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NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS—PART 102

Subpart A—Definitions

Section 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.

Sec. 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.

Sec. 102.3 *General Counsel*.—The term "General Counsel" as used herein shall mean the General Counsel under section 3(d) of the Act.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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 that 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, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the Act; but nothing herein shall

be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

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

CHARGE

Sec. 102.9 *Who may file; withdrawal and dismissal*.—A charge[1] that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the Regional Director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the Regional Director issuing the complaint, the administrative law judge designated to conduct the hearing, or the Board.

Sec. 102.10 *Where to file*.—Except as provided in section 102.33 such charge shall be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occuring in two or more Regions may be filed with the Regional Director for any such Regions.

Sec. 102.11 *Forms; jurat; or declaration*. — Such charges 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. Sec. 1746). One original of such charge shall be filed. A party filing a charge 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.

Sec. 102.12 *Contents*.—Such charge shall contain the following:

(a) The full name and address of the person making the charge.

(b) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

(c) The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent).

(d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

Sec. 102.13 *Note*.—This section, which in Series 7 of the Rules and Regulations related to the filing requirements of section 9(f), (g), and (h) of the Labor Management Relations Act, was eliminated by amendments effective September 14, 1959. To avoid the renumbering of sections 102.14 to 102.72 the Board has left this section number blank.

[1] Procedure under sec. 10(j) to (l) of the Act is governed by subparts F and G of the Rules and Regulations. Procedures for unfair labor practice cases and representation cases under sec. 8(b)(7) of the Act are governed by subpart D.

Sec. 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 Regional Director by facsimile transmission. In this event the receipt printed upon the Agency's copy by the Agency's own facsimile machine, showing the phone number to which the charge was transmitted and the date and time of receipt shall be proof of service of the same. However, whether serving by facsimile, by regular mail, or otherwise, the Regional Director shall not be deemed to assume responsibility for such service.

(c) Date of service of charge. In the case of service of a charge by mail or private delivery service, the date of service is the date of deposit with the post office or other carrier. In the case of service by other methods, including hand delivery or facsimile transmission, the date of service is the date of receipt.

COMPLAINT

Sec. 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 the 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, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

Sec. 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) Where 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 section 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.

Sec. 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 section 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 section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

Sec. 102.18 *Withdrawal*.—Any such complaint may be withdrawn before the hearing by the Regional Director on his own motion.

Sec. 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 section 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 an appeal with the General Counsel in Washington, D.C., and filing a

copy of the appeal 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 section 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 appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. A request for extension of time to file an appeal shall be in writing and be received by the General Counsel, and a copy of such request filed with the Regional Director, prior to the expiration of the filing period. Copies of the acknowledgment of the filing of an appeal and of any ruling on a request for an extension of time for the filing of an 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, D.C., of the appeal issues may be permitted a party on written request made within 4 days after service of acknowledgement 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

Sec. 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.

Sec. 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 shall be stated. A party who is not represented by an attorney or non-attorney representative shall sign his/her answer and state his/her address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of the attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Sec. 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.

Sec. 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

Sec. 102.24 *Motions; where to file; contents; service on other parties; promptness in filing and response; summary judgment procedures*.—(a) All motions under section 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 summary judgment or dismissal made prior to the hearing shall be filed in writing with the Board pursuant to the provisions of section 102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in section 102.16(a), shall be filed in writing with the chief administrative law judge in Washington, D.C., 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 made 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 section 102.45, shall be filed with the administrative law judge, care of the chief administrative law judge in Washington, D.C., 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 above 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 summary judgment or dismissal, shall be filed with the Executive Secretary of the Board in Washington, D.C., by transmitting eight copies thereof together with an affidavit of service on the parties. Unless otherwise provided in these rules, motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding.

(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 the motion, 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. It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. 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 summary judgment or dismissal, if appropriate, shall be entered.

Sec. 102.25 *Ruling on motions*.—An administrative law judge designated by the chief administrative law judge in Washington, D.C., 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 sections 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 section 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 section 102.50, the Board shall rule on such motion.

