.49 Modification or setting aside of order of Board before record filed in court; action thereafter.

Within the limitations of the provisions of section 10(c) of the Act, and §102.48, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to §102.50, insofar as applicable.

§ 102.50 Hearings before Board or member thereof.

Whenever the Board deems it necessary in order to effectuate the purpose of the act or to avoid unnecessary costs or delay, it may, at any time after a complaint has issued pursuant to §102.15 or §102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any member of the Board. The provisions of this subpart shall, insofar as applicable, govern proceedings before the Board or any member pursuant to this section, and the powers granted to administrative law judges in such provisions shall, for the purpose of this section, be reserved to and exercised by the Board or the member thereof who shall preside.

§ 102.51 Settlement or adjustment of issues.

At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was filed, for consideration facts, arguments, offers of settlement, or proposals of adjustment.

BACK-PAY PROCEEDINGS

§ 102.52 Compliance with Board order; notification of compliance determination.

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director shall seek compliance from all persons having obligations thereunder. The Regional Director shall make a compliance determination as appropriate and shall notify the parties of the compliance determination. A charging party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

[53 FR 37755, Sept. 28, 1988]
§ 102.53 Review by the General Counsel of compliance determination; appeal to the Board of the General Counsel’s decision.

(a) The charging party may appeal such determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination provided as set forth in § 102.52. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based and shall identify with particularity the error claimed in the Regional Director’s determination. The charging party shall serve a copy of the appeal on all other parties and on the Regional Director. The General Counsel may for good cause shown extend the time for filing an appeal.

(b) The General Counsel may affirm or modify the determination of the Regional Director, or may take such other action deemed appropriate, stating the grounds for the decision.

(c) Within 14 days after service of the General Counsel’s decision, the charging party may file a request for review of that decision with the Board in Washington, DC. The request for review shall contain a complete statement of the facts and reasons upon which it is based and shall identify with particularity the error claimed in the General Counsel’s decision. A copy of the request for review shall be served on the General Counsel and on the Regional Director.

(d) The Board may affirm or modify the decision of the General Counsel, or make such other disposition of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the decision of the General Counsel.


§ 102.54 Initiation of formal compliance proceedings; issuance of compliance specification and notice of hearing.

(a) If it appears that controversy exists with respect to compliance with an order of the Board which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and notice of hearing issued pursuant to § 102.15 a compliance specification based on that complaint. After opening of the hearing, consolidation shall be subject to the approval of the Board or the administrative law judge, as appropriate. Issuance of a compliance specification shall not be a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.


§ 102.55 Contents of compliance specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification shall contain a clear and concise description of the respects in which the respondent has failed to comply with a Board or court order, including the remedial acts
§ 102.56 Answer to compliance specification.

(a) Filing and service of answer; form. Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

(b) Contents of answer to specification. The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent’s position as to the applicable premises and furnishing the appropriate supporting figures.

(c) Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification. If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director’s own motion or upon proper cause shown by any respondent, the Regional Director issuing the compliance specification and notice of hearing may by written order extend the time within which the answer to the specification shall be filed.

(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any respondent affected by the amendment may amend its answer thereto.

§ 102.57 Extension of date of hearing.

Upon the Regional Director’s own motion or upon proper cause shown, the Regional Director issuing the compliance specification and notice of hearing may extend the date of the hearing.
§ 102.58 Withdrawal.

Any compliance specification and notice of hearing may be withdrawn before the hearing by the Regional Director upon his or her own motion.

[53 FR 37756, Sept. 28, 1988]

§ 102.59 Hearing; posthearing procedure.

After the issuance of a compliance specification and notice of hearing, the procedures provided in §§ 102.24 to 102.51 shall be followed insofar as applicable.

[53 FR 37756, Sept. 28, 1988]

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

§ 102.60 Petitions.

(a) Petition for certification or decertification. A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition 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 by facsimile, if otherwise proper. A person filing a petition electronically pursuant to §102.114(i) need not file an original. Except as provided in §102.72, such petitions shall be filed with the regional director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the regional director when the petition is filed. Along with the petition, the petitioner shall serve the Agency’s description of procedures in representation cases and the Agency’s Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) Petition for clarification of bargaining unit or petition for amendment of certification. A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

[79 FR 74477, Dec. 15, 2014]
§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) RC Petitions. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

1. The name of the employer.
2. The address of the establishments involved.
3. The general nature of the employer’s business.
4. A description of the bargaining unit which the petitioner claims to be appropriate.
5. The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.
6. The number of employees in the alleged appropriate unit.
7. A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.
8. A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.
9. The number of employees in the alleged appropriate unit.
10. Any other relevant facts.
11. The type, date(s), time(s) and location(s) of the election sought.

(b) RM Petitions. A petition for certification, when filed by an employer, shall contain the following:

1. The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.
2. The general nature of the petitioner’s business.
3. A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.
4. The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim.
5. A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date(s).
6. Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.
7. Any other relevant facts.
8. Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. However, no proof of representation on the part of the labor organization claiming a majority is required and the regional director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.
9. The type, date(s), time(s) and location(s) of the election sought.
10. The type, date(s), time(s) and location(s) of the election sought.
(c) **RD Petitions.** Petitions for decertification shall contain the following:

1. The name of the employer.
2. The address of the establishments and a description of the bargaining unit involved.
3. The general nature of the employer's business.
4. The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.
5. The name or names and addresses of the individuals or labor organizations who have been certified or are currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.
6. An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in Section 9(a) of the Act.
7. The number of employees in the unit.
8. A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.
9. Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.
10. Any other relevant facts.

(d) **UC Petitions.** A petition for clarification shall contain the following:

1. The name of the employer and the name of the recognized or certified bargaining representative.
2. The address of the establishment involved.
3. The general nature of the employer's business.
4. A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.
5. A description of the proposed clarification.
6. The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.
7. The number of employees in the present bargaining unit and in the unit as proposed under the clarification.
8. The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.
9. A statement by petitioner setting forth reasons why petitioner desires clarification of unit.
10. The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.
11. Any other relevant facts.

(e) **AC Petitions.** A petition for amendment of certification shall contain the following:

1. The name of the employer and the name of the certified union involved.
2. The address of the establishment involved.
3. The general nature of the employer's business.
4. Identification and description of the existing certification.
5. A statement by petitioner setting forth the details of the desired amendment and reasons therefor.
6. The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.
7. The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.
8. Any other relevant facts.
§ 102.62 Election agreements; voter list; Notice of Election.

(a) Consent election agreements with final regional director determinations of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§102.69 and 102.70.

(b) Stipulated election agreements with discretionary Board review. Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the regional director’s resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§102.69 and 102.70.

(c) Full consent election agreements with final regional director determinations of pre- and post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§102.63, 102.64, 102.65, 102.66, and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§102.69 and
102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) Voter list. Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 2 business days after the approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer’s failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) Notice of election. Upon approval of the election agreement pursuant to paragraphs (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the regional director shall promptly transmit the Board’s Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with §102.67(k). The employer’s failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

[79 FR 74479, Dec. 15, 2014]

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of notice of hearing.

(a) Investigation; notice of hearing; Notice of Petition for Election. (i) After a petition has been filed under §102.61(a), (b), or (c), if no agreement such as that provided in §102.62 is entered into and
§ 102.63

If it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the regional director shall set the hearing for a date 8 days from the date of service of the notice excluding intervening Federal holidays, but if the 8th day is a weekend or Federal holiday, the regional director shall set the hearing for the following business day. The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. A copy of the petition, a description of procedures in representation cases, a "Notice of Petition for Election", and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on the director's own motion.

(2) Within 2 business days after service of the notice of hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b)(1) Statement of Position in RC cases. If a petition has been filed under §102.61(a) and the regional director has issued a notice of hearing, the employer shall file with the regional director and serve on the parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state
the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer’s position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(ii) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(iii) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The employer shall also include a list of names alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(2) Statement of Position in RM cases. If a petition has been filed under §102.61(b) and the regional director has issued a notice of hearing, each individual or labor organization named in the petition shall file with the regional director and serve on the other parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) Individual or labor organization’s Statement of Position. Each individual or labor organization’s Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) Identification of representative for service of papers. Each individual or labor organization’s Statement of Position shall also state the name, title, address, telephone number, facsimile
§ 102.63 29 CFR Ch. I (7–1–15 Edition)

number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) Employer’s Statement of Position. Within the time permitted for filing the Statement of Position, the employer shall file with the regional director and serve on the parties named in the petition a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer’s Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer’s relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date. The regional director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) Statement of Position in RD cases. If a petition has been filed under §102.61(c) and the regional director has issued a notice of hearing, the employer and the certified or recognized representative of employees shall file with the regional director and serve on the parties named in the petition their respective Statements of Position such that they are received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open not more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(i) The Statements of Position of the employer and the certified or recognized representative shall state each party’s position concerning the Board’s jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party’s respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(ii) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(iii) The employer’s Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in
the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer’s Statement of Position shall also provide the requested information concerning the employer’s relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(c) UC or AC cases. After a petition has been filed under §102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on the director’s own motion. All hearing and posthearing procedure under this paragraph (c) shall be in conformance with §§102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in §102.62(a), the regional director’s action shall be final, and the provisions for review of regional director’s decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by §102.71. The regional director’s dismissal shall be by decision, and a request for review therefrom may be obtained under §102.67, except where an agreement under §102.62(a) is involved.

[79 FR 74480, Dec. 15, 2014]

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. Subject to the provisions of §102.66, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.

(c) The hearing shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. The regional director may, in the director’s discretion, adjourn the hearing to a different place by announcement thereof at the hearing or by other appropriate notice.

[79 FR 74482, Dec. 15, 2014]

§ 102.65 Motions; intervention; appeals of hearing officer’s rulings.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall
be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. Extra copies of electronically-filed papers need not be filed. The regional director may rule upon all motions filed with him, causing a copy of the ruling to be served on the parties, or may refer the motion to the hearing officer, except that if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in §102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to the hearing officer as hereinabove provided, except that the hearing officer shall rule on motions to intervene and to amend the petition, and except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be. All motions, rulings, and orders shall become a part of the record except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in §102.66(f).

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director, or the hearing officer at the specific direction of the regional director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the regional director may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) Rulings by the hearing officer shall not be appealed directly to the regional director, except by special permission of the regional director, but shall be considered by the regional director when the director reviews the entire record. Requests to the regional director for special permission to appeal from a ruling of the hearing officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. No party shall be precluded from raising an issue at a later time because it did not seek special permission to appeal. If the regional director grants the request for special permission to appeal, the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall stay the proceedings unless otherwise ordered by the regional director. As stated in §102.67, the parties may request Board review of regional director actions.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer.
officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

[79 FR 74482, Dec. 15, 2014]

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) Rights of parties at hearing. Any party shall have the right to appear at any 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 existence of a question of representation. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) Response to Statement of Position. Issues in dispute shall be identified as follows: After a Statement of Position is received in evidence and prior to the introduction of further evidence, all other parties shall respond on the record to each issue raised in the Statement. The regional director may permit the Statement of Position to be amended in a timely manner for good cause, in which event the other parties shall respond to each amended position. The regional director may also permit responses to be amended in a timely manner for good cause. The hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board’s jurisdiction over the employer or limit the regional director’s discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director

67
§ 102.66 29 CFR Ch. I (7–1–15 Edition)

determines that record evidence is necessary.

(c) Offers of proof. The regional director shall direct the hearing officer concerning the issues to be litigated at the hearing. The hearing officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness’s testimony. If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent’s position, the evidence shall not be received.

(d) Preclusion. A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board’s statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter’s eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(ii), (b)(2)(ii), or (b)(3)(ii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

(e) Objections. Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(f) Subpoenas. The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer, except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena upon a showing that the evidence is not relevant or material to the issues in the proceeding or that the party requesting the evidence failed to comply with any rule or order of the regional director or hearing officer.
if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(g) Election details. Prior to the close of the hearing, the hearing officer will:

(1) Solicit the parties’ positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Solicit the name, address, email address, facsimile number, and phone number of the employer’s on-site representative to whom the regional director should transmit the Notice of Election in the event the regional director directs an election;

(3) Inform the parties that the regional director will issue a decision as soon as practicable and that the director will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(4) Inform the parties what their obligations will be under these rules if the director directs an election and of the time for complying with such obligations.

(h) Oral argument and briefs. Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the regional director together with the brief. No reply brief may be filed except upon special permission of the regional director.

(i) Hearing officer analysis. The hearing officer may submit an analysis of the record to the regional director but shall make no recommendations.

(j) Witness fees. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

[79 FR 74483, Dec. 15, 2014]

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(a) Proceedings before regional director. The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter. A decision by the regional director upon the record shall set forth the director’s findings, conclusions, and order or direction.

(b) Directions of elections. If the regional director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also transmit the Board’s Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided).
and it will ordinarily be transmitted simultaneously with the direction of election. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

(c) Requests for Board review of regional director actions. Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under Section 3(b) of the Act except as the Board’s rules provide otherwise, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

(d) Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of, or
(ii) A departure from, officially reported Board precedent.

(2) 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.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(e) Contents of request. A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the regional director.

(f) Opposition to request. Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition.

(g) Finality; waiver; denial of request. The regional director’s actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director’s action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(h) Grant of review; briefs. The grant of a request for review shall not stay the regional director’s action unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other
briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board may provide for oral argument or further hearing. The Board will consider the entire record in the light of the grounds relied on for review and shall make such disposition of the matter as it deems appropriate. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(j) Format of request. All documents filed with the Board under the provisions of this section shall be filed in seven copies, double spaced, on 8½-by-11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof and any motions under paragraph (j) of this section; statements in opposition thereto; and briefs on review 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 Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited. A party may combine a request for review of the regional director’s decision with direction of election with a request for review of a regional director’s post-election decision, if the party has not previously filed a request for review of the pre-election decision. Repetitive requests will not be considered.

(k) Service. The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A certificate of service shall be filed with the Board together with the document.

(3) Extensions. Requests for extensions of time to file requests for review, statements in opposition to a request for review, or 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.

(j) Requests for extraordinary relief. (1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief:

(i) Expedited consideration of the request;
(ii) A stay of some or all of the proceedings, including the election; or
(iii) Impoundment and/or segregation of some or all of the ballots.

(2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.

(k) Notice of election. The employer shall post copies of the Board’s Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail. In all cases, the notices shall remain posted until the end of the election. The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer’s failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.
(l) Voter list. Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 business days after issuance of the direction, provide to the regional director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the direction respectively within 2 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer’s failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

[79 FR 74485, Dec. 15, 2014]
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 an original and five copies of 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. 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, stipulations, exhibits, together with any report on 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 request 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 8½- 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.

§ 102.70 Runoff election.

(a) The regional director shall conduct a runoff election, without further order of the Board, when an election in which the ballot provided for not less than three choices (i.e., at least two representatives and “neither”) results in no choice receiving a majority of the valid ballots cast and no objections are filed as provided in §102.69. Only one runoff shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.
§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the regional director.

