

March 2017

## Panel: NLRB 101: A Prima on National Labor Relations Board Procedures

John Walsh  
*NLRB Regional Director*

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# Update on NLRB Representation Case Rule Changes



John J. Walsh, Jr.

Regional Director

Region 1

Boston MA & Hartford CT

March, 2017




# Overview of Presentation

- **Pending Litigation**
- **Implementation**
- **Changes**
  - **Filing the Petition**
  - **Initial Processing**
  - **Pre-Election Hearing**
  - **Decision and Direction of Election**
  - **Election**
  - **Blocking Charges**
- **Statistics**
- **Hot Topics - Pacific Lutheran University**



# Changes

- **Effective Date: April 14, 2015**

April 2015 						
Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

- **New Rules apply to petitions filed *on or after* April 14, 2015.**
- **Old rules continue to be applied to all petitions filed *before* April 14, 2015.**

# Significant Court Litigation



***Chamber of Commerce of the United States v. NLRB, 1:15-cv-00009 (D. D.C. 2015)***

***Associated Builders & Contractors of Texas, Inc. v. NLRB, 1:15-cv-00026 (W.D. Tex. 2015)***



## Changes: Filing the Petition

- **Petition form includes: requested election date, time, place and method**
- **Petition *can* be e-Filed**
- **Serve petition, statement of position form, and description of procedures in R cases**
- **When filed with the Region, Petition must be accompanied by:**
  - **Showing of Interest** (may be e-filed or faxed if originals provided to Region within 2 business days)
  - **Certificate of Service** showing service on all parties



## **Aria Resort & Casino, 363 NLRB No. 24 (2015)**

Failure to answer all questions on the petition form.



# Changes: Filing the Petition

**Petitioner must serve the parties named in the petition with:**

- **A copy of the Petition**
- **Statement of Position form (new)**
- **Description of Procedures in R Cases (revised Form 4812)**



**(Sec. 102.60)**

*The Statement of Position form and the Description of Procedures are available on the NLRB website and in Field Offices.*





# Changes: Filing the Petition

- **Petition form will include Petitioner's preference on election details (date, time, place and method) (Sec. 102.61)**
- **Petition *can* be e-Filed (Sec. 102.60)**
- **When filed, Petition must be accompanied by:**
  - **Showing of Interest** (may be e-filed or faxed if originals provided to Region within 2 business days) (Sec. 102.61)
  - **Certificate of Service** showing service on all parties named in petition (Sec. 102.60)





# Changes: Initial Processing

## Region will serve:

- **Notice of Hearing** which sets
  - **Hearing date**
  - **Statement of Position due date** – generally *noon* of business day before hearing is set to open
- **Notice of Petition for Election** – similar to current Form 5492 but specifies the proposed unit
- **Description of Procedures in R Cases**
- **Statement of Position form**
- **Copy of the petition**





# Changes: Initial Processing

**In addition to petition and forms, Region will serve:**

- **NOTICE OF HEARING**, which sets
  - **Hearing date – 8 days from service, excluding intervening holidays**, (or the next business day thereafter if the 8<sup>th</sup> day falls on a weekend or Federal holiday)

Sun	Mon	Tue	Wed	Thu	Fri	Sat
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

**Statement of Position due date** – generally will be noon of business day before hearing is set to open

- **NOTICE OF PETITION FOR ELECTION**, which specifies the proposed unit



## Changes: Initial Processing

### Employer must post Notice of Petition for Election

- Within 2 business days of service of Notice of Hearing

### Must also distribute Notice electronically *if* Employer customarily communicates with employees electronically

- Failure to post or distribute *may* be grounds for setting aside election
- **§102.63(a)(2)**



# Changes: Initial Processing

**Statement of Position form will include, among other things:**

- **Whether Employer agrees proposed unit is appropriate.**

**If not, it must provide:**

- **Basis for contention it is not appropriate**
- **The classifications, locations, or other employee groupings that should be added or excluded**
- **Individuals whose voting eligibility the Employer intends to contest at the pre-election hearing and the basis for each such contention**