Sec. 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*.—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 section 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the administrative law judge on motions and/or by the administrative law judge on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of 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 section 102.46. Requests to the Board for special permission to appeal from a ruling of the Regional Director or of the administrative law judge, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state (1) the reasons special permission should be granted and (2) 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.

Sec. 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, D.C., 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.

Sec. 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.

INTERVENTION

Sec. 102.29 *Intervention; requisite; 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 on 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 on 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 section 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

Sec. 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 section 102.45 or section 102.50. Such application shall be served on the Regional Director or the administrative law judge, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The Regional Director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve on the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served on all the other parties by the Regional Director or on all parties by the administrative law judge.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to type-writing by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered or certified mail to the Regional Director or the administrative law judge, care of 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.

(d) The administrative law judge shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

Sec. 102.31 *Issuance of subpoenas; petitions to revoke subpoenas; right to inspect or 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 on 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 or the Board 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, as the case may be, to the party at whose request the subpoena was issued. The administrative law judge or the Board, as the case may be, shall revoke the subpoena if in its 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 administrative law judge or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(c) With the approval of the Attorney General of the United States, the Board may issue an order requiring any individual to give testimony or provide other information at any proceeding before the Board if, in the judgment of the Board, (1) the testimony or other

information from such individual may be necessary to the public interest, and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. Requests for the issuance of such an order by the Board may be made by any party. Prior to hearing, and after transfer of the proceeding to the Board, such requests shall be made to the Board in Washington, D.C., and the Board shall take such action thereon as it deems appropriate. During the hearing, and thereafter while the proceeding is pending before the administrative law judge, such requests shall be made to the administrative law judge. If the administrative law judge denies the request, his ruling shall be subject to appeal to the Board in Washington, D.C., in the manner and to the extent provided in section 102.26 with respect to rulings and orders by an 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 denial 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 claims the privilege against self-incrimination shall be required, or permitted, to testify or to give other information respecting the subject matter of the claim.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

(e) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the Regional Director to inspection of the official transcript of their testimony, but shall be entitled to make copies of documentary evidence or exhibits which they have produced.

Sec. 102.32—*Payment of witness fees and mileage; fees of persons taking depositions*.—Witnesses summoned before the administrative law judge 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 persons taking the deposition shall be paid by the party at whose instance the deposition is taken.

TRANSFER, CONSOLIDATION, AND SEVERANCE

Sec. 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, D.C., or may, at any time after a charge has been filed with a Regional Director pursuant to section 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 sections 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 possible, govern such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

(c) The Regional Director may, prior to hearing, exercise the powers in subsections (a) (2) and (4) of this section with respect to proceedings pending in his Region.

(d) Motions to consolidate or sever proceedings after issuance of complaint shall be filed as provided in section 102.24 and ruled upon as provided in section 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 section 102.26.

HEARINGS

Sec. 102.34 *Who shall conduct; to be public unless otherwise ordered*.—The hearing for the purpose of taking evidence upon a complaint shall be conducted by an administrative law judge designated by the chief administrative law judge in Washington, D.C., 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, unless the Board or any Member thereof presides. At any time an administrative law judge may be designated to take the place of the administrative law judge previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the Board or the administrative law judge.

Sec. 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 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, the associate chief judge in Atlanta, or the associate chief judge in 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.

Sec. 102.36 *Unavailability of administrative law judges*.—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, 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, may designate another administrative law judge for the purpose of further hearing or other appropriate action.

Sec. 102.37 *Disqualification of administrative law judges*.—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 grounds 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 section 102.26, with respect to review of rulings of administrative law judges, shall thereupon apply.

Sec. 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.

Sec. 102.39 *Rules of evidence controlling so far as practicable*.—Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723–B, 723–C).

Sec. 102.40 *Stipulations of fact admissible*.—In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.

Sec. 102.41—*Objection to conduct of hearing; how made; objections not waived by further participation*.—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.