(a) If, after a petition has been filed and at any time prior to the close of hearing, it shall appear to the regional director that no further proceedings are warranted, the regional director may dismiss the petition by administrative action and shall so advise the petitioner in writing, setting forth a simple statement of the procedural or other grounds for the dismissal, with copies to the other parties to the proceeding. Any party may obtain a review of such action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A request for review from an action of a regional director pursuant to this subsection may be granted only upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

2. There are compelling reasons for reconsideration of an important Board rule or policy.

3. The request for review is accompanied by documentary evidence previously submitted to the regional director raising serious doubts as to the regional director’s factual findings, thus indicating that there are factual issues which can best be resolved upon the basis of a record developed at a hearing.

4. The regional director’s action is, on its face, arbitrary or capricious.

5. The petition raises issues which can best be resolved upon the basis of a record developed at a hearing.

(b) Where the regional director dismisses a petition or directs that the proceeding on the petition be held in abeyance, and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices, and the regional director, upon request, has so notified the parties in writing, any party may obtain a review of the regional director’s action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A review of an action of a regional director pursuant to this subsection may be granted only upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

2. There are compelling reasons for reconsideration of an important Board rule or policy.

3. The regional director’s action is, on its face, arbitrary or capricious.

4. The petition raises issues which can best be resolved upon the basis of a record developed at a hearing.

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the regional director and copies served on all the other parties within 14 days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall be submitted in eight
§ 102.75 Suspension of proceedings on the charge where timely petition is filed.

If it appears to the regional director that issuance of a complaint may be

§ 102.75 Suspension of proceedings on the charge where timely petition is filed.

If it appears to the regional director that issuance of a complaint may be
§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of §§102.60 and 102.61, insofar as applicable, except that if a charge under §102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the labor organization is currently recognized but desires certification under the Act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

[79 FR 74488, Dec. 15, 2014]

§ 102.77 Investigation of petition by regional director; directed election.

(a) Where a petition has been filed pursuant to §102.76 the regional director shall make an investigation of the matters and allegations set forth therein. Any party, and any individual or labor organization purporting to act as representative of the employees involved and any labor organization on whose behalf picketing has been conducted as described in section 8(b)(7)(C) of the Act may present documentary and other evidence relating to the matters and allegations set forth in the petition.

(b) If after the investigation of such petition or any petition filed under subpart C of this part, and after the investigation of the charge filed pursuant to §102.73, it appears to the regional director that an expedited election under section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, the regional director shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter, except that in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, the director may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following shall be governed insofar as applicable by §§102.63 through 102.68 inclusive.


§ 102.78 Election procedure; method of conducting balloting; postballoting procedure.

If no agreement such as that provided in §102.79 has been made, the regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements for the balloting. The method of conducting the balloting and the postballoting procedure shall be governed, insofar as applicable, by the provisions of §§102.69 and 102.70 except that the labor organization on whose behalf picketing has been conducted may not have its name removed from the ballot without the consent of the regional director and except that the regional director’s rulings on any objections or challenged ballots shall be final unless the Board grants special permission to appeal from the regional director.
directors rulings. Any request for such permission shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting review shall immediately serve a copy thereof on each other party. A request for review shall not operate as a stay of the regional director’s rulings unless so ordered by the Board.

§ 102.79 Consent-election agreements.

Where a petition has been duly filed, the parties involved may, subject to the approval of the regional director, enter into an agreement governing the method of conducting the election as provided for in §102.62(a), insofar as applicable.

§ 102.80 Dismissal of petition; refusal to process petition under expedited procedure.

(a) If, after a petition has been filed pursuant to the provisions of §102.76, and prior to the close of the hearing, it shall appear to the regional director that further proceedings in respect thereto in accordance with the provisions of §102.77 are not warranted, he may dismiss the petition by administrative action, and the action of the regional director shall be final, subject to a prompt appeal to the Board on special permission which may be granted by the Board. Upon such appeal the provisions of §102.71 shall govern insofar as applicable. Such appeal shall not operate as a stay unless specifically ordered by the Board.

(b) If it shall appear to the regional director that an expedited election is not warranted but that proceedings under subpart C of this part are warranted, he shall so notify the parties in writing with a simple statement of the grounds for his decision.

(c) Where the regional director, pursuant to §§102.77 and 102.78, has determined that a hearing prior to election is not required to resolve the issues raised by the petition and has directed an expedited election, any party aggrieved may file a request with the Board for special permission to appeal from such determination. Such request shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting such appeal shall immediately serve a copy thereof on each other party. Should the Board grant the requested permission to appeal, such action shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director.


§ 102.81 Review by the general counsel of refusal to proceed on charge; resumption of proceedings upon charge held during pendency of petition; review by the general counsel of refusal to proceed on related charge.

(a) Where an election has been directed by the regional director or the Board in accordance with the provisions of §§102.77 and 102.78, the regional director shall decline to issue a complaint on the charge, and he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, DC, and filing a copy of the appeal with the regional director, within 7 days from the service of the notice of such refusal by the regional director. In all other respects the appeal shall be subject to the provisions of §102.19. Such appeal shall not operate as a stay of any action by the regional director.

(b) Where an election has not been directed and the petition has been dismissed in accordance with the provisions of §102.80, the regional director shall resume investigation of the charge and shall proceed in accordance with §102.74.

(c) If in connection with an 8(b)(7) proceeding, unfair labor practice charges under other sections of the act have been filed and the regional director upon investigation has declined to issue a complaint upon such charges, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making such charges may obtain a review of such action by filing an appeal with the general counsel in Washington, DC, and filing a copy of the appeal with the regional director, within
§ 102.82 Transfer, consolidation, and severance.

The provisions of §§102.33 and 102.72, respecting the filing of a charge or petition with the general counsel and the transfer, consolidation, and severance of proceedings, shall apply to proceedings under this subpart, except that the provisions of §§102.73 to 102.81, inclusive, shall govern proceedings before the general counsel.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

§ 102.83 Petition for referendum under Section 9(e) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such a labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition shall be filed with the regional director where the bargaining unit exists or, if the unit exists in two or more Regions, with the regional director for any of such Regions. A person filing a petition 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 by facsimile, if otherwise proper. A person filing a petition electronically pursuant to §102.114(i) need not file an original. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed. Upon approval of the withdrawal of any petition the case shall be closed.

[79 FR 74489, Dec. 15, 2014]

§ 102.84 Contents of petition to rescind authority.

(a) The name of the employer.
(b) The address of the establishments involved.
(c) The general nature of the employer’s business.
(d) A description of the bargaining unit involved.
(e) The name and address of the labor organization whose authority it is desired to rescind.
(f) The number of employees in the unit.
(g) Whether there is a strike or picketing in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.
(h) The date of execution and of expiration of any contract in effect covering the unit involved.
(i) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the proceeding.
(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.
(k) Any other relevant facts.
(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to Section 8(a)(3) of the Act. Such evidence shall be filed together with the petition, but shall not be served on any other party.
(m) Evidence filed pursuant to paragraph (l) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of
§ 102.89 Initiation of proceedings.

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) of the Act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve upon the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the Act, he shall give it priority over all other cases in the office except other

§ 102.88 Refusal to conduct referendum; appeal to Board.

If, after a petition has been filed, and prior to the close of the hearing, it shall appear to the regional director that no referendum should be conducted, he shall dismiss the petition by administrative action. Such dismissal shall be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, DC, and filing a copy of such request with the regional director and the other parties within 14 days from the service of notice of such dismissal. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

[51 FR 30636, Aug. 28, 1986]

Subpart F—Procedure To Hear and Determine Disputes Under Section 10(k) of the Act

§ 102.89 Initiation of proceedings.

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) of the Act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve upon the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the Act, he shall give it priority over all other cases in the office except other

§ 102.88 Refusal to conduct referendum; appeal to Board.

If, after a petition has been filed, and prior to the close of the hearing, it shall appear to the regional director that no referendum should be conducted, he shall dismiss the petition by administrative action. Such dismissal shall be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, DC, and filing a copy of such request with the regional director and the other parties within 14 days from the service of notice of such dismissal. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

[51 FR 30636, Aug. 28, 1986]

Subpart F—Procedure To Hear and Determine Disputes Under Section 10(k) of the Act

§ 102.89 Initiation of proceedings.

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) of the Act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve upon the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the Act, he shall give it priority over all other cases in the office except other
§ 102.90 Notice of filing of charge; notice of hearing; proceedings before the Board; briefs; determination of dispute.

If it appears to the Regional Director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the Regional Director that they have adjusted, or have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of hearing under section 10(k) of the Act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of the filing of said charge. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the Act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in §§ 102.64 to 102.68, inclusive. Upon the close of the hearing, the proceeding shall be transferred to the Board and the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, eight copies thereof shall be filed with the Board in Washington, DC, within 7 days after the close of the hearing: Provided, however, That in cases involving the national defense and so designated in the notice of hearing no briefs shall be filed, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions: Provided further, That, in cases involving the national defense, upon application for leave to file briefs expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may for good cause shown grant such leave and thereupon specify the time for filing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing with copies thereof served on the other parties. No reply brief may be filed except upon special leave of the Board.

§ 102.91 Compliance with determination; further proceedings.

If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the Act and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern: Provided, however, That if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

§ 102.92 Review of determination.

The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the Act.
§ 102.93 Alternative procedure.

If, either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the Act is occurring or has occurred, he may issue a complaint under §102.15, and the procedure prescribed in §§102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and §§102.90 to 102.92, inclusive, are inapplicable:

Provided, however, That if an agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

[36 FR 9133, May 20, 1971]

Subpart G—Procedure in Cases Under Section 10(j), (l), and (m) of the Act

§ 102.94 Expedient processing of section 10(j) cases.

(a) Whenever temporary relief or a restraining order pursuant to section 10(j) of the Act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order shall be heard expeditiously and the case shall be given priority by the Board in its successive steps following the issuance of the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under section 10 (l) and (m) of the Act.

(b) In the event the trial examiner hearing a complaint, concerning which the Board has procured temporary relief or a restraining order pursuant to section 10(j), recommends a dismissal in whole or in part of such complaint, the chief law officer shall forthwith suggest to the district court which issued such temporary relief or restraining order the possible change in circumstances arising out of the findings and recommendations of the trial examiner.

§ 102.95 Priority of cases pursuant to section 10(l) and (m) of the Act.

(a) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of paragraph (4) (A), (B), (C), or (7) of section 8(b) of the Act, or section 8(e) of the Act, the regional office in which such charge is filed or to which it is referred shall give it priority over all other cases in the office except cases of like character and cases under paragraph (4)(D) of section 8(b) of the Act in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the Act.

(b) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 of the Act, the regional office in which such charge is filed or to which it is referred shall give it priority over all other cases in the office except cases of like character and cases under section 10(l) of the Act.

§ 102.96 Issuance of complaint promptly.

Whenever the regional attorney or other Board officer to whom the matter may be referred seeks injunctive relief of a district court pursuant to section 10(l) of the Act, a complaint against the party or parties sought to be enjoined, covering the same subject matter as such application for injunctive relief, shall be issued promptly, normally within 5 days of the date upon which such injunctive relief is first sought, except in those cases under section 10(l) of the Act in which...
§ 102.97 Expeditious processing of section 10(l) and (m) cases in successive stages.

(a) Any complaint issued pursuant to §102.95(a) or, in a case in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the Act, any complaint issued pursuant to §102.93 or notice of hearing issued pursuant to §102.90 shall be heard expeditiously and the case shall be given priority in such successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character.

(b) Any complaint issued pursuant to §102.95(b) shall be heard expeditiously and the case shall be given priority in its successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character and cases under section 10(l) of the Act.

Subpart H—Declaratory Orders and Advisory Opinions Regarding Board Jurisdiction

§ 102.98 Petition for advisory opinion; who may file; where to file.

Whenever an agency or court of any State or territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act.

§ 102.99 Contents of petition for advisory opinion; contents of request for administrative advice.

(a) A petition for an advisory opinion, when filed by an agency or court of a State or territory, shall allege the following:

1. The name of the agency or court.
2. The names of the parties to the proceeding and the docket number.
3. The nature of the proceeding, and the need for the Board’s opinion on the jurisdictional issue to the proceeding.
4. The general nature of the business involved in the proceeding and, where appropriate, the nature of and details concerning the employing enterprise.
5. The findings of the agency or court or, in the absence of findings, a statement of the evidence relating to the commerce operations of such business and, where appropriate, to the nature of the employing enterprise.

(b) Eight copies of such petition or request shall be submitted to the Board in Washington, DC. Such petition or request shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted.

§ 102.100 Notice of petition; service of petition.

Upon the filing of a petition the petitioner shall immediately serve in the manner provided by §102.114(a) of these rules a copy of the petition on all parties to the proceeding and on the director of the Board’s regional office having jurisdiction over the territorial area in which such agency or court is located. A statement of service shall be filed with the petition as provided by §102.114(b) of the rules.

§ 102.101 Response to petition; service of response.

Any party served with such petition may, within 14 days after service thereof, respond to the petition, admitting or denying its allegations. Eight copies of such response shall be filed with the Board in Washington, DC. Such response shall be printed or otherwise legibly duplicated: Provided however, That carbon copies of typewritten materials will not be accepted. Such response shall immediately be served on all other parties to the proceeding, and a statement of service shall be filed in
accordance with the provisions of §102.114(b) of these rules.

[51 FR 23749, July 1, 1986]

§ 102.102 Intervention.

Any person desiring to intervene shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. Eight copies of such motion shall be filed with the Board in Washington, DC. Such motion shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

[29 FR 15922, Nov. 28, 1964]

§ 102.103 Proceedings before the Board; briefs; advisory opinions.

The Board shall thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that it would or would not assert jurisdiction. Such determination shall be in the form of an advisory opinion and shall be served upon the parties. No briefs shall be filed except upon special permission of the Board.

§ 102.104 Withdrawal of petition.

The petitioner may withdraw his petition at any time prior to issuance of the Board’s advisory opinion.

§ 102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.

Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a regional office of the Board, and the general counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, he may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the cases. Such petition may be withdrawn at any time prior to the issuance of the Board’s order.

§ 102.106 Contents of petition for declaratory order.

A petition for a declaratory order shall allege the following:

(a) The name of the employer.

(b) The general nature of the employer’s business.

(c) The case numbers of the unfair labor practice and representation cases.

(d) The commerce data relating to the operations of such business.

(e) Whether any proceeding involving the same subject matter is pending before an agency or court of a State or territory. Eight copies of the petition shall be filed with the Board in Washington, DC. Such petition shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.


§ 102.107 Notice of petition, service of petition.

Upon filing a petition, the general counsel shall immediately serve a copy thereof on all parties and shall file a statement of service as provided by §102.114(b) of these rules.

[51 FR 23749, July 1, 1986]

§ 102.108 Response to petition; service of response.

Any party to the representation or unfair labor practice case may, within 14 days after service thereof, respond to the petition, admitting or denying its allegations. Eight copies of such response shall be filed with the Board in Washington, DC. Such response shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten materials will not be accepted. Such response shall be served on the general counsel and all other parties, and a statement of service shall be filed as provided by §102.114(b) of these rules.

[51 FR 23749, July 1, 1986]
§ 102.109 Intervention.

Any person desiring to intervene shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. Eight copies of such motion shall be filed with the Board in Washington, DC. Such motion shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

[29 FR 15922, Nov. 28, 1964]

§ 102.110 Proceedings before the Board; briefs; declaratory orders.