# Changes: Initial Processing

## Statement of Position form (cont.):

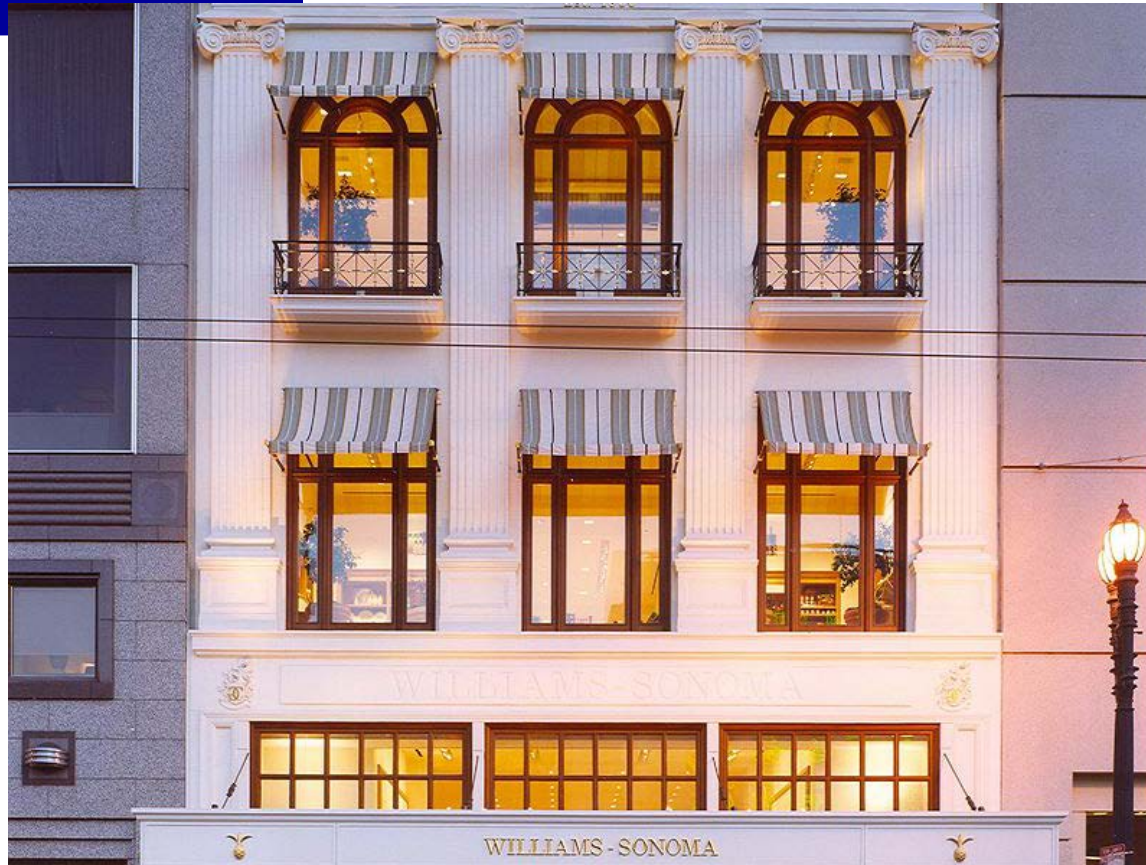
- Alphabetized electronic list(s) of employees:
  - (a) With full names, work locations, shifts and job classifications of all individuals in proposed unit
  - (b) If Employer claims unit is inappropriate, a separate list of the full names, work locations, shifts and job classifications of all individuals Employer claims should be added to the unit
- If Employer contends unit is not appropriate, it must also separately list the individuals whom it believes should be excluded from the proposed unit to make it an appropriate unit.



# Changes: Initial Processing

## Statement of Position form (cont.):

- Any election bar asserted by Employer
- Other issues Employer intends to raise at the pre-election hearing
- Employer's position on election details:
  - Type (Manual, Mail, Mixed Mail/Manual)
  - Date(s)
  - Time(s)
  - Location(s)
  - Payroll Period information (length and last ending date)
  - Eligibility period (e.g. special eligibility formulas)



## **Williams-Sonoma Direct, Inc., 365 NLRB No. 13 (2017)**

Statement of Position Form. Failure to raise an issue may preclude the party 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.





# Changes: Initial Processing

## Statement of Position form (cont.):

- **Failure to provide list:**

If the Employer fails to timely furnish the list of employees, the Employer will 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.



# Changes: Initial Processing

## Postponement of Hearing (Sec. 102.63(a)(1))



The Regional Director may postpone the hearing for

- ***up to*** 2 business days upon request of a party showing **special circumstances**
- ***more than*** 2 business days upon request of a party showing **extraordinary circumstances.**



# Changes: Pre-Election Hearing

## Hearing

- **QCR – appropriateness and scope of unit**
- **Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated.**
- **RD has discretion to postpone litigation of eligibility issues that affect a small percentage of employees in the unit.**
- **Briefs:** Parties are entitled to oral argument but not allowed to file post-hearing briefs unless RD grants special permission.



# Changes: Pre-Election Hearing

## Hearing

- **All other parties have the opportunity to respond on the record to each issue raised in the Statement of Position before introduction of further evidence.**
- **Preclusion**: A party is precluded from:
  - raising any issue,
  - presenting evidence relating to any issue,
  - cross-examining any witness concerning any issue, and
  - presenting argument concerning any issuethat 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.



# Changes: Pre-Election Hearing



## Hearing (Sec. 102.66):

**Election Details:** Prior to the close of the hearing the Hearing Officer will:

- solicit the parties' positions on the type, date(s), time(s), and location(s) of the election, and the eligibility period;
- solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the Region should transmit the Notice of Election if the RD directs an election;
- inform the parties what their obligations will be if an election is directed and the time for complying with such obligations.