Sec. 102.42 *Filings of briefs and proposed findings with the administrative law judge and oral argument at the hearing*.— Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which may include presentation of proposed findings and conclusions, and shall be included in the stenographic report of the hearing. In the discretion of the administrative law judge, any party may, upon request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge, who may fix a reasonable time for such filing, but not in excess of 35 days from the close of the hearing. Requests for further extensions of time shall be made to the chief administrative law judge in Washington, D.C., to the associate chief judge in San Francisco, California, to the associate chief judge in New York, New York, or to the 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.

Sec. 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 hearing by the administrative law judge, or by other appropriate notice.

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

Sec. 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 section 102.46, shall constitute the record in the case.

EXCEPTIONS TO THE RECORD AND PROCEEDINGS

Sec. 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 section 102.45, any party may (in accordance with section 10(c) of the Act and sections 102.111 and 102.112 of these rules) file with the Board in Washington, D.C., 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 also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 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 subsection shall be limited to matters raised in the brief to which it is replying, and shall not exceed 10 pages. No extensions of time shall be granted for the filing of reply briefs, nor shall permission 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 permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of this section with a statement 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 arguments 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 legibly duplicated. Carbon copies of typewritten matter will not be accepted. Eight copies of such documents shall be filed with the Board in Washington, D.C., and copies shall also be served promptly on the other parties. All documents filed pursuant to this section shall be double spaced on 8-1/2 by 11-inch paper. Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, 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 10 days 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.

Sec. 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 section 102.45 shall be filed with the Board in Washington, D.C., by transmitting eight copies thereof to the Board, together with an affidavit of service upon the parties. Such motions 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.

PROCEDURE BEFORE THE BOARD

Sec. 102.48 *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions*.—(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations contained in the administrative law judge's decision shall, pursuant to section 10(c) of the Act, automatically become the decision 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-exceptions or answering briefs, as provided in section 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 before 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 factual 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 exceptions, 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 rehearing need not be filed to exhaust administrative remedies.

Sec. 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 section 102.48 of these rules, 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 section 102.50, insofar as applicable.

Sec. 102.50 *Hearings before the Board or Member thereof*.—Whenever the Board deems it necessary in order to effectuate the purpose of the Act or to avoid unnecessary

cost or delay, it may, at any time, after a complaint has issued pursuant to section 102.15 or section 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.

Sec. 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.

COMPLIANCE PROCEEDINGS

Sec. 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.

Sec. 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, D.C., within 14 days of the written statement of compliance determination provided as set forth in section 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, D.C. 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.

Sec. 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 section 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.

Sec. 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 claimed to be necessary for compliance by the respondent and, where known, the approximate dates, places, and names of the respondent's agents or other representatives described in the specification.

(c) *Amendments to specification*.—After the issuance of the notice of compliance hearing but prior to the opening of the hearing, the Regional Director may amend the specification. After the opening of the hearing, the specification may be amended upon leave of the administrative law judge or the Board, as the case may be, upon good cause shown.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 102.59 *Hearing; posthearing procedure*.—After the issuance of a compliance specification and notice of hearing, the procedures provided in sections 102.24 to 102.51 shall be followed insofar as applicable.

SUBPART C—PROCEDURE UNDER SECTION 9(c) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES[3] AND FOR CLARIFICATION OF BARGAINING UNITS AND FOR AMENDMENT OF CERTIFICATIONS UNDER SECTION 9(b) OF THE ACT

Sec. 102.60 *Petitions.*

(a) *Petition for certification or decertification; who may file; where to file; withdrawal.*—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. Sec. 1746). One original of the petition shall be filed. 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. 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. Prior to the transfer of the case to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of the case 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 under section 9(b) of the Act; who may file; where to file; withdrawal.*—A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in subsection (a) of this section shall be followed.

Sec. 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) 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 establishment involved.

(3) The general nature of the employer's business.

[3] Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D.