The Board shall thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that it would or would not assert jurisdiction over them. Such determination shall be made by a declaratory order, with like effect as in the case of other orders of the Board, and shall be served upon the parties. Any party desiring to file a brief shall file eight copies with the Board in Washington, DC, with a statement that copies thereof are being served simultaneously on the other parties.

[29 FR 15922, Nov. 28, 1964]

Subpart I—Service and Filing of Papers

§ 102.111 Time computation.

(a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day (see appendix A to this part 102 setting forth the official business hours of the Agency’s several offices). When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) When the Act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the official closing time of the receiving office on the last day of the time limit, if any, for such filing or extension of time that may have been granted (see appendix A to the part 102 setting forth the official business hours of the Agency’s several offices). A request for an extension of time to file a document shall be filed no later than the official closing time of the receiving office on the date on which the document is due. Requests for extensions of time filed within three days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. “Postmarking” shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. Provided, however, The following documents must be received on or before the official closing time of the receiving office on the last day for filing:

(1) Charges filed pursuant to section 10(b) of the Act (see also § 102.14).
(2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.
(3) Petitions to revoke subpoenas.
(4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) The following documents may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

(1) In unfair labor practice proceedings, motions, exceptions, answers
§ 102.111 Date of service; date of filing.

The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by electronic mail, the date of service shall be the date on which the message is sent. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by §102.111.

§ 102.113 Methods of service of process and papers by the Agency; proof of service.

(a) Service of complaints and compliance specifications. Complaints and accompanying notices of hearing, compliance specifications, and amendments to either complaints or to compliance specifications, shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(b) Service of final orders and decisions. Final orders of the Board in unfair labor practice cases and administrative law judges’ decisions shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(c) Service of subpoenas. Subpoenas shall be served upon the recipient either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(d) Service of other documents. Other documents may be served by the Agency by any of the foregoing methods as well as regular mail, electronic mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

(e) Proof of service. In the case of personal service, or delivery to a principal office or place of business, the verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same. In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(f) Service upon representatives of parties. Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or other representative, service upon any one of such persons in addition to the party shall satisfy this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of
§ 102.114 Filing and service of papers by parties; form of papers; manner and proof of filing or service; electronic filings.

(a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically or if specifically provided for in these rules), or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of §102.113(a) or (c) provide otherwise.

(b) When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made by a private delivery service, the receipt from that service showing delivery shall be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(c) Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either:

(1) A rejection of the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8½- by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Nonconforming papers may, at the Agency’s discretion, be rejected.

(e) The person or party serving the papers or process on other parties in conformance with §102.113 and paragraph (a) of this section shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in paragraph (a) of this section shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(f) Unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if transmitted to the facsimile machine of the appropriate office. Other documents, except those specifically prohibited in paragraph (g) of this section, will be accepted by the Agency if transmitted to the facsimile machine of the office designated to receive them only with advance permission from the receiving office which may be obtained by telephone. Advance permission must be obtained for each such filing. At the discretion of the receiving office, the person submitting a document by facsimile may be required simultaneously to serve the original and any required copies on the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by facsimile transmission pursuant to this section, receipt of the transmitted document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will not be excused.
§ 102.117 Freedom of Information Act Regulations: Board materials and formal documents available for public inspection and copying; requests for described records; time limit for response; appeal from denial of request; fees for document search and duplication; files and records not subject to inspection.

(a)(1) This subpart contains the rules that the National Labor Relations Board follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Information routinely provided to the public as part of a regular Agency activity (for example, press releases issued by the Division of Information) may be obtained from the Board upon request.

on the basis of a claim that transmission could not be accomplished because the receiving machine was offline or busy or unavailable for any other reason.

(g) Facsimile transmissions of the following documents will not be accepted for filing: Answers to Complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Default Judgment; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

(h) Documents and other papers filed through facsimile transmission shall be served on all parties in the same way as used to serve the office where filed, or in a more expeditious manner, in conformance with paragraph (a) of this section. Thus, facsimile transmission shall be used for this purpose whenever possible. When a party cannot be served by this method, or chooses not to accept service by facsimile as provided for in paragraph (a) of this section, the party shall be notified personally or by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service or overnight delivery service.

(i) The Agency’s Web site (http://www.nlrb.gov) contains certain forms that parties or other persons are permitted to file with the Agency electronically. Parties or other persons choosing to utilize those forms to file documents electronically are permitted to do so by following the instructions described on the Web site, notwithstanding any contrary provisions elsewhere in these rules. In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.

Subpart J—Certification and Signature of Documents

§ 102.115 Certification of papers and documents.

The executive secretary of the Board or, in the event of his absence or disability, whosoever may be designated by the Board in his place and stead shall certify copies of all papers and documents which are a part of any of the files or records of the Board as may be necessary or desirable from time to time.

§ 102.116 Signature of orders.

The executive secretary or the associate executive secretary or, in the event of their absence or disability, whosoever may be designated by the Board in their place and stead is hereby authorized to sign all orders of the Board.

Subpart K—Records and Information

§ 102.117 Freedom of Information Act Regulations: Board materials and formal documents available for public inspection and copying; requests for described records; time limit for response; appeal from denial of request; fees for document search and duplication; files and records not subject to inspection.

Subpart J—Certification and Signature of Documents
§ 102.117  29 CFR Ch. 1 (7–1–15 Edition)

provided to the public without following this subpart. Such records may also be made available in the Agency’s reading room in paper form, as well as electronically to facilitate public access. As a matter of policy, the Agency will consider making discretionary disclosures of records or information exempt under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(2) The following materials are available to the public for inspection and copying during normal business hours:

(i) All final opinions and orders made in the adjudication of cases;

(ii) Statements of policy and interpretations that are not published in the FEDERAL REGISTER;

(iii) Administrative staff manuals and instructions that affect any member of the public (excepting those establishing internal operating rules, guidelines, and procedures for investigation, trial, and settlement of cases);

(iv) A current index of final opinions and orders in the adjudication of cases;

(v) A record of the final votes of each Member of the Board in every Agency proceeding;

(vi) Records which have been released and which the Agency determines, because of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records; and

(vii) A general index of records referred to in paragraph (a)(2)(vi) of this section. Items in paragraphs (a)(2)(i) through (a)(2)(vii) of this section created on or after November 1, 1996, will be made available by November 1, 1997, to the public by computer telecommunications or, if computer telecommunications means have not been established by the Agency, by other electronic means. The Agency shall maintain and make available for public inspection and copying a current subject matter index of all reading room materials which shall be updated regularly, at least quarterly, with respect to newly included records. Copies of the index are available upon request for a fee of the direct cost of duplication. The index of FOIA-processed records referred to in paragraph (a)(2)(vii) of this section will be available by computer telecommunications by December 31, 1999.

(3) Copies of forms prescribed by the board for the filing of charges under section 10 alleging violations of the Act under section 8, or petitions under section 9, may be obtained without charge from any Regional, Subregional, or Resident Office of the Board. These forms are available electronically through the Agency’s World Wide Web site (which can be found at http://www.nlrb.gov).

(4) The Agency shall, on or before February 1, 1998, and annually thereafter, submit a FOIA report covering the preceding fiscal year to the Attorney General of the United States. The report shall include those matters required by 5 U.S.C. 552(e), and shall be made available electronically.

(b)(1) The formal documents constituting the record in a case or proceeding are matters of official record and, until officially destroyed pursuant to applicable statutory authority, are available to the public for inspection and copying during normal business hours at the Board’s offices in Washington, DC. Items in paragraph (a)(2)(iii) of this section are also available for inspection and copying during normal business hours at each Regional, Subregional, and Resident Office of the Board. Final opinions and orders made by Regional Directors in the adjudication of representation cases pursuant to the delegation of authority from the Board under section 3(b) of the Act are available to the public for inspection and copying in the original office where issued. Records encompassed within paragraphs (a)(2)(i) through (a)(2)(vii) of this section created on or after November 1, 1996, will be made available by November 1, 1997, to the public by computer telecommunications or, if computer telecommunications means have not been established by the Agency, by other electronic means. The Agency shall maintain and make available for public inspection and copying a current subject matter index of all reading room materials which shall be updated regularly, at least quarterly, with respect to newly included records. Copies of the index are available upon request for a fee of the direct cost of duplication. The index of FOIA-processed records referred to in paragraph (a)(2)(vii) of this section will be available by computer telecommunications by December 31, 1999.

(2) The Executive Secretary shall certify copies of all formal documents
upon request made a reasonable time in advance of need and payment of lawfully prescribed costs.

(c)(1) Requests for the inspection and copying of records other than those specified in paragraphs (a) and (b) of this section must be in writing and must reasonably describe the record in a manner to permit its identification and location. The envelope and the letter, or the cover sheet of any fax transmittal, should be clearly marked to indicate that it contains a request for records under the Freedom of Information Act (FOIA). The request must contain a specific statement assuming financial liability in accordance with paragraph (d)(2) of this section for the direct costs of responding to the request. If the request is made for records in a Regional or Subregional Office of the Agency, it should be made to that Regional or Subregional Office. If the request is for records located in Washington, DC (in the Office of the General Counsel, the Offices of the Board, or the Office of the Inspector General), it should be made to the NLRB FOIA Officer, Washington, DC. Requests made to other than the appropriate office will be forwarded to that office by the receiving office, but in that event the applicable time limit for response set forth in (c)(2)(i) of this section shall be calculated from the date of receipt by the appropriate office. FOIA requests made to an office other than to the office where the records were generated may be referred to the generating office for response. In the case of records generated by the Inspector General in the possession of another office, or in the possession of the Inspector General but generated by another office of the Agency, the request will be referred to the appropriate FOIA officer for the generating office for decision. If the Agency determines that a request does not reasonably describe records, it may contact the requester to inform the requester either what additional information is needed or why the request is insufficient. Requesters may be given an opportunity to discuss their request so that requests may be modified to meet the requirements of this section.

(c)(2)(i) The Agency ordinarily shall respond to requests according to their order of receipt. Effective October 2, 1997, an initial response shall be made within 20 working days (i.e. exempting Saturdays, Sundays, and legal public holidays) after the receipt of a request for a record under this part by the Freedom of Information Officer or his designee. An appeal under paragraph (c)(2)(v) of this section shall be decided within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such an appeal by the Office of Appeals or the Chairman of the Board. Because the Agency has been able to process its requests without a backlog of cases, the Agency will not institute a multitrack processing system.

(ii) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve: Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; the loss of substantial due process rights; or a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence. A request for expedited processing may be made at the time of the initial request for records or at any later time. A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person’s knowledge and belief, explaining in detail the basis for requesting expedited processing. The formality of certification may be waived as a matter of administrative discretion. Within ten calendar days of its receipt of a request for expedited processing, the Agency shall decide whether to grant it and shall notify the requester of the decision. Once the determination has been made to grant expedited processing, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, the Agency shall act expeditiously on any appeal of that decision.
(iii) Within 20 working days after receipt of a request by the appropriate office of the Agency, a determination shall be made whether to comply with such request, and the person making the request shall be notified in writing of that determination. In the case of requests made for Inspector General records, that determination shall be made by the Inspector General. In the case of all other requests, that determination shall be made by the NLRB FOIA Officer, or the Regional or Sub-regional Office, as the case may be. If the determination is to comply with the request, the records shall be made promptly available to the person making the request and, at the same time, a statement of any charges due in accordance with the provisions of paragraph (d)(2) of this section will be provided. If the determination is to deny the request in any respect, the requester shall be notified in writing of that determination.

Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver or reduction or placement in a particular fee category; and a denial of a request for expedited treatment. For a determination to deny a request in any respect, the notification shall set forth the reasons therefor and the name and title or position of each person responsible for the denial, shall provide an estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation (this estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption), and shall notify the person making the request of the right to appeal the adverse determination under provisions of paragraph (c)(2)(v) of this section.

(iv) Business information obtained by the Agency from a submitter will be disclosed under the FOIA only consistent with the procedures established in this section.

(A) For purposes of this section:

(1) Business information means commercial or financial information obtained by the Agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter means any person or entity from whom the Agency obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(B) A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period. The Agency shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (c)(2)(iv)(C) of this section, except as provided in paragraph (c)(2)(iv)(F) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (c)(2)(iv)(D) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(C) Notice shall be given to a submitter wherever: the information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or the Agency has reason to believe that the information may be protected from disclosure under Exemption 4.

(D) The Agency will allow a submitter a reasonable time to respond to the notice described in paragraph
National Labor Relations Board

§ 102.117

(c)(2)(iv)(B) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(E) The Agency shall consider a submitter’s objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever the Agency decides to disclose business information over the objection of a submitter, the Agency shall give the submitter written notice, which shall include: A statement of the reason(s) why each of the submitter’s disclosure objections was not sustained; a description of the business information to be disclosed; and a specified disclosure date, which shall be a reasonable time subsequent to the notice.

(F) The notice requirements of paragraphs (c)(2)(iv)(B) and (E) of this section shall not apply if: The Agency determines that the information should not be disclosed; the information lawfully has been published or has been officially made available to the public; disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or the designation made by the submitter under paragraph (c)(2)(iv)(B) of this section appears obviously frivolous except that, in such a case, the Agency shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(G) Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the Agency shall promptly notify the submitter.

(H) Whenever the Agency provides a submitter with notice and an opportunity to object to disclosure under paragraph (c)(2)(iv)(B) of this section, the Agency shall also notify the requester(s). Whenever the Agency notifies a submitter of its intent to disclose requested information under paragraph (c)(2)(iv)(E) of this section, the Agency shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the Agency shall notify the requester(s).

(v) An appeal from an adverse determination made pursuant to paragraph (c)(2)(iii) of this section must be filed within 28 calendar days of the service of the adverse determination, in whole or in part. If the adverse determination was made by the NLRB FOIA Officer concerning records located in the Office of the General Counsel, Washington, DC, or by a Regional Office or a Subregional Office concerning records located there, the appeal shall be filed with the General Counsel in Washington, DC. If the adverse determination was made by the NLRB FOIA Officer concerning records in the Offices of the Board, or by the Inspector General concerning records generated by that office, the appeal shall be filed with the Chairman of the Board in Washington, DC. As provided in paragraph (c)(2)(iii) of this section, an adverse determination will notify the requester of the right to appeal the adverse determination and will specify where such appeal shall be filed. Within 20 working days after receipt of an appeal, the General Counsel or the Chairman of the Board, as the case may be, shall make a determination with respect to such appeal and shall notify the person making the request in writing. If the determination is to comply with the request, the record shall be made promptly available to the person making the request upon receipt of payment of any charges due in accordance with the provisions of paragraph (d)(2) of this section. If on appeal the denial of the request for records is upheld in whole or in part, the person making the request shall be notified of the reasons for the determination, the
name and title or position of each person responsible for the denial, and the provisions for judicial review of that determination under the provisions of 5 U.S.C. 552(4)(B). Even if no appeal is filed from a denial in whole or in part of a request for records by the person making the request, the General Counsel or the Chairman of the Board may, without regard to the time limit for filing of an appeal, sua sponte initiate consideration of an adverse determination under this appeal procedure by written notification to the person making the request. In such event, the time limit for making the determination shall commence with the issuance of such notification. An adverse determination by the General Counsel or the Chairman of the Board, as the case may be, will be the final action of the Agency. If the requester wishes to seek review by a court of any adverse determination, the requester must first appeal it under this section.