## Changes: Direction of Election

- **Election Date:** Earliest day practicable. The 25-day waiting period – to allow Board to rule on a request for review - was eliminated.
- **Request for Review:** Parties may file a request for review at any time following the decision until 14 days after a final disposition of the proceeding by the Regional Director.
  - Can file before the election or wait until after the election and see if the election results moot it.
- **Stay of Election, Expedited Consideration, or Impounding of Ballots:** May be requested, but will only be granted upon a “clear showing that it is necessary under the specific circumstances of the case.”



# Changes: Election

## Voter List Contents:

- **Within 2 business days after approval of Election Agreement or D&DE issuance, Employer must provide the parties and the Region with an alpha list in electronic format of the following information for all eligible voters:**
  - **Full names**
  - **Work locations**
  - **Shifts**
  - **Job classifications**
  - **Contact information (including home addresses, available personal email addresses and available home and personal cell telephone numbers)**



## Danbury Hospital, Case No. 1-RC-153086

Exercise reasonable diligence in preparing the voter list.





# Changes: Election

- **Challenged Voters:** The Employer shall also include, in a separate section of the voter list, the same information for those individuals who will be permitted to vote subject to challenge
- **Notice of Election:** Employer must post for 3 full working days and now must also distribute electronically if it customarily communicates with employees in the unit electronically.
- **Election** – At the election, a party generally can challenge someone for cause even if their eligibility was not contested at the hearing.



## Changes: Blocking Charges

- **Offer of Proof:** When a party to a representation proceeding files a ulp charge and requests that it block 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 must provide the names of the witnesses who will promptly testify in support of the charge and a summary of each witness's anticipated testimony.



*Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2nd Cir. 1992)



**HAMILTON** 

Compare *NLRB v. Parsons School of Design*, 793 F.2d 503 (2<sup>nd</sup> Cir. 1986) ; *Hamilton Test Systems, New York, Inc., v. NLRB*, 743 F.2d 136 (2<sup>nd</sup> Cir. 1984)



# Implementation of Final Rule

**Election Rule Information is on the NLRB website, such as:**

- **GC 15-06 Guidance Memorandum**
- **OM 15-28 Hearing Dates & SOP Due Dates**
- **FAQs**
- **Petition forms**
- **Statement of Position forms**
- **Certificate of Service forms**
- **Description of Procedures in R Cases**

# RC Case Rule Statistics

## Pre-Rule

### 4/14/14 – 4/14/16

### YTD through 3/1/17\*

### (National)

	<u>YTD</u>	<u>Post-Rule</u>	<u>Pre-Rule</u>
● Total petitions	2419	2709	2792
– RC	1898	2175	2141
– RD	326	339	436

**\* Disclaimer - The statistics provided herein are estimated values as they were obtained using data that is still being reviewed for accuracy.**

## Statistics for Regions 1, 2 & 29\*

	<u>YTD</u>	<u>Post-Rule</u>	<u>Pre-Rule</u>
● Total petitions	387	494	446
– RC	319	422	353
– RD	41	45	65

**\* Disclaimer - The statistics provided herein are estimated values as they were obtained using data that is still being reviewed for accuracy.**

# R Case Rule Statistics (National)

Median days between Petition Filing and

YTD Post-Rule Pre-Rule

● Pre-election Hearing	10	11	13
● Election Agreement	8	8	11
● Election	23	24	38
– With election agmt	23	23	38
– With directed election	41	34	64
● Certification	35	36	50

# Statistics for Regions 1, 2 & 29

Median days between Petition Filing and

	<u>YTD Post-Rule Pre-Rule</u>		
● Pre-election Hearing	12	10	14
● Election Agreement	8	9	12
● Election	23	25	40
– With election agmt	23	24	39
– With directed election	57	47	70
● Certification	35	37	51



# R Case Rule Statistics (National)

	<u>YTD Post-Rule Pre-Rule</u>		
● Election Agmt Rate	91.7%	91.2%	91.6%
● Blocked charges	109	131	194

# Statistics for Regions 1, 2 & 29

	YTD Post-Rule Pre-Rule		
● Election Agmt Rate	89.1%	92.7%	89.6.%
● Blocked charges	13	19	24

# R Case Rule Statistics (National)

YTD 2015 2014

Win Rate

Election Results Cases w/ certs

- RC Petitions	71%	70%	71%
- RD Petitions	33%	41%	40%

# Statistics for Regions 1, 2 & 29

YTD 2015 2014

Win Rate

Election Results Cases w/ certs

RC Petitions

76% 74% 74%

RD Petitions

25% 50% 21%



## Pacific Lutheran University, 361 NLRB No. 157

1. A jurisdictional test for religious educational institutions.
2. Refinement of the Yeshiva managerial test.