(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 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 but desires certification under the Act.
(8) The name, the affiliation, if any, and the address of the petitioner.
(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.
(b) A petition for certification, when filed by an employer, shall contain the following:
(1) The name and address of the petitioner.
(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, the affiliation, if any, and the addresses of the individuals or labor organizations making such claim for recognition.
(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration dates.
(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.
(c) A petition for decertification shall contain the following:
(1) The name of the employer.
(2) The address of the establishment and a description of the bargaining unit involved.
(3) The general nature of the employer's business.
(4) The name, the affiliation, if any, and the address of the petitioner.
(5) The name or names of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration dates 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) 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.
(9) Any other relevant facts.

(d) 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.

(11) Any other relevant facts.

(e) 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.

(8) Any other relevant facts.

Sec. 102.62 *Consent-election agreements*.—(a) 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 a consent-election agreement leading to a determination by the Regional Director of the facts ascertained after such consent election. Such 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 what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to sections 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 as if issued by the

Board, provided further that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(b) 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 providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such 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 consent election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to sections 102.69 and 102.70.

Sec. 102.63 *Investigation of petition by Regional Director; notice of hearing; service of notice; withdrawal of notice*.—(a) After a petition has been filed under section 102.61(a), (b), or (c), if no agreement such as that provided in section 102.62 is entered into and 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 the appropriate unit, the Regional Director shall prepare and cause to be served on the parties and on 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. A copy of the petition 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 his own motion.

(b) After a petition has been filed under section 102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served on the parties and on 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 his own motion. All hearing and posthearing procedure under this subsection (b) shall be in conformance with sections 102.64 through 102.68 whenever applicable, *except* where the unit or certification involved arises out of an agreement as provided in section 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 section 102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under section 102.67, except where an agreement under section 102.62(a) is involved.

Sec. 102.64 *Conduct of hearing*.—(a) 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. It shall be the duty of the hearing officer to inquire fully into all matters in issue and

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.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

Sec. 102.65 *Motions; interventions*.—(a) All motions, including motions for intervention pursuant to subsections (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 case 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 case to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matters shall not be filed and if submitted will not be accepted. Eight copies of such motions shall be filed with the Board. The Regional Director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer: *Provided*, 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 section 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 him as hereinabove provided, 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.

(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, 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, and such intervenor shall thereupon become a party to the proceeding.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in section 102.66(c). Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate appeal pursuant to section 102.67(b), (c), and (d) or whenever the case is transferred to it for decision: *Provided, however*, That if the Regional Director has issued an order transferring the case to the Board for decision such rulings may be appealed directly to the Board by special permission of the Board. Nor shall rulings by the hearing officer be appealed directly to the Regional Director unless expressly authorized by the Rules and Regulations, except by special permission of the Regional Director, but shall be considered by the Regional Director when he reviews the entire record. Requests to the Regional Director, or to the Board in appropriate cases, 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 (1) the reasons special

permission should be granted and (2) 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. If the Board or the Regional Director, as the case may be, grants the request for special permission to appeal, the Board or the Regional Director may proceed forthwith to rule on the appeal.

(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 with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided, however,* 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 this paragraph 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, except that, if the motion states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the ballots of such employees shall be challenged and impounded 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.

Sec. 102.66 *Introduction of evidence; rights of parties at hearing; subpoenas*.—(a) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall 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) 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.

(c) 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 subopoena, 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: *Provided, however,* 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, 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.

(d) 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.

(e) The hearing officer may submit an analysis of the record to the Regional Director or the Board but he shall make no recommendations.

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

Sec. 102.67 *Proceedings before the Regional Director; further hearing; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action*.—(a) The Regional Director may proceed, either forthwith upon the record or after

oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the Regional Director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however*, That prior to the close of the hearing and for good cause the hearing officer may grant an extension of time not to exceed an additional 14 days. 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 leave of the Regional Director.

(b) A decision by the Regional Director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the Regional Director shall be final: *Provided, however,* That within 14 days after service thereof any party may file a request for review with the Board in Washington, D.C. The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

(c) 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 the 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.

(d) Any 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 ground (2), and other grounds where appropriate, said 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. But such request may not raise any issue or allege any facts not timely presented to the Regional Director.

(e) 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 thereto, which shall be served in accordance with the requirements of paragraph (k) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) 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.