(vi) In unusual circumstances as specified in this paragraph, the time limits prescribed in either paragraph (c)(2)(i) or (iv) of this section may be extended by written notice to the person requesting the record setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice or notices shall specify a date or dates that would result in an extension or extensions totaling more than 10 working days with respect to a particular request, except as set forth below in this paragraph. As used in this paragraph, unusual circumstances means, but only to the extent reasonably necessary to the proper processing of the particular request:

(A) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(B) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

(C) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or with two or more components of the Agency having a substantial subject matter interest in the request. Where the extension is for more than ten working days, the Agency shall provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period for processing the request or a modified request.

(vii) The Agency shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration’s General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

(d)(1) For purposes of this section, the following definitions apply:

(i) Direct costs means those expenditures which are actually incurred in searching for and duplicating and, in the case of commercial use requests, reviewing documents to respond to a FOIA request.

(ii) Search refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The Agency shall ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(iii) Duplication refers to the process of making a copy of a record, or the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microfilm, videotape, audiotape, or electronic records (e.g., magnetic tape or disk), among others. The Agency shall honor a requester’s specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.
(iv) Review refers to the process of examining documents located in response to a request that is for commercial use to determine whether any portion of it is exempt from disclosure. It includes processing any documents for disclosure, e.g., doing all that is necessary to redact and prepare them for disclosure. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(2)(iv) of this section, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(v) Commercial use request refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.

(vi) Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(vii) Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in instances where they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but the Agency shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for commercial use. However, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(viii) Working days, as used in this paragraph, means calendar days excepting Saturdays, Sundays, and legal holidays.

(2) Persons requesting records from this Agency shall be subject to a charge of fees for the full allowable direct costs of document search, review, and duplicating, as appropriate, in accordance with the following schedules, procedures, and conditions:

(i) Schedule of charges:

(A) For each one-quarter hour or portion thereof of clerical time * * * $3.10.

(B) For each one-quarter hour or portion thereof of professional time * * * $9.25.

(C) For each sheet of duplication (not to exceed 8½ by 14 inches) of requested records * * * $0.12.

(D) All other direct costs of preparing a response to a request shall be charged to the requester in the same amount as incurred by the Agency. Such costs shall include, but not be limited to: Certifying that records are true copies; sending records to requesters or receiving records from the Federal records storage centers by special methods such as express mail; and, where applicable, the cost of conducting computer searches for information and for providing information in electronic format.

(ii) Fees incurred in responding to information requests are to be charged in accordance with the following categories of requesters:

(A) Commercial use requesters will be assessed charges to recover the full direct costs for searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought.

(B) Educational institution requesters will be assessed charges for the cost of reproduction alone, excluding
charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but are sought in furtherance of scholarly research. Requesters must reasonably describe the records sought.

(C) Requesters who are representatives of the news media will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (d)(1)(vii) of this section, and the request must not be made for commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use. Requesters must reasonably describe the records sought.

(D) All other requesters, not elsewhere described, will be assessed charges to recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first 2 hours of search time shall be furnished without charge. Requesters must reasonably describe the records sought.

(E) Absent a reasonably based factual showing that a requester should be placed in a particular user category, fees will be imposed as provided for in the commercial use requester category.

(iii)(A) In no event shall fees be imposed on any requester when the total charges are less than $5, which is the Agency’s cost of collecting and processing the fee itself.

(B) If the Agency reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, the Agency will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(iv) Documents are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest. A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Where only some of the requested records satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(v) If a requester fails to pay chargeable fees that were incurred as a result of the Agency’s processing of the information request, beginning on the 31st day following the date on which the notification of charges was sent, the Agency may assess interest charges against the requester in the manner prescribed in 31 U.S.C. 3717. Where appropriate, other steps permitted by federal debt collection statutes, including disclosure to consumer reporting agencies, use of collection agencies, and offset, will be used by the Agency to encourage payment of amounts overdue.

(vi) Each request for records shall contain a specific statement assuming financial liability, in full or to a specified maximum amount, for charges, in accordance with paragraphs (d)(2)(i) and (ii) of this section, which may be incurred by the Agency in responding to the request. If the anticipated charges exceed the maximum limit stated by the person making the request or if the request contains no assumption of financial liability or charges, the person shall be notified and afforded an opportunity to assume financial liability. In either case, the request for records shall not be deemed received for purposes of the applicable time limit for response until a written
National Labor Relations Board

§ 102.118 Present and former Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.

(a)(1) Except as provided in §102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no present or former Regional Director, field examiner, administrative law judge, attorney, specially designated agent, General Counsel, Member of the Board, or other officer or employee of the Agency shall produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the Chairman of the Board if the document is in Washington, DC, and in control of the Board; or of the General Counsel if the document is in a Regional Office of the Agency or is in Washington, DC, and in the control of the General Counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to that person’s knowledge in his or her official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board if the person is in Washington, DC, and subject to the supervision or control of the Board or was subject to such supervision or control when formerly employed at the Agency; or of the General Counsel if the person is in a Regional Office of the Agency or is in Washington, DC, and subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the Agency. A request that such consent be granted shall be in

assumption of financial liability is received. The Agency may require a requester to make an advance payment of anticipated fees under the following circumstances:

(A) If the anticipated charges are likely to exceed $250, the Agency shall notify the requester of the likely cost and obtain satisfactory assurance of full payment when the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(B) If a requester has previously failed to pay fees that have been charged in processing a request within 30 days of the date of the notification of fees was sent, the requester will be required to pay the entire amount of fees that are owed, plus interest as provided for in paragraph (d)(2)(v) of this section, before the Agency will process a further information request. In addition, the Agency may require advance payment of fees that the Agency estimates will be incurred in processing the further request before the Agency commences processing that request. When the Agency acts under paragraph (d)(2)(vi)(A) or (B) of this section, the administrative time limits for responding to a request or an appeal from initial denials will begin to run only after the Agency has received the fee payments required above.

(vii) Charges may be imposed even though the search disclose no records responsive to the request, or if records located are determined to be exempt from disclosure.

(e) Subject to the provisions of §§102.31(c) and 102.66(c), all fines, documents, reports, memoranda, and records of the Agency falling within the exemptions specified in 5 U.S.C. 552(b) shall not be made available for inspection or copying, unless specifically permitted by the Board, its Chairman, or its General Counsel.

writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to aduce testimony or require the production of records as described hereinabove, shall have been served on any such person or otherwise expressly directed by the Board or the Chairman of the Board or the General Counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or other officer or employee of the Board, that person will, unless otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

(2) No regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall, by any means of communication to any person or to another agency, disclose personal information about an individual from a record in a system of records maintained by this agency, as more fully described in the notices of systems of records published by this agency in accordance with the provisions of section (e)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(e)(4), or by the Notices of Government-wide Systems of Personnel Records published by the Civil Service Commission in accordance with those statutory provisions, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be in accordance with the provisions of section (b) (1) through (11), both inclusive, of the Privacy Act of 1974, 5 U.S.C. 552a(b) (1) through (11).

(b)(1) Notwithstanding the prohibitions of paragraph (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge in camera. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholdings, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness.

(c) The provisions of paragraph (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to §102.69(d)
National Labor Relations Board

§ 102.119

and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under paragraph (b) of this section shall be exercised by the hearing officer presiding.

(d) The term \textit{statement} as used in paragraphs (b) and (c) of this section means:

(1) A written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

§ 102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

(a) An individual will be informed whether a system of records maintained by this Agency contains a record pertaining to such individual. An inquiry should be made in writing or in person during normal business hours to the official of this Agency designated for that purpose and at the address set forth in a notice of a system of records published by this Agency, in a Notice of Systems of Government-wide Personnel Records published by the Office of Personnel Management, or in a Notice of Government-wide Systems of Records published by the Department of Labor. Copies of such notices, and assistance in preparing an inquiry, may be obtained from any Regional Office of the Board or at the Board offices at 1099 14th Street, NW., Washington, DC 20570. The inquiry should contain sufficient information, as defined in the notice, to identify the record.

Reasonable verification of the identity of the inquirer, as described in paragraph (e) of this section, will be required to assure that information is disclosed to the proper person. The Agency shall acknowledge the inquiry in writing within 10 days (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment shall supply the information requested. If, for good cause shown, the Agency cannot supply the information within 10 days, the inquirer shall within that time period be notified in writing of the reasons therefor and when it is anticipated the information will be supplied. An acknowledgment will not be provided when the information is supplied within the 10-day period. If the Agency refuses to inform an individual whether a system of records contains a record pertaining to an individual, the inquirer shall be notified in writing of that determination and the reasons therefor, and of the right to obtain review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(b) An individual will be permitted access to records pertaining to such individual contained in any system of records described in the notice of system of records published by this Agency, or access to the accounting of disclosures from such records. The request for access must be made in writing or in person during normal business hours to the person designated for that purpose and at the address set forth in the published notice of system of records. Copies of such notices, and assistance in preparing a request for access, may be obtained from any Regional Office of the Board or at the Board offices at 1099 14th Street, NW., Washington, DC 20570. Reasonable verification of the identity of the requester, as described in paragraph (e) of this section, shall be required to assure that records are
disclosed to the proper person. A request for access to records or the accounting of disclosures from such records shall be acknowledged in writing by the Agency within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment shall inform the requester whether access will be granted and, if so, the time and location at which the records or accounting will be made available. If access to the record or accounting is to be granted, the record or accounting will normally be provided within 30 days (excluding Saturdays, Sundays, and legal public holidays) of the request, unless for good cause shown the Agency is unable to do so, in which case the individual will be informed in writing within that 30-day period of the reasons therefor and when it is anticipated that access will be granted. An acknowledgment of a request will not be provided if the record is made available within the 10-day period.

If an individual’s request for access to a record or an accounting of disclosure from such a record under the provisions of this paragraph is denied, the notice informing the individual of the denial shall set forth the reasons therefor and advise the individual of the right to obtain a review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(c) An individual granted access to records pertaining to such individual contained in a system of records may review all such records. For that purpose the individual may be accompanied by a person of the individual’s choosing, or the record may be released to the individual’s representative who has written consent of the individual, as described in paragraph (e) of this section. A first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form comprehensible to the individual. Fees for any other copies of requested records shall be assessed at the rate of 10 cents for each sheet of duplication.

(d) An individual may request amendment of a record pertaining to such individual in a system of records maintained by this Agency. A request for amendment of a record must be in writing and submitted during normal business hours to the person designated for that purpose and at the address set forth in the published notice for the system of records containing the record of which amendment is sought. Copies of such notices, and assistance in preparing a request for amendment, may be obtained from any Regional Office of the Board or at the Board offices at 1099 14th Street, NW., Washington, DC 20570. The requester must provide verification of identity as described in paragraph (e) of this section, and the request should set forth the specific amendment requested and the reason for the requested amendment. The Agency shall acknowledge in writing receipt of the request within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment shall advise the individual of the determination of the request. If the review of the request for amendment cannot be completed and a determination made within 10 days, the review shall be completed as soon as possible, normally within 30 days (Saturdays, Sundays, and legal public holidays excluded) of receipt of the request unless unusual circumstances preclude completing the review within that time, in which event the requester will be notified in writing within that 30-day period of the reasons for the delay and when the determination of the request may be expected. If the determination is to amend the record, the requester shall be so notified in writing and the record shall be amended in accordance with that determination. If any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended shall be advised of the amendment and its substance. If it is determined that the request should not be granted, the requester shall be notified in writing of that determination and of the reasons therefor, and advised of the right to obtain review of the adverse determination under the
provisions of paragraph (f) of this section. The provisions of this paragraph do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(e) Verification of the identification of individuals required under paragraphs (a), (b), (c), and (d) of this section to assure that records are disclosed to the proper person shall be required by the Agency to an extent consistent with the nature, location, and sensitivity of the records being disclosed. Disclosure of a record to an individual in person will normally be made upon the presentation of acceptable identification. Disclosure of records by mail may be made on the basis of the identifying information set forth in the request. Depending on the nature, location, and sensitivity of the requested record, a signed notarized statement verifying identity may be required by the Agency. Proof of authorization as representative to have access to a record of an individual shall be in writing, and a signed notarized statement of such authorization may be required by the Agency if the record requested is of a sensitive nature.

(f)(1) Review may be obtained with respect to:

(i) A refusal, under paragraph (a) or (g) of this section, to inform an individual if a system of records contains a record concerning that individual,

(ii) A refusal, under paragraph (b) or (g) of this section, to grant access to a record or an accounting of disclosure from such a record, or

(iii) A refusal, under paragraph (d) of this section, to amend a record.

(iv) The request for review should be made to the Chairman of the Board if the system of records is maintained in the office of a Member of the Board, the office of the Executive Secretary, the office of the Solicitor, the Division of Information, or the Division of Administrative Law Judges. Consonant with the provisions of section 3(d) of the National Labor Relations Act, and the delegation of authority from the Board to the General Counsel, the request should be made to the General Counsel if the system of records is maintained by an office of the Agency other than those enumerated above. Either the Chairman of the Board or the General Counsel may designate in writing another officer of the Agency to review the refusal of the request. Such review shall be completed within 30 days (excluding Saturdays, Sundays, and legal public holidays) from the receipt of the request for review unless the Chairman of the Board or the General Counsel, as the case may be, for good cause shown, shall extend such 30-day period.

(2) If, upon review of a refusal under paragraph (a) or (g) of this section, the reviewing officer determines that the individual should be informed of whether a system of records contains a record pertaining to that individual, such information shall be promptly provided. If the reviewing officer determines that the information was properly denied, the individual shall be so informed in writing with a brief statement of the reasons therefor.

(3) If, upon review of a refusal under paragraph (b) or (g) of this section, the reviewing officer determines that access to a record or to an accounting of disclosures should be granted, the requester shall be so notified and the record or accounting shall be promptly made available to the requester. If the reviewing officer determines that the request for access was properly denied, the individual shall be so informed in writing with a brief statement of the reasons therefor, and of the right to judicial review of that determination under the provisions of 5 U.S.C. 552a(g)(1)(B).

(4) If, upon review of a refusal under paragraph (i) of this section, the reviewing official grants a request to amend, the requester shall be so notified, the record shall be amended in accordance with the determination, and, if any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended shall be advised of the amendment and its substance. If the reviewing officer determines that the denial of a request for amendment should be sustained, the Agency shall advise the requester of the determination and the reasons therefor, and that the individual may file with the Agency a concise statement of the reason for disagreeing with
the determination, and may seek judicial review of the Agency’s denial of the request to amend the record. In the event a statement of disagreement is filed, that statement—

(i) Will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Agency, a brief statement summarizing the Agency’s reasons for declining to amend the record, and

(ii) Will be supplied, together with any Agency statements, to any prior recipients of the disputed record to the extent that an accounting of disclosure was made.