(g) The granting of a request for review shall not stay the Regional Director's decision 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 will consider the entire record in the light of the grounds relied on for review. 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.

(h) In any case in which it appears to the Regional Director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the Regional Director, the parties may, within such time after service of the order transferring the case as is fixed by the Regional Director, file with the Board the brief previously filed with the Regional Director. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the Regional Director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with the requirements of subsection (k) of this section within the time set by the Regional Director. If the order transferring the case is served on the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of the time within which to file a brief with the Board for a period not to exceed an additional 14 days. No reply brief may be filed except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the Regional Director, and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the Regional Director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(k)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8-1/2-by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Requests for review, including briefs in support thereof; 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 references and an alphabetical table of cases and other authorities cited.

(2) 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 statement of such service shall be filed with the Board together with the document.

(3) 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.

Sec. 102.68 *Record; what constitutes; transmission to the Board*.—The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the Regional Director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the Regional Director or to the Board, and the decision of the Regional Director, if any. Immediately upon issuance by the Regional Director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board.

Sec. 102.69 *Election procedure; tally of ballots; objections; certification by the Regional Director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing* (a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot: Provided, however, That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. 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. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results

of the election. A person filing objections by facsimile pursuant to §102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to §102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to section 102.70, the Regional Director shall forthwith issue to the parties a 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, and the proceeding will thereupon be closed.

(c)(1) If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the Regional Director shall, consistent with the provisions of section 102.69(d), initiate an investigation, as required, of such objections or challenges.

(2) If a consent election has been held pursuant to section 102.62(b), the Regional Director shall prepare and cause to be served on the parties a report on challenged ballots or on objections, or on both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, any party may file with the Board in Washington, D.C., exceptions to such report, with supporting documents as permitted by section 102.69(g)(3) and/or a supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting documents and/or supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief, with supporting documents as permitted by section 102.69(g)(3) if desired, with the Board in Washington, D.C. If no exceptions are filed to such report, the Board, 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. The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

(3) If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the Regional Director may (i) issue a report on objections or on challenged ballots, or on both, as in the case of a consent election pursuant to paragraph (b) of section 102.62, or (ii) exercise his authority to decide the case and issue a decision disposing of the issues, and directing appropriate action or certifying the results of the election.

(4) If the Regional Director issues a report on objections and challenges, the parties shall have the rights set forth in paragraph (c)(2) of this section and in section 102.69(f); if the Regional Director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith, including the right to submit documents supporting the request for review or opposition thereto as permitted by section 102.69(g)(3).

(d) In issuing a report on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) or 102.67, or in issuing a decision on objections or on challenged ballots, or on both, following proceedings under section 102.67, the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues.

(e) Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall, if directed by the Regional Director, 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. In any case in which the Regional Director has directed that a report be prepared and served, any party may, within 14 days from the date of issuance of such report, file with the Regional Director the original and one copy, which may be a carbon 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, which may be a carbon 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. 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.

(f) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or on objections, or on both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the Regional Director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66 insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, file with the Board in Washington, D.C., exceptions to such report, with supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C. If no exceptions are filed to

such report, the Board, 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. The Board shall thereupon proceed pursuant to section 102.67: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing the provisions of section 102.46 of these rules shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(g)(1)(i) In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, and exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the Regional Director, if any, and the record previously made as defined in section 102.68. Materials other than those set out above shall not be a part of the record.

(ii) 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 report on objections or on challenged ballots and any exceptions to such a report, any Regional Director's 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 or report, 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 (g)(3) of this section.

(2) Immediately upon issuance of a report on objections or on challenges, or on both, upon issuance by the Regional Director of an order transferring the case to the Board, or 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 (g)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing exceptions to a Regional Director's report on objections or on challenges, a request for review of a Regional Director's decision on objections or on challenges, or any opposition thereto may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the Regional Director and which were not included in the report or decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to timely submit such documentary evidence to the Regional Director, or 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 related unfair labor practice proceeding.

(h) In any such case 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. The proceeding shall thereupon be closed.

(i)(1) The action of the Regional Director in issuing a notice of hearing on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) shall constitute a transfer of the case to the Board, and the provisions of section 102.65(c) shall apply with respect to special permission to appeal to the Board from any such direction of hearing.

(2) Exceptions, if any, to the hearing officer's report or to the administrative law judge's decision, and any answering brief to such exceptions, shall be filed with the Board in Washington, D.C., in accordance with subsection (f) of this section.

(j)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8-1/2-by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. 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 Board 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.

(2) The party filing with the Board exceptions to a report, a supporting brief, or an answering brief shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. A statement of such service shall be filed with the Board together with the document.

(3) Requests for extensions of time to file exceptions to a report, 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, or the Regional Director. A statement of such service shall be filed with the document.

Sec. 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 section 102.69. Only one runoff election 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.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the Regional Director shall declare the first election a nullity and shall conduct another election, providing for a selection from among the three choices afforded in the original ballot; and shall thereafter proceed in

accordance with subsections (a), (b), and (c) of this section. In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and a certification of results of election shall be issued. Only one such further election pursuant to this subsection may be held.

(e) Upon the conclusion of the runoff election, the provisions of section 102.69 shall govern, insofar as applicable.

Sec. 102.71 *Dismissal of petition; refusal to proceed with petition; requests for review by 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, D.C., in accordance with the provisions of subsection (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 the 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, D.C., in accordance with the provisions of subsection (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.

(c) A request for review must be filed with the Board in Washington, D.C., 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 copies and shall contain a complete statement setting forth facts and reasons upon which the request is based. Such request shall be printed or otherwise legibly duplicated: *Provided, however*, That carbon copies of typewritten materials will not be accepted. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, D.C., and a statement of service shall accompany such request.

Sec. 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*.—(a) Whenever it appears necessary in order to effectuate the purposes of the Act, or to avoid unnecessary costs or delay, the General Counsel may permit a petition to be filed with him in Washington, D.C., or may, at any time after a petition has been filed with a Regional Director pursuant to section 102.60, order that such petition and any proceeding that may have been instituted 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 Region; or

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

(b) The provisions of sections 102.60 to 102.71, inclusive, shall, insofar as applicable, apply to 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 petition and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such petition and such proceeding as if the petition had originally been filed in the Region to which the transfer was made.

(c) The Regional Director may exercise the powers in subsections (a)(2) and (4) of this section with respect to proceedings pending in his Region.

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

Sec. 102.73 *Initiation of proceedings*.—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 8(b)(7) of the Act, the Regional Director shall investigate such charge, giving it the priority specified in subpart G of these rules.

Sec. 102.74 *Complaint and formal proceedings*.—If it appears to the Regional Director that the charge has merit, formal proceedings in respect thereto shall be instituted in accordance with the procedures described in sections 102.15 to 102.51, inclusive, insofar as they are applicable, and insofar as they are not inconsistent with the provisions of this subpart. If it appears to the Regional Director that issuance of a complaint is not warranted, he shall decline to issue a complaint, and the provisions of section 102.19, including the provisions for appeal to the General Counsel, shall be applicable unless an election has been directed under sections 102.77 and 102.78, in which event the provisions of section 102.81 shall be applicable.

Sec. 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 warranted but for the pendency of a petition under section 9(c) of the Act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the Regional Director shall suspend proceedings on the charge and shall proceed to investigate the petition under the expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of section 8(b)(7) of the Act.

Sec. 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 sections 102.60 and 102.61, insofar as applicable: *Provided, however*, That if a charge under section 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 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.

Sec. 102.77 *Investigation of petition by Regional Director; directed election*.—(a) Where a petition has been filed pursuant to section 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 these rules, and after the investigation of the charge filed pursuant to section 102.73, it appears to the Regional Director that an expedited election under section 8(b)(7)(C) is

warranted, and that the policies of the Act would be effectuated thereby, he shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter: *Provided, however*, That in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, he 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, including transfer of the case to the Board, shall be governed insofar as applicable by sections 102.63 to 102.68, inclusive, except that the parties shall not file briefs without special permission of the Regional Director or the Board, as the case may be, but shall, however, state their respective legal positions upon the record at the close of the hearing, and except that any request for review of a decision of the Regional Director shall be filed promptly after the issuance of such decision.