(g) To the extent that portions of system of records described in notices of Governmentwide systems of records published by the Office of Personnel Management are identified by those notices as being subject to the management of an officer of this Agency, or an officer of this Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment shall be in accordance with the provisions of 5 CFR 297.101, et seq., as promulgated by the Office of Personnel Management. To the extent that portions of system of records described in notices of Governmentwide system of records published by the Department of Labor are identified by those notices as being subject to the management of an officer of this Agency, or an officer of this Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment shall be in accordance with the provisions of this rule. Review of a refusal to inform an individual whether such a system of records contains a record pertaining to that individual and review of a refusal to grant an individual’s request for access to a record in such a system may be obtained in accordance with the provisions of paragraph (f) of this section.

(h) Pursuant to 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains Investigative Files shall be exempted from the provisions of 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for criminal law enforcement purposes.

(i) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains the Investigative Files shall be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f), from 29 CFR 102.117 (c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for law enforcement purposes not within the scope of the exemption at 29 CFR 102.119(h).

(j) Privacy Act exemptions contained in paragraphs (h) and (i) of this section are justified for the following reasons:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since this system of records is being exempted from subsection (d) of
the Act, concerning access to records, this section is inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in this system of records could inform the subject of an investigation of an actual or potential criminal violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his/her activities, or of the identity of confidential sources, witnesses, and law enforcement personnel and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation, thereby enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances, the subject of an investigation cannot be required to provide information to investigators and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(5) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation that could interfere with the investigation. Moreover, providing such a notice to the
subject of an investigation could seriously impede or compromise an undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Act. Although the system would be exempt from these requirements, OIG has published information concerning its notification, access, and contest procedures because, under certain circumstances, OIG could decide it is appropriate for an individual to have access to all or a portion of his/her records in this system of records.

(8) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines "maintain" to include the collection of information, complying with this provision could prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which seems unrelated, irrelevant, or incomplete when collected can take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(9) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(11) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his/her request if any system of records named by the individual contains a record pertaining to him/her. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation were able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since this system would be exempt from subsection (d) of the Act, concerning access to records, the requirements of subsection (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.
Act. Although this system would be exempt from the requirements of subsection (f) of the Act, OIG has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of his/her records in this system of records.

(12) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since this system of records would be exempt from subsections (c)(3) and (4), (d), (e)(1), (2), and (3) and (4)(G) through (I), (e)(5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act would be inapplicable to the extent that this system of records will be exempt from those subsections of the Act.

(k) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the NLRB containing Agency Disciplinary Case Files (Nonemployees) shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system contains investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2): Case Activity Tracking System (CATS) and Associated Regional Office Files (NLRB–25), Regional Advice and Injunction Litigation System (RAILS) and Associated Headquarters Files (NLRB–28), and Appeals Case Tracking System (ACTS) and Associated Headquarters Files (NLRB–30). Pursuant to 5 U.S.C. 552a(k)(2), limited categories of information from the following four proposed systems of records shall be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), insofar as the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2):

(1) the Judicial Case Management Systems–Pending Case List (JCMS–PCL) and Associated Headquarters Files (NLRB–21)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(2) the Solicitor’s System (SOL) and Associated Headquarters Files (NLRB–29)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(3) the Special Litigation Case Tracking System (SPLIT) and Associated Headquarters Files (NLRB–27)—information relating to investigative subpoena enforcement cases, injunction and mandamus actions regarding Agency cases under investigation, bankruptcy case information in matters under investigation, Freedom of Information Act cases involving investigatory records, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes; and
(4) The Freedom of Information Act Tracking System (FTS) and Associated Agency Files (NLRB–32)—information requested under the Freedom of Information Act, 5 U.S.C. 552, that relates to the Agency’s investigation of unfair labor practice and representation cases or other proceedings described in paragraphs (m)(1) through (3) of this section.

(n) The reasons for exemption under 5 U.S.C. 552a(k)(2) are as follows:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at such individual’s request. These accountings must state the date, nature, and purpose of each disclosure of a record, and the name and address of the recipient. Providing such an accounting of investigatory information to a party in an unfair labor practice or representation matter under investigation could inform that individual of the precise scope of an Agency investigation, or the existence or scope of another law enforcement investigation. Accordingly, this Privacy Act requirement could seriously impede or compromise either the Agency’s investigation, or another law enforcement investigation, by causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, or fabrication of testimony.

(2) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to such individual, to request amendment to such records, to request review of an agency decision not to amend such records, and, where the Agency refuses to amend records, to submit a statement of disagreement to be included with the records. Such disclosure of investigatory information could seriously impede or compromise the Agency’s investigation by revealing the identity of confidential sources or confidential business information, or causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, fabrication of testimony, or unwarranted invasion of the privacy of others. Amendment of the records could interfere with ongoing law enforcement proceedings and impose an undue administrative burden by requiring investigations to be continuously reinvestigated.

(3) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence.

(4) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at the individual’s request, if the system of records contains a record pertaining to the individual, for gaining access to such a record, and for contesting its content. Because certain information from these systems of records is exempt from subsection (d) of the Act concerning access to records, and consequently, from subsection (f) of the Act concerning access to records, and for contesting its content, these requirements are inapplicable to that information.

(5) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of sources of information, to protect against the disclosure of investigatory techniques and procedures, to avoid threats or reprisals against informers by subjects of investigations, and to protect against informers refusing to give full information to investigators for fear of having their identities as sources revealed.

(6) 5 U.S.C. 552a(f) requires an agency to promulgate rules for notifying individuals of Privacy Act rights granted by subsection (d) of the Act concerning access and amendment of records. Because certain information from these systems is exempt from subsection (d) of the Act, the requirements of subsection (f) of the Act are inapplicable to that information.

[72 FR 38778, July 16, 2007]
§ 102.120 Post-employee restrictions on activities by former Officers and employees.

Former officers and employees of the Agency who were attached to any of its regional offices or the Washington staff are subject to the applicable post-employment restrictions imposed by 18 U.S.C. 207. Guidance concerning those restrictions may be obtained from the Designated Agency Ethics Officer and any applicable regulations issued by the Office of Government Ethics.


Subpart M—Construction of Rules

§ 102.121 Rules to be liberally construed.

The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act.

Subpart N—Enforcement of Rights, Privileges, and Immunities Granted or Guaranteed Under Section 222(f), Communications Act of 1934, as Amended, to Employees of Merged Telegraph Carriers

§ 102.122 Enforcement.

All matters relating to the enforcement of rights, privileges, or immunities granted or guaranteed under section 222(f) of the Communications Act of 1934, as amended, shall be governed by the provisions of subparts A, B, I, J, K, and M of this part, insofar as applicable, except that reference in subpart B of this part to “unfair labor practices” or “unfair labor practices affecting commerce” shall for the purposes of this article mean the denial of any rights, privileges, or immunities granted or guaranteed under section 222(f) of the Communications Act of 1934, as amended.

§ 102.123 Amendment or rescission of rules.

Any rule or regulation may be amended or rescinded by the Board at any time.

Subpart O—Amendments

§ 102.124 Petitions for issuance, amendment, or repeal of rules.

Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original and seven copies of such petition shall be filed with the Board in Washington, DC, and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

[29 FR 15922, Nov. 28, 1964]

§ 102.125 Action on petition.

Upon the filing of such petition, the Board shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

Subpart P—Ex Parte Communications

AUTHORITY: Sec. 6, National Labor Relations Act, as amended (49 Stat. 452; 29 U.S.C. 156).

SOURCE: 42 FR 13113, Mar. 8, 1977, unless otherwise noted.

§ 102.126 Unauthorized communications.

(a) No interested person outside this agency shall, in an on-the-record proceeding of the types defined in §102.128, make or knowingly cause to be made any prohibited ex parte communication to Board agents of the categories designated in that section relevant to the merits of the proceeding.

(b) No Board agent of the categories defined in §102.128, participating in a particular proceeding as defined in that section, shall (i) request any prohibited
§ 102.127 Definitions.

When used in this subpart:

(a) The term "person outside this agency," to whom the prohibitions apply, shall include any individual outside this agency, partnership, corporation, association, or other entity, or an agent thereof, and the general counsel or his representative when prosecuting an unfair labor practice proceeding before the Board pursuant to section 10(b) of the Act.

(b) The term "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, subject however, to the provisions of §§102.129 and 102.130.

§ 102.128 Types of on-the-record proceedings; categories of Board agents; and duration of prohibition.

Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of §102.126 shall be applicable in the following types of on-the-record proceedings to unauthorized ex parte communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a preelection proceeding pursuant to section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to section 9(b) of the Act, in which a formal hearing is held, communications to the regional director and members of his staff who review the record and prepare a draft of his report or decision, and members of the Board and their legal assistants, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to section 9(b) of the Act, in which no formal hearing is held, communications to members of the Board and their legal assistants, from the time the regional director's report or decision is issued.

(c) In a proceeding pursuant to section 10(k) of the Act, communications to members of the Board and their legal assistants, from the time the hearing is opened.

(d) In an unfair labor practice proceeding pursuant to section 10(b) of the Act, communications to the administrative law judge assigned to hear the case or to make rulings upon any motions or issues therein and members of the Board and their legal assistants, from the time the complaint and/or notice of hearing is issued, or the time the communicator has knowledge that a complaint or notice of hearing will be issued, whichever occurs first.

(e) In any other proceeding to which the Board by specific order makes the prohibition applicable, to the categories of personnel and from the stage of the proceeding specified in the order.

§ 102.129 Communications prohibited.

Except as provided in §102.130, ex parte communications prohibited by §102.126 shall include:

(a) Such communications, when written, if copies thereof are not contemporaneously served by the communicator on all parties to the proceeding in accordance with the provisions of §102.114(a).

(b) Such communications, when oral, unless advance notice thereof is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present.
§ 102.130 Communications not prohibited.

Ex parte communications prohibited by §102.126 shall not include:

(a) Oral or written communications which relate solely to matters which the hearing officer, regional director, administrative law judge, or member of the Board is authorized by law or Board rules to entertain or dispose of on an ex parte basis.

(b) Oral or written requests for information solely with respect to the status of a proceeding.

(c) Oral or written communications which all the parties to the proceeding agree, or which the responsible official formally rules, may be made on an ex parte basis.

(d) Oral or written communications proposing settlement or an agreement for disposition of any or all issues in the proceeding.

(e) Oral or written communications which concern matters of general significance to the field of labor-management relations or administrative practice and which are not specifically related to pending on-the-record proceedings.

(f) Oral or written communications from the general counsel to the Board when the general counsel is acting as counsel for the Board.

§ 102.131 Solicitation of prohibited communications.

No person shall knowingly and willfully solicit the making of an unauthorized ex parte communication by any other person.

§ 102.132 Reporting of prohibited communications; penalties.

(a) Any Board agent of the categories defined in §102.128 to whom a prohibited oral ex parte communication is attempted to be made shall refuse to listen to the communication, inform the communicator of this rule, and advise him that if he has anything to say it should be said in writing with copies to all parties. Any such Board agent who receives, or who makes or knowingly causes to be made, an unauthorized ex parte communication shall place or cause to be placed on the public record of the proceeding:

(1) The communication, if it was written,

(2) A memorandum stating the substance of the communication, if it was oral,

(3) All written responses to the prohibited communication, and

(4) Memoranda stating the substance of all oral responses to the prohibited communication.

(b) The executive secretary, if the proceeding is then pending before the Board, the administrative law judge, if the proceeding is then pending before any such judge, or the regional director, if the proceeding is then pending before a hearing officer or the regional director, shall serve copies of all such materials placed on the public record of the proceeding on all other parties to the proceeding and on the attorneys of record for the parties. Within 14 days after the mailing of such copies, any party may file with the executive secretary, administrative law judge, or regional director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the prohibited communication. All such responses shall be placed in the public record of the proceeding, and provision may be made for any further action, including reopening of the record which may be required under the circumstances. No action taken pursuant to this provision shall constitute a waiver of the power of the Board to impose an appropriate penalty under §102.133.

§ 102.133 Penalties and enforcement.

(a) Where the nature and circumstances of a prohibited communication made by or caused to be made by a party to the proceeding are such that the interests of justice and statutory policy may require remedial action, the Board, administrative law judge, or regional director, as the case may be, may issue to the party making the communication a notice to show cause, returnable before the Board within a stated period not less than 7 days from the date thereof, why the Board should not determine that the interests of justice and statutory policy require that the claim or interest...
§ 102.135 Employment-management agreements.

(a) Employment-management agreements. All matters within the jurisdiction of the National Labor Relations Board pursuant to the Postal Reorganization Act (chapter 12 of title 39, U.S. Code, as revised) shall be governed by the provisions of subparts A, B, C, D, F, G, I, J, K, L, M, O, and P of the rules and regulations insofar as applicable.

(b) Inconsistencies. To the extent that any provision of this subpart Q is inconsistent with any provision of title 39, United States Code, the provision of said title 39 shall govern.

(c) Exceptions. For the purposes of this subpart, references in the subparts of the rules and regulations cited above to (1) employer shall be deemed to include the Postal Service, (2) Act shall in the appropriate context mean “Postal Reorganization Act,” (3) section 9(c) of the Act and cited paragraphs thereof shall mean “39 U.S.C. secs. 1203(c) and 1204,” and (4) section 9(b) of the Act shall mean “39 U.S.C. sec. 1202.”

[36 FR 12532, July 1, 1971]

Subpart R—Advisory Committees

§ 102.136 Establishment and utilization of advisory committees.

Advisory committees may from time to time be established or utilized by the agency in the interest of obtaining advice or recommendations on issues of concern to the agency. The establishment, utilization, and functioning of such committees shall be in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. app. I, sections 1–15, and Office of Management and Budget Circular A–63 (rev. March 27, 1975), Advisory Committee Management Guidance, 39 FR 12389–12391, to the extent applicable.


[40 FR 59728, Dec. 30, 1975]
§ 102.138 Definition of meeting.
For purposes of this subpart, *meeting* shall mean the deliberations of at least three members of the full Board, or the deliberations of at least two members of any group of three Board members to whom the Board has delegated powers which it may itself exercise, where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations to determine whether a meeting should be closed to public observation in accordance with the provisions of this subpart.

§ 102.139 Closing of meetings; reasons therefor.
(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, shall not be open to public observation where the deliberations concern the issuance of a subpoena, the Board’s participation in a civil action or proceeding or an arbitration, or the initiation, conduct or disposition by the Board of particular representation or unfair labor practice proceedings under sections 8, 9, or 10 of the Act, or any court proceedings collateral or ancillary thereto.

(b) Meetings, or portions thereof, may also be closed by the Board, except where it determines that the public interest requires otherwise, when the deliberations concern matters or information falling within the reasons for closing meetings specified in 5 U.S.C. 552b(c)(1) (secret matters concerning national defense or foreign policy); (c)(2) (internal personnel rules and practices); (c)(3) (matters specifically exempted from disclosure by statute); (c)(4) (privileged or confidential trade secrets and commercial or financial information); (c)(5) (matters of alleged criminal conduct or formal censure); (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy); (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes); or (c)(9)(B) (disclosure would significantly frustrate implementation of a proposed agency action).

§ 102.140 Action necessary to close meetings; record of votes.
A meeting shall be closed to public observation under § 102.139, only when a majority of the members of the Board who will participate in the meeting vote to take such action.