Sec. 102.78 *Election procedure; method of conducting balloting; postballoting procedure*.—If no agreement such as that provided in section 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 sections 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's rulings. Any request for such permission shall be filed promptly, in writing, and shall briefly state the grounds relied on. 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.

Sec. 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 section 102.62(a), insofar as applicable.

Sec. 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 section 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 section 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 section 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 these rules 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 sections 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 on. 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.

Sec. 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 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 sections 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, D.C., 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 section 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 section 102.80, the Regional Director shall resume investigation of the charge and shall proceed in accordance with section 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, D.C., 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 section 102.19.

Sec. 102.82 *Transfer, consolidation, and severance.*—The provisions of sections 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 of these rules, except that the provisions of section 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

Sec. 102.83 *Petition for referendum under section 9(e)(1) 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 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 wherein 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. The petition may be withdrawn only with the approval of the Regional Director with whom such petition was filed, except that if the proceeding has been transferred to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the Board. Upon approval of the withdrawal of any petition the case shall be closed.

Sec. 102.84 *Contents of petition to rescind authority.*—

(a) The name of the employer.

(b) The address of the establishment 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 dates of execution and of expiration of any contract in effect covering the unit involved.

(i) The name and address of the person designated to accept service of documents for petitioner.

(j) Any other relevant facts.

Sec. 102.85 *Investigation of petition by Regional Director; consent referendum; directed referendum.*—Where a petition has been filed pursuant to section 102.83 and it appears to the Regional Director that the petitioner has made an appropriate showing, in such form as the Regional Director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer: *Provided, however*, That in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing

he may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The Regional Director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the Regional Director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the Regional Director or by the Board.

Sec. 102.86 *Hearing; posthearing procedure*.—The method of conducting the hearing and the procedure following the hearing, including transfer of the case to the Board, shall be governed, insofar as applicable, by sections 102.63 to 102.68, inclusive.

Sec. 102.87 *Method of conducting balloting; postballoting procedure*.—The method of conducting the balloting and the postballoting procedure shall be governed by the provisions of section 102.69, insofar as applicable.

Sec. 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, D.C., 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.

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

Sec. 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 on 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(l) of the Act, he shall give it priority over all other cases in the office except other cases under section 10(l) and cases of like character.

Sec. 102.90 *Notice of filing of charge; notice of hearing; 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 sections 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, D.C., 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, D.C., 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.

Sec. 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 sections 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.

Sec. 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.

Sec. 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 the 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 section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and sections 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.

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

Sec. 102.94 *Expeditious 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 administrative law judge 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 administrative law judge.

Sec. 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.

Sec. 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 the procedure set forth in sections 102.90 to 102.92, inclusive, is deemed applicable.

Sec. 102.97 *Expeditious processing of section 10(l) and (m) cases in successive stages.*—(a) Any complaint issued pursuant to section 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 section 102.93 or notice of hearing issued pursuant to section 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 section 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—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

Sec. 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.

Sec. 102.99 *Contents of petition for advisory opinion*

(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, D.C. Such petition or request shall be printed or otherwise legibly duplicated: Carbon copies of typewritten matter will not be accepted.

Sec. 102.100 *Notice of petition; service of petition*.—Upon the filing of a petition the petitioner shall immediately serve in the manner provided by section 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 section 102.114(b) of these rules.

Sec. 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, D.C. 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 section 102.114(b) of these rules.

Sec. 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, D.C. 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.

Sec. 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 on the parties. No briefs shall be filed except upon special permission of the Board.

Sec. 102.104 *Withdrawal of petition*.—The petitioner may withdraw his petition at any time prior to issuance of the Board's advisory opinion.

Sec. 102.105 *Petitions for declaratory