(a) When the meeting deliberations concern matters specified in § 102.139(a), the Board members shall vote at the beginning of the meeting, or portion thereof, on whether to close such meeting, or portion thereof, to public observation, and on whether the public interest requires that a meeting which may properly be closed should nevertheless be open to public observation. A record of such vote, reflecting the vote of each member of the Board, shall be kept and made available to the public at the earliest practicable time.

(b) When the meeting deliberations concern matters specified in § 102.139(b), the Board shall vote on whether to close such meeting, or portion thereof, to public observation, and on whether there is a public interest which requires that a meeting which may properly be closed should nevertheless be open to public observation. The vote shall be taken at a time sufficient to permit inclusion of information concerning the open or closed status of the meeting in the public announcement thereof. A single vote may be taken with respect to a series of meetings at which the deliberations will concern the same particular matters where such subsequent meetings are scheduled to be held within thirty days after the initial meeting. A record of such vote, reflecting the vote of each member of the Board, shall be kept and made available to the public within one day after the vote is taken.

(c) Whenever any person whose interests may be directly affected by deliberations during a meeting, or a portion thereof, requests that the Board close that meeting, or portion thereof, to public observation for any of the reasons specified in 5 U.S.C. 552b(c)(5) (matters of alleged criminal conduct or formal censure), (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy), or (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes), the Board shall consider the request and take appropriate action in accordance with this section.
§ 102.141 Notice of meetings; public announcement and publication.

(a) A public announcement setting forth the time, place and subject matter of meetings or portions thereof closed to public observation pursuant to the provisions of §102.139(a) of this part, shall be made at the earliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of §102.139(a) of this part, the agency shall make public announcement of each meeting to be held at least 7 days before the scheduled date of the meeting. The announcement shall specify the time, place and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address, and phone number of an agency official designated to respond to requests for information about the meeting. The 7 day period for advance notice may be shortened only upon a determination by a majority of the members of the Board who will participate in the meeting that agency business requires that such meeting be called at an earlier date, in which event the public announcements shall be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date shall be kept and made available to the public.

(d) After public announcement of a meeting as provided in §102.141 of this part, a meeting, or portion thereof, announced as closed may be opened, or a meeting, or portion thereof, announced as open may be closed, only if a majority of the members of the Board who will participate in the meeting determine by a recorded vote that Board business so requires and that an earlier announcement of the change was not possible. The change made and the vote of each member of the Board on the change shall be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to §102.139, the solicitor of the Board shall certify that in his or her opinion the meeting may properly be closed to public observation. The certification shall set forth each applicable exemptive provision for such closing. Such certification shall be retained by the agency and made publicly available as soon as practicable.

§ 102.142 Notice of public announcement.

(a) A public announcement setting forth the time, place and subject matter of meetings or portions thereof closed to public observation pursuant to the provisions of §102.139(a) of this part, shall be made at the earliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of §102.139(a) of this part, the agency shall make public announcement of each meeting to be held at least 7 days before the scheduled date of the meeting. The announcement shall specify the time, place and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address, and phone number of an agency official designated to respond to requests for information about the meeting. The 7 day period for advance notice may be shortened only upon a determination by a majority of the members of the Board who will participate in the meeting that agency business requires that such meeting be called at an earlier date, in which event the public announcement shall be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date shall be kept and made available to the public.

(c) Within one day after a vote to close a meeting, or any portion thereof, pursuant to the provisions of §102.139(b) of this part, the agency shall make publicly available a full written explanation of its action closing the meeting, or portion thereof, together with a list of all persons expected to attend the meeting and their affiliation.

(d) If after public announcement required by paragraph (b) of this section the time and place of the meeting are changed, a public announcement shall be made at the earliest practicable time. The subject matter of the meeting may be changed after the public announcement only if a majority of the members of the Board who will participate in the meeting determine that agency business so requires and that no earlier announcement of the change was possible. When such a change in subject matter is approved a public announcement of the change shall be made at the earliest practicable time. A record of the vote to change the subject matter of the meeting shall be kept and made available to the public.

(e) All announcements or changes thereto issued pursuant to the provisions of paragraphs (b) and (d) of this section, or pursuant to the provisions of §102.140(d), shall be submitted for publication in the FEDERAL REGISTER immediately following their release to the public.

(f) Announcements of meetings made pursuant to the provisions of this section shall be made publicly available by the executive secretary.
§ 102.142 Transcripts, recordings or minutes of closed meetings; public availability; retention.

(a) For every meeting or portion thereof closed under the provisions of §102.139 of this part, the presiding officer shall prepare a statement setting forth the time and place of the meeting and the persons present, which statement shall be retained by the agency. For each such meeting or portion thereof there shall also be maintained a complete transcript or electronic recording of the proceedings, except that for meetings closed pursuant to §102.139(a) the Board may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reasons thereof and views thereon, documents considered, and the members' vote on each roll call vote.

(b) The agency shall make promptly available to the public copies of transcripts, recordings or minutes maintained as provided in accordance with paragraph (a) of this section, except to the extent the items therein contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552(c). Copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, shall to the extent determined to be publicly available, be furnished to any person, subject to the payment of duplication costs in accordance with the schedule of fees set forth in §102.117(c)(2)(iv), and the actual cost of transcription.

(c) The agency shall maintain a complete verbatim copy of the transcript, a complete electronic recording, or a complete set of the minutes for each meeting or portion thereof closed to the public, for a period of at least one year after the close of the agency proceeding of which the meeting was a part, but in no event for a period of less than two years after such meeting.

Subpart T—Awards of Fees and Other Expenses

§ 102.143 “Adversary adjudication” defined; entitlement to award; eligibility for award.

(a) The term adversary adjudication, as used in this subpart, means unfair labor practice proceedings pending before the Board on complaint and backpay proceedings under §§102.52 to 102.59 of these rules pending before the Board on notice of hearing at any time after October 1, 1984.

(b) A respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of fees and other expenses allowable under the provisions of §102.145 of these rules.

(c) Applicants eligible to receive an award are as follows:

1. An individual with a net worth of not more than $2 million;
2. The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;
3. A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;
4. A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and
5. Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(d) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding.

(e) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of unincorporated business” if the issues on which the applicant prevails are related primarily to personal
§ 102.144 Standards for awards.

(a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel’s position in the proceeding was substantially justified.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award unjust.


§ 102.145 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the attorney or agent fees under these rules may exceed $75.00 per hour. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the following matters shall be considered:

(1) If the attorney, agent or expert witness is in practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding; and

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of an applicant may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant’s case.

§ 102.146 Rulemaking on maximum rates for attorney or agent fees.

Any person may file with the Board a petition under §102.124 of these rules for rulemaking to increase the maximum rate for attorney or agent fees.
The petition should specify the rate the petitioner believes should be established and explain fully why the higher rate is warranted by an increase in the cost of living or a special factor (such as the limited availability of qualified attorneys or agents for the proceedings involved).

§ 102.147 Contents of application; net worth exhibit; documentation of fees and expenses.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the adversary adjudication for which an award is sought. The application shall state the particulars in which the applicant has prevailed and identify the positions of the General Counsel in that proceeding that the applicant alleges were not substantially justified. Unless the applicant is an individual, the application shall also state the number, category, and work location of employees of the applicant and its affiliates and describe briefly the type and purpose of its organization or business.

(b) The application shall include a statement that the applicant’s net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant’s belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this Agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true.

(f) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant’s and its affiliates’ assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge may require an applicant to file such additional information as may be required to determine its eligibility for an award.

(g)(1) Unless otherwise directed by the administrative law judge, the net worth exhibit will be included in the public record of the fee application proceeding. An applicant that objects to public disclosure of information in any portion of the exhibit may submit that portion of the exhibit in a sealed envelope labeled “Confidential Financial Information”, accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why public disclosure of the information would adversely affect the applicant and why disclosure is not required in the public interest. The exhibit shall be served on the General Counsel but need not be served on any other party to the proceeding. If the administrative law judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding.

(2) If the administrative law judge grants the motion to withhold from public disclosure, the exhibit shall remain sealed, except to the extent that its contents are required to be disclosed at a hearing. The granting of the motion to withhold from public disclosure shall not be determinative of the
availability of the document under the Freedom of Information Act in response to a request made under the provisions of §102.117. Notwithstanding that the exhibit may be withheld from public disclosure, the General Counsel may disclose information from the exhibit to others if required in the course of an investigation to verify the claim of eligibility.

(h) The application shall be accompanied by full documentation of the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the dates and the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.


§ 102.149 Filing of documents; service of documents; motions for extension of time.

(a) All motions and pleadings after the time the case is referred by the Board to the administrative law judge until the issuance of the judge’s decision shall be filed with the administrative law judge in triplicate together with proof of service. Copies of all documents filed shall be served on all parties to the adversary adjudication.

(b) Motions for extensions of time to file motions, documents, or pleadings permitted by §102.150 or by §102.152 shall be filed with the chief administrative law judge in Washington, D.C., the associate chief judge in San Francisco, California, the associate chief judge in New York, New York, or the associate chief judge in Atlanta, Georgia, as the case may be, not later than 3 days before the due date of the document. Notice of the request shall be
immediately served on all other parties and proof of service furnished.

§ 102.150 Answer to application; reply to answer; comments by other parties.

(a) Within 35 days after service of an application the general counsel may file an answer to the application. Unless the general counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file a timely answer may be treated as a consent to the award requested. The filing of a motion to dismiss the application shall stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. Within 21 days after service of any motion to dismiss, the applicant shall file a response thereto. Review of an order granting a motion to dismiss an application in its entirety may be obtained by filing a request therefor with the Board in Washington, DC, pursuant to § 102.27 of these rules.

(b) If the General Counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate toward a settlement. The filing of such a statement shall extend the time for filing an answer for an additional 35 days.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the General Counsel’s position. If the answer is based on alleged facts not already in the record of the adversary adjudication supporting affidavits shall be provided or a request made for further proceedings under § 102.152.

(d) Within 21 days after service of an answer, the applicant may file a reply. If the reply is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits shall be provided or a request made for further proceedings under § 102.152.

(e) Any party to an adversary adjudication other than the applicant and the general counsel may file comments on a fee application within 35 days after it is served and on an answer within 21 days after it is served. A commenting party may not participate further in the fee application proceeding unless the administrative law judge determines that such participation is required in order to permit full exploration of matters raised in the comments.

§ 102.151 Settlement.

The applicant and the General Counsel may agree on a proposed settlement of the award before final action on the application. If a prevailing party and the General Counsel agree on a proposed settlement of an award before an application has been filed, the proposed settlement shall be filed with the application. All such settlements shall be subject to approval by the Board.

§ 102.152 Further proceedings.

(a) Ordinarily the determination of an award will be made on the basis of the documents in the record. The administrative law judge, however, upon request of either the applicant or the General Counsel, or on his or her own initiative, may order further proceedings, including an informal conference, oral argument, additional written submissions or an evidentiary hearing. An evidentiary hearing shall be held only when necessary for resolution of material issues of fact.

(b) A request that the administrative law judge order further proceedings under this section shall specifically identify the disputed issues and the evidence sought to be adduced, and shall explain why the additional proceedings are necessary to resolve the issues.

(c) An order of the administrative law judge scheduling further proceedings shall specify the issues to be considered.

(d) Any evidentiary hearing held pursuant to this section shall be open to the public and shall be conducted in accordance with §§ 102.30 to 102.44 of these rules, except §§ 102.33, 102.34 and 102.38.

(e) Rulings of the administrative law judge shall be reviewable by the Board only in accordance with the provisions of § 102.26.
§ 102.153 Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case.

(a) Upon conclusion of proceedings under §§102.147 to 102.152, the administrative law judge shall prepare a decision. The decision shall include written findings and conclusions as necessary to dispose of the application. The administrative law judge shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties. Service of the administrative law judge's decision and of the order transferring the case to the Board shall be complete upon mailing.

(b) The record in a proceeding on an application for an award of fees and expenses shall include the application and any amendments or attachments thereto, the net worth exhibit, the answer and any amendments or attachments thereto, any reply to the answer, any comments by other parties, motions, rulings, orders, stipulations, written submissions, the stenographic transcript of any oral argument, the stenographic transcript of any hearing, exhibits and depositions, together with the administrative law judge's decision and of the order transferring the case to the Board shall be complete upon mailing.

§ 102.154 Exceptions to administrative law judge's decision; briefs; action of Board.

Procedures before the Board, including the filing of exceptions to the administrative law judge’s decision and briefs, and action by the Board, shall be in accordance with §§102.46, 102.47, 102.48 and 102.50 of these rules. The Board will issue a decision on the application or remand the proceeding to the administrative law judge for further proceedings.

§ 102.155 Payment of award.

To obtain payment of an award made by the Board the applicant shall submit to the Director, Division of Administration, a copy of the Board’s final decision granting the award, accompanied by a statement that the applicant will not seek court review of the decision. If such statement is filed the Agency will pay the amount of the award within 60 days, unless judicial review of the award or of the underlying decision has been sought.

Subpart U—Debt-Collection Procedures by Administrative Offset


§ 102.156 Administrative offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the administrative offset procedures set forth in the Debt Collection Act of 1982 (Pub. L. 97–365), 31 U.S.C. 3716.

§ 102.157 Definitions.

(a) The term administrative offset means the withholding of money payable by the United States to, or held by the United States on behalf of, a person to satisfy a debt owed the United States by that person.

(b) The term debtor is any person against whom the Board has a claim.

(c) The term person does not include any agency of the United States, or any state or local government.

(d) The terms claim and debt are synonymous and interchangeable. They refer to an amount of money or property which has been determined by an appropriate Agency official to be owed to the United States from any person, organization, or entity, except another Federal agency.

(e) A debt is considered delinquent if it has not been paid by the date specified in the Agency’s initial demand letter (§102.161), unless satisfactory payment arrangements have been made by that date, or if, at any time thereafter,
the debtor fails to satisfy his obligations under a payment agreement with the Agency.

§ 102.158 Agency requests for administrative offsets and cooperation with other Federal agencies.

Unless otherwise prohibited by law, the Agency may request that monies due and payable to a debtor by another Federal agency be administratively offset in order to collect debts owed the Agency by the debtor. In requesting an administrative offset, the Agency will provide the other Federal agency holding funds of the debtor with written certification stating:

(a) That the debtor owes the Board a debt (including the amount of debt); and

(b) That the Agency has complied with the applicable Federal Claims Collection Standards, including any hearing or review.

§ 102.159 Exclusions.

(a)(1) The Agency is not authorized by the Debt Collection Act of 1982 (31 U.S.C. 3716) to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) When a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(2) No claim that has been outstanding for more than 10 years after the Board’s right to collect the debt first accrued may be collected by means of administrative offset, unless facts material to the right to collect the debt were not known and could not reasonably have been known by the official of the Agency who was charged with the responsibility to discover and collect such debts until within 10 years of the initiation of the collection action. A determination of when the debt first accrued should be made according to existing laws regarding the accrual of debts, such as under 28 U.S.C. 2415. Unless otherwise provided by contract or law, debts or payments owed the Board which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority, pursuant to this paragraph or Board regulations established pursuant to such other statutory authority.

(b) Collection by offset against a judgment obtained by a debtor against the United States shall be accomplished in accordance with 31 U.S.C. 3728.

§ 102.160 Agency responsibilities.

(a) The Agency shall provide appropriate written or other guidance to Agency officials in carrying out this subpart, including the issuance of guidelines and instructions, which may be deemed appropriate. The Agency shall also take such administrative steps as may be appropriate to carry out the purposes and ensure the effective implementation of this subpart.

(b) Before collecting a claim by means of administrative offset, the Agency must ensure that administrative offset is feasible, allowable and appropriate, and must notify the debtor of the Agency’s policies for collecting a claim by means of administrative offset.

(c) Whether collection by administrative offset is feasible is a determination to be made by the Agency on a case-by-case basis, in the exercise of sound discretion. The Agency shall consider not only whether administrative offset can be accomplished, both practically and legally, but also whether administrative offset will further and protect the best interests of the United States Government. In appropriate circumstances, the Agency may give due consideration to the debtor’s financial condition, and it is not expected that administrative offset will be used in every available instance, particularly where there is another readily available source of funds. The Agency may also consider whether administrative offset would substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated.

(d) Administrative offset shall be considered by the Agency only after attempting to collect a claim under 31 U.S.C. 3711(a).
§ 102.161 Notification.

(a) The Agency shall send a written demand to the debtor in terms which inform the debtor of the consequences of failure to cooperate. In the demand letter, the Agency shall provide the name of an Agency employee who can provide a full explanation of the claim. When the Agency deems it appropriate to protect the Government’s interests (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand may be preceded by other appropriate actions.

(b) In accordance with guidelines established by the Agency, the Agency official responsible for collection of the debt shall send written notice to the debtor, informing such debtor as appropriate:

1. Of the nature and amount of the Board’s claim;
2. Of the date by which payment is to be made (which normally should be not more than 30 days from the date that the initial notification was mailed or hand delivered);
3. Of the Agency’s intention to collect by administrative offset and of the debtor’s rights in conjunction with such an offset;
4. That the Agency intends to collect, as appropriate, interest, penalties, administrative costs and attorneys fees;
5. Of the rights of such debtor to a full explanation of the claim, of the opportunity to inspect and copy Agency records with respect to the claim and to dispute any information in the Agency’s records concerning the claim;
6. Of the debtor’s right to administrative appeal or review within the Agency concerning the Agency’s claim and how such review shall be obtained;
7. Of the debtor’s opportunity to enter into a written agreement with the Agency to repay the debt; and
8. Of the date on which, or after which, an administrative offset will begin.

§ 102.162 Examination and copying of records related to the claim; opportunity for full explanation of the claim.

Following receipt of the demand letter specified in §102.161, and in conformity with Agency guidelines governing such requests, the debtor may request to examine and copy publicly available records pertaining to the debt, and may request a full explanation of the Agency’s claim.

§ 102.163 Opportunity for repayment.

(a) The Agency shall afford the debtor the opportunity to repay the debt or enter into a repayment plan which is agreeable to the Agency and is in a written form signed by such debtor. The Agency may deem a repayment plan to be abrogated if the debtor should, after the repayment plan is signed, fail to comply with the terms of the plan.

(b) The Agency has discretion and should exercise sound judgment in determining whether to accept a repayment agreement in lieu of administrative offset.

§ 102.164 Review of the obligation.

(a) The debtor shall have the opportunity to obtain review by the Agency of the determination concerning the existence or amount of the debt as set forth in the notice. In cases where the amount of the debt has been fully liquidated, the review is limited to ensuring that the liquidated amount is correctly represented in the notice.

(b) The debtor seeking review shall make the request in writing to the Agency, not more than 15 days from the date the demand letter was received by the debtor. The request for review shall state the basis for challenging the determination. If the debtor alleges that the Agency’s information relating to the debt is not accurate, timely, relevant or complete, the debtor shall provide information or documentation to support this allegation.

(c) The Agency may effect an administrative offset against a payment to be made to a debtor prior to the completion of the due process procedures required by this subpart, if failure to take the offset would substantially prejudice the Agency’s ability to collect the debt; for example, if the time before the payment is to be made would not reasonably permit the completion of due process procedures.
must be promptly followed by the completion of those procedures. Amounts recovered by administrative offset, but later found not owed to the Agency, will be promptly refunded.

(d) Upon completion of the review, the Agency’s reviewing official shall transmit to the debtor the Agency’s decision. If appropriate, this decision shall inform the debtor of the scheduled date on or after which administrative offset will begin. The decision shall also, if appropriate, indicate any changes in information to the extent such information differs from that provided in the initial notification to the debtor under §102.161.

(e) Nothing in this subpart shall preclude the Agency from sua sponte reviewing the obligation of the debtor, including a reconsideration of the Agency’s determination concerning the debt, and the accuracy, timeliness, relevance, and completeness of the information on which the debt is based.

§ 102.165 Cost shifting. Costs incurred by the Agency in connection with referral of debts for administrative offset will be added to the debt and thus increase the amount of the offset. Such costs may include administrative costs and attorneys fees.

§ 102.166 Additional administrative collection action. Nothing contained in this subpart is intended to preclude the Agency from utilizing any other administrative or legal remedy which may be available.

§ 102.167 Prior provision of rights with respect to debt. To the extent that the rights of the debtor in relation to the same debt have been previously provided for under some other statutory or regulatory authority, the Agency is not required to duplicate those efforts before effecting administrative offset.

Subpart V—Debt Collection Procedures By Federal Income Tax Refund Offset

§ 102.168 Federal income tax refund offset; purpose and scope. The regulations in this subpart specify the Agency procedures that will be followed in order to implement the Federal income tax refund offset procedures set forth in 26 U.S.C. 6402(d) of the Internal Revenue Code (Code), 31 U.S.C. 3720A, and 301.6402–6 of the Treasury Regulations on Procedure and Administration (26 CFR 301.6402–6).

This statute and the implementing regulations of the Internal Revenue Service (IRS) at 26 CFR 301.6402–6 authorize the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States. The regulations apply to past-due legally enforceable debts owed to the Agency by individuals and business entities. The regulations are not intended to limit or restrict debtor access to any judicial remedies to which he or she may otherwise be entitled.

§ 102.169 Definitions.

(a) Tax refund offset refers to the IRS income tax refund offset program operated under authority of 31 U.S.C. 3720A.

(b) Past-due legally enforceable debt is a delinquent debt administratively determined to be valid, whereon no more than 10 years have lapsed since the date of delinquency (unless reduced to judgment), and which is not discharged under a bankruptcy proceeding or subject to an automatic stay under 11 U.S.C. 362.

(c) Individual refers to a taxpayer identified by a social security number (SSN).

(d) Business entity refers to an entity identified by an employer identification number (EIN).

(e) Taxpayer mailing address refers to the debtor’s current mailing address as obtained from IRS.

(f) Memorandum of understanding refers to the agreement between the Agency and IRS outlining the duties and responsibilities of the respective parties for participation in the tax refund offset program.

Source: 62 FR 55166, Oct. 23, 1997, unless otherwise noted.
§ 102.170 Agency referral to IRS for tax referral effect; Agency responsibilities.

(a) As authorized and required by law, the Agency may refer past-due legally enforceable debts to the Internal Revenue Service (IRS) for collection by offset from any overpayment of income tax that may otherwise be due to be refunded to the taxpayer. By the date and in the manner prescribed by the IRS, the Agency may refer for tax refund offset past-due legally enforceable debts. Such referrals shall include the following information:

1. Whether the debtor is an individual or a business entity;
2. The name and taxpayer identification number (SSN or EIN) of the debtor who is responsible for the debt;
3. The amount of the debt;
4. A designation that the Agency is referring the debt and (as appropriate) Agency account identifiers.

(b) The Agency will ensure the confidentiality of taxpayer information as required by IRS in its Tax Information Security Guidelines.

(c) As necessary, the Agency will submit updated information at the times and in the manner prescribed by IRS to reflect changes in the status of debts or debtors referred for tax refund offset.

(d) Amounts erroneously offset will be refunded by the Agency or IRS in accordance with the Memorandum of Understanding.

§ 102.171 Cost shifting.

Costs incurred by the Agency in connection with referral of debts for tax refund offset will be added to the debt and thus increase the amount of the offset. Such costs may include administrative costs and attorneys fees.

§ 102.172 Minimum referral amount.

The minimum amount of a debt otherwise eligible for Agency referral to the IRS is $25 for individual debtors and $100 for business debtors. The amount referred may include the principal portion of the debt, as well as any accrued interest, penalties, administrative cost charges, and attorney fees.

§ 102.173 Relation to other collection efforts.

(a) Tax refund offset is intended to be an administrative collection remedy to be utilized consistent with IRS requirements for participation in the program, and the costs and benefits of pursuing alternative remedies when the tax refund offset program is readily available. To the extent practical, the requirements of the program will be met by merging IRS requirements into the Agency’s overall requirements for delinquent debt collection.

(b) As appropriate, debts of an individual debtor of $100 or more will be reported to a consumer or commercial credit reporting agency before referral for tax refund offset.

(c) Debts owed by individuals will be screened for administrative offset potential using the most current information reasonably available to the Agency, and will not be referred for tax refund offset where administrative offset potential is found to exist.

§ 102.174 Debtor notification.

(a) The Agency shall send appropriate written demand to the debtor in terms which inform the debtor of the consequences of failure to repay debts or claims owed the Board.

(b) Before the Agency refers a debt to IRS for tax refund offset, it will make a reasonable attempt to notify the debtor that:

1. The debt is past-due;
2. Unless the debt is repaid or a satisfactory repayment agreement is established within 60 days thereafter, the debt will be referred to IRS for offset from any overpayment of tax remaining after taxpayer liabilities of greater priority have been satisfied; and
3. The debtor will have a minimum of 60 days from the date of notification to present evidence that all or part of the debt is not past due or legally enforceable, and the Agency will consider this evidence in a review of its determination that the debt is past due and legally enforceable. The debtor will be advised where and to whom evidence is to be submitted.

(c) The Agency will make a reasonable attempt to notify the debtor by
using the most recent address information available to the Agency or obtained from the IRS, unless written notification to the Agency is received from the debtor stating that notices from the Agency are to be sent to a different address.

(d) The notification required by paragraph (b) of this section and sent to the address specified in paragraph (c) of this section may, at the option of the Agency, be incorporated into demand letters required by paragraph (a) of this section.

§ 102.175 Agency review of the obligation.

(a) The Agency official responsible for collection of the debt will consider any evidence submitted by the debtor as a result of the notification required by §102.174 and notify the debtor of the result. If appropriate, the debtor will also be advised where and to whom to request a review of any unresolved dispute.

(b) The debtor will be granted 30 days from the date of the notification required by paragraph (a) of this section to request a review of the determination of the Agency official responsible for collection of the debt on any unresolved dispute. The debtor will be advised of the result.

§ 102.176 Prior provision of rights with respect to debt.

To the extent that the rights of the debtor in relation to the same debt have been previously provided under some other statutory or regulatory authority, including administrative offset procedures set forth in subpart U, the Agency is not required to duplicate those efforts before referring a debt for tax refund offset.

Subpart W—Misconduct by Attorneys or Party Representatives

§ 102.177 Exclusion from hearings; Refusal of witness to answer questions; Misconduct by attorneys and party representatives before the Agency; Procedures for processing misconduct allegations.

(a) Any attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.

(b) Misconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the administrative law judge, hearing officer, or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the administrative law judge or hearing officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

(e) All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, shall be handled in accordance with the following procedures:

(1) Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph, shall be the Associate General Counsel, Division of Operations-Management, or his/her designee.

(2) The Investigating Officer or his/her designee shall conduct such investigation as he/she deems appropriate and shall have the usual powers of investigation provided in Section 11 of the Act. Following the investigation, the Investigating Officer shall make a
recommendation to the General Counsel, who shall make the determination whether to institute disciplinary proceedings against the attorney or party representative. The General Counsel's authority to make this determination shall not be delegable to the Regional Director or other personnel in the Regional Office. If the General Counsel determines not to institute disciplinary proceedings, all interested persons shall be notified of the determination, which shall be final.

(3) If the General Counsel decides to institute disciplinary proceedings against the attorney or party representative, the General Counsel or his/her designee shall serve the Respondent with a complaint which shall include: a statement of the acts which are claimed to constitute misconduct including the approximate date and place of such acts together with a statement of the discipline recommended; notification of the right to a hearing before an administrative law judge with respect to any material issues of fact or mitigation; and an explanation of the method by which a hearing may be requested. Such a complaint shall not be issued until the Respondent has been notified of the allegations in writing and has been afforded a reasonable opportunity to respond.

(4) Within 14 days of service of the disciplinary complaint, the respondent shall file an answer admitting or denying the allegations, and may request a hearing. If no answer is filed or no material issue of fact or relevant to mitigation; and an explanation of the method by which a hearing may be requested. A complaint shall not be issued until the Respondent has been notified of the alleged misconduct.

(5) The hearing shall be conducted at a reasonable time, date, and place. In setting the hearing date, the administrative law judge shall give due regard to the respondent's need for time to prepare an adequate defense and the need of the Agency and the respondent for an expeditious resolution of the allegations.

(7) The hearing shall be public unless otherwise ordered by the Board or the administrative law judge.

(8) Any person bringing allegations of misconduct or filing a petition for disciplinary proceedings against an attorney or party representative shall be given notice of the scheduled hearing. Any such person shall not be a party to the disciplinary proceeding, however, and shall not be afforded the rights of a party to call, examine or cross-examine witnesses and introduce evidence at the hearing, to file exceptions to the administrative law judge's decision, or to appeal the Board's decision.

(9) The respondent will, upon request, be provided with an opportunity to read the transcript or listen to a recording of the hearing.

(10) The General Counsel must establish the alleged misconduct by a preponderance of the evidence.

(11) At any stage of the proceeding prior to hearing, the respondent may submit a settlement proposal to the General Counsel, who may approve the settlement or elect to continue with the proceedings. Any formal settlement reached between the General Counsel and the respondent, providing for entry of a Board order reprimanding, suspending, disbarring or taking other disciplinary action against the respondent, shall be subject to final approval by the Board. In the event any settlement, formal or informal, is reached after opening of the hearing, such settlement must be submitted to the administrative law judge for approval. In the event the administrative law judge rejects the settlement, either the General Counsel or the respondent may appeal such ruling to the Board as provided in §102.26.

(12) If it is found that the respondent has engaged in misconduct in violation of paragraph (d) of this section, the Board may issue a final order imposing such disciplinary sanctions as it deems appropriate, including, where the misconduct is of an aggravated character, suspension and/or disbarment from practice before the Agency, and/or other sanctions.
National Labor Relations Board

(f) Any person found to have engaged in misconduct warranting disciplinary sanctions under paragraph (d) of this section may seek judicial review of the administrative determination.

[61 FR 65331, Dec. 12, 1996]

Subpart X—Special Procedures When the Board Lacks a Quorum

SOURCE: 76 FR 77700, Dec. 14, 2011, unless otherwise noted.

§ 102.178 Normal operations should continue.

The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.

§ 102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, all motions for default judgment, summary judgment, or dismissal filed or pending pursuant to §102.50 of this part shall be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, shall not be appealed directly to the Board, but shall be considered by the Board if such matters are raised by a party in its request for review or exceptions.

§ 102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, any request for special permission to appeal filed or pending pursuant to §102.26 of this part shall be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, shall not be appealed directly to the Board, but shall be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46 of this part.

§ 102.181 Administrative and procedural requests referred to Executive Secretary.

During any period when the Board lacks a quorum, administrative and procedural requests that would normally be filed with the Office of the Executive Secretary for decision by the Board prior to the filing of a request for review under §102.67 of this part, or exceptions under §§102.46 and 102.69 of this part, shall be referred to the Executive Secretary for ruling. Such rulings by the Executive Secretary, and orders in connection therewith, shall not be appealed directly to the Board, but shall be considered by the Board if such matters are raised by a party in its request for review or exceptions.

§ 102.182 Representation cases should be processed to certification.

During any period when the Board lacks a quorum, the second proviso of §102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

[76 FR 82133, Dec. 30, 2011]

APPENDIX A TO PART 102—NLRB OFFICIAL OFFICE HOURS

NLRB Headquarters,
Business Hours (Local Time):
Washington, DC .......... 8:30 a.m.–5 p.m.
Division of Judges, Business Hours (Local Time):
Washington, DC .......... 8:30 a.m.–5 p.m.
San Francisco .......... 8:30 a.m.–5 p.m.
New York .......... 8:30 a.m.–5 p.m.
Atlanta ................. 8 a.m.–4:30 p.m.
Regional Office Business Hours (Local Time):
1—Boston .......... 8:30 a.m.–5 p.m.
2—New York .... 8:45 a.m.–5:15 p.m.
3—Buffalo .......... 8:30 a.m.–5 p.m.
Albany ................. 8:30 a.m.–5 p.m.
4—Philadelphia .... 8:30 a.m.–5 p.m.
5—Baltimore .......... 8:15 a.m.–4:45 p.m.
Subpart C—Appropriate Bargaining Units

103.30 Appropriate bargaining units in the health care industry.

Subpart E [Reserved]

Subpart F—Remedial Orders

103.100 Offers of reinstatement to employees in Armed Forces.


Subpart A—Jurisdictional Standards

§ 103.1 Colleges and universities.

The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million.

[35 FR 18370, Dec. 3, 1970]

§ 103.2 Symphony orchestras.

The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any symphony orchestra which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million.

[38 FR 6177, Mar. 7, 1973]

§ 103.3 Horseracing and dogracing industries.

The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries.

[38 FR 9607, Apr. 17, 1973]

Subpart B—Election Procedures

§ 103.20 Election procedures and blocking charges; filing of blocking charges; simultaneous filing of offer of proof; prompt furnishing of witnesses.

Whenever any party to a representation proceeding files an unfair labor
practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness’s anticipated testimony. The party seeking to block the processing of a petition shall also promptly make available to the regional director the witnesses identified in its offer of proof. If the regional director determines that the party’s offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.

[79 FR 74490, Dec. 15, 2014]

Subpart C—Appropriate Bargaining Units

§ 103.30 Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.
(2) All physicians.
(3) All professionals except for registered nurses and physicians.
(4) All technical employees.
(5) All skilled maintenance employees.
(6) All business office clerical employees.
(7) All guards.
(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, as nearly as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) Hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) Acute care hospital is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term “acute care hospital” shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term
§ 103.100 Offers of reinstatement to employees in Armed Forces.

When an employer is required by a Board remedial order to offer an employee employment, reemployment, or reinstatement, or to notify an employee of his or her entitlement to reinstatement upon application, the employer shall, if the employee is serving in the Armed Forces of the United States at the time such offer or notification is made, also notify the employee of his or her right to reinstatement upon application in accordance with the Military Selective Service Act of 1967, as amended, after discharge from the Armed Forces.


PART 104—NOTIFICATION OF EMPLOYEE RIGHTS; OBLIGATIONS OF EMPLOYERS (effective date delayed indefinitely)

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec. 104.201 What definitions apply to this part?
104.202 What employee notice must employers subject to the NLRA post in the workplace?
104.203 Are Federal contractors covered under this part?
104.204 What entities are not subject to this part?

APPENDIX TO SUBPART A—TEXT OF EMPLOYEE NOTICE

Subpart B—General Enforcement and Complaint Procedures

104.210 How will the Board determine whether an employer is in compliance with this part?
104.211 What are the procedures for filing a charge?
104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?
104.213 What remedies are available to cure a failure to post the employee notice?
104.214 How might other Board proceedings be affected by failure to post the employee notice?

Subpart C—Ancillary Matters

104.220 What other provisions apply to this part?


SOURCE: 76 FR 54046, Aug. 30, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 54046, Aug. 30, 2011 part 104 was added, effective November 14, 2011. At 76 FR 63188, Oct. 12, 2011, the effective date for part 104 was delayed to January 31, 2012. At 76 FR 82133, December 30, 2011, the effective date was further delayed to April 30, 2012. At 77 FR 25868, May 2, 2012, the effective date was delayed indefinitely.
§ 104.201 What definitions apply to this part?

Employee includes any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. However, it does not include agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act (45 U.S.C. 151 et seq.), or by any other person who is not an employer as defined in the NLRA. 29 U.S.C. 152(3).

Employee notice means the notice set forth in the Appendix to Subpart A of this part that employers subject to the NLRA must post pursuant to this part.

Employer includes any person acting as an agent of an employer, directly or indirectly. The term does not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Further, the term “employer” does not include entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. 152(5).

§ 104.202 What employee notice must employers subject to the NLRA post in the workplace?

(a) Posting of employee notice. All employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part.

(b) Size and form requirements. The notice to employees shall be at least 11 inches by 17 inches in size, and in such format, type size, and style as the Board shall prescribe. If an employer chooses to print the notice after downloading it from the Board’s Web site, the printed notice shall be at least 11 inches by 17 inches in size.

(c) Adaptation of language. The National Labor Relations Board may find that an Act of Congress, clarification of existing law by the courts or the Board, or other circumstances make modification of the employee notice necessary to achieve the purposes of this part. In such circumstances, the Board will promptly issue rules, regulations, or orders as are needed to ensure that all future employee notices contain appropriate language to achieve the purposes of this part.

(d) Physical posting of employee notice. The employee notice must be posted in conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. Where 20 percent or more of an employer’s workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language the employees speak. If an employer’s workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer’s option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.

(e) Obtaining a poster with the employee notice. A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Board, and may be obtained from the Board’s office, 1099 14th Street, NW., Washington, DC 20570, or from any of the Board’s regional, subregional, or resident offices. Addresses and telephone numbers of those offices may be found on the Board’s Web site at http://www.nlrb.gov. A copy of the poster in English and in languages other than English may also be downloaded from the Board’s Web site at http://www.nlrb.gov. Employers also may reproduce and use copies of the Board’s official poster, provided that the copies duplicate the official poster in size, content, format, and size and style of type. In addition, employers may use commercial services to provide the employee notice poster consolidated onto one poster with other Federally mandated labor and employment notices, so long as the consolidation does not alter the size, content, format, or size and style of type of the poster provided by the Board.

(f) Electronic posting of employee notice. (1) In addition to posting the required notice physically, an employer must also post the required notice on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means. An employer that customarily posts notices to employees about personnel rules or policies on an intranet or internet site will satisfy the electronic posting requirement by displaying prominently—i.e., no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board’s Web site, or a link to the Board’s Web site containing the poster. The link to the Board’s Web site must read, “Employee Rights under the National Labor Relations Act.”

(2) Where 20 percent or more of an employer’s workforce is not proficient in English and speaks a language other than English, the employer must provide notice as required in paragraph (f)(1) of this section in the language the employees speak. If an employer’s workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must provide the notice in each such language. The Board will provide translations of the link to the Board’s Web site for any employer that must or wishes to display the link on its Web site. If an employer requests from the Board a notice in a language in which it is not
available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.

§ 104.203 Are Federal contractors covered under this part?
Yes, Federal contractors are covered. However, contractors may comply with the provisions of this part by posting the notices to employees required under the Department of Labor’s notice-posting rule, 29 CFR part 471.

§ 104.204 What entities are not subject to this part?
(a) The following entities are excluded from the definition of “employer” under the National Labor Relations Act and are not subject to the requirements of this part:
(1) The United States or any wholly owned Government corporation;
(2) Any Federal Reserve Bank;
(3) Any State or political subdivision thereof;
(4) Any person subject to the Railway Labor Act;
(5) Any labor organization (other than when acting as an employer); or
(6) Anyone acting in the capacity of officer or agent of such labor organization.
(b) In addition, employers employing exclusively workers who are excluded from the definition of “employee” under § 104.201 are not covered by the requirements of this part.
(c) This part does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.
(d)(1) This part does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board’s discretionary jurisdiction standards. The most commonly applicable standards are:
(i) The retail standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.
(ii) The nonretail standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called “outflow”) or goods or services purchased by the employer from out of state (called “inflow”). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct—to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.
(2) There are other standards for miscellaneous categories of employers. These standards are based on the employer’s gross annual volume of business unless stated otherwise. These standards are listed in the Table to this section.

<table>
<thead>
<tr>
<th>Employer category</th>
<th>Jurisdictional standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amusement industry</td>
<td>$500,000.</td>
</tr>
<tr>
<td>Apartment houses, condominiums, cooperatives</td>
<td>$500,000.</td>
</tr>
<tr>
<td>Architects</td>
<td>Nonretail standard.</td>
</tr>
<tr>
<td>Art museums, cultural centers, libraries</td>
<td>$1 million.</td>
</tr>
<tr>
<td>Bandleaders</td>
<td>$1 million.</td>
</tr>
<tr>
<td>Cemeteries</td>
<td>$500,000.</td>
</tr>
<tr>
<td>Colleges, universities, other private schools</td>
<td>$1 million.</td>
</tr>
<tr>
<td>Communications (radio, TV, cable, telephone, telegraph)</td>
<td>$100,000.</td>
</tr>
<tr>
<td>Credit unions</td>
<td>Either retail or nonretail standard.</td>
</tr>
<tr>
<td>Day care centers</td>
<td>$250,000.</td>
</tr>
<tr>
<td>Gaming industry</td>
<td>$500,000.</td>
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<tr>
<td>Health care institutions:</td>
<td></td>
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<tr>
<td>Nursing homes, visiting nurses associations</td>
<td>$100,000.</td>
</tr>
<tr>
<td>Hospitals, blood banks, other health care facilities (including doctors’ and dentists’ offices)</td>
<td>$250,000.</td>
</tr>
<tr>
<td>Hotels and motels</td>
<td>$500,000.</td>
</tr>
<tr>
<td>Instrumentalities of interstate commerce</td>
<td>$50,000.</td>
</tr>
<tr>
<td>Labor organizations (as employers)</td>
<td>Nonretail standard.</td>
</tr>
</tbody>
</table>
(3) If an employer can be classified under more than one category, the Board will assert jurisdiction if the employer meets the jurisdictional standard of any of those categories.

(4) There are a few employer categories without specific jurisdictional standards:

(i) Enterprises whose operations have a substantial effect on national defense or that receive large amounts of Federal funds

(ii) Enterprises in the District of Columbia

(iii) Financial information organizations and accounting firms

(iv) Professional sports

(v) Stock brokerage firms

(vi) U. S. Postal Service

(5) A more complete discussion of the Board’s jurisdictional standards may be found in An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board’s Web site, http://www.nlrb.gov.

(e) This part does not apply to the United States Postal Service.

APPENDIX TO SUBPART A—TEXT OF EMPLOYEE NOTICE

“EMPLOYER RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

“Under the NLRA, you have the right to:

• Form, join or assist a union.

• Bargain collectively through representatives of employees’ own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

• Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.

• Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

• Strike and picket, depending on the purpose or means of the strike or the picketing.

• Choose not to do any of these activities, including joining or remaining a member of a union.

“Under the NLRA, it is illegal for your employer to:

• Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

• Question you about your union support or activities in a manner that discourages you from engaging in that activity.

• Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

• Threaten to close your workplace if workers choose a union to represent them.
National Labor Relations Board

§ 104.211

• Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
• Prohibit you from wearing union hats, buttons, t-shirt, pins and pins in the workplace except under special circumstances.
• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

"Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

• Threaten or coerce you in order to gain your support for the union.
• Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
• Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
• Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
• Take adverse action against you because you have not joined or do not support the union.

"If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

"Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees must seek assistance from the nearest regional NLRB office, which can be found on the Agency’s Web site: http://www.nlrb.gov.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB’s Web site or by calling the toll-free numbers listed above.

"The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railroad Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

“This is an official Government Notice and must not be defaced by anyone.”

Subpart B—General Enforcement and Complaint Procedures

§ 104.210 How will the Board determine whether an employer is in compliance with this part?

The Board has determined that employees must be aware of their NLRA rights in order to exercise those rights effectively. Employers subject to this rule are required to post the employee notice to inform employees of their rights. Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).

Normally, the Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a charge in motion the Board’s procedures for investigating and adjudicating alleged unfair labor practices, and for remedying conduct that the Board finds to be unlawful. See NLRA Sections 10–11, 29 U.S.C. 150–61, and 29 CFR part 102, subpart B.

§ 104.211 What are the procedures for filing a charge?

(a) Filing charges. Any person (other than Board personnel) may file a charge with the Board alleging that an employer has failed to post the employee notice as required by this part. A charge should be filed with the Regional Director of the Region in which the alleged failure to post the required notice is occurring.

(b) Contents of charges. The charge must be in writing and signed, and must be sworn to before a Board agent, notary public, or other person authorized to administer oaths or take acknowledgements, or contain a declaration by the person signing it, under penalty of perjury, that its contents
§ 104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?

(a) When a charge is filed with the Board under this section, the Regional Director will investigate the allegations of the charge. If it appears that the allegations are true, the Regional Director will make reasonable efforts to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.

(b) If an alleged violation cannot be resolved informally, the Regional Director may issue a formal complaint against the respondent employer, alleging a violation of the notice-posting requirement and scheduling a hearing before an administrative law judge. After a complaint issues, the matter will be adjudicated in keeping with the Board’s customary procedures. See NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.

§ 104.213 What remedies are available to cure a failure to post the employee notice?

(a) If the Board finds that the respondent employer has failed to post the required employee notices as alleged, the respondent will be ordered to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice. In some instances additional remedies may be appropriately invoked in keeping with the Board’s remedial authority.

(b) Any employer that threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement may be found to have committed an unfair labor practice. See NLRA Section 8(a)(1) and 8(a)(4), 29 U.S.C. 158(a)(1), (4).

§ 104.214 How might other Board proceedings be affected by failure to post the employee notice?

(a) Tolling of statute of limitations. When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful. See NLRA Section 10(b), 29 U.S.C. 160(b).

(b) Noncompliance as evidence of unlawful motive. The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue.

Subpart C—Ancillary Matters

§ 104.220 What other provisions apply to this part?

(a) The regulations in this part do not modify or affect the interpretation of any other NLRB regulations or policy.

(b)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This part creates no right or benefit, substantive or procedural, enforceable at law or in equity by any
parties against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

PARTS 105–199 [RESERVED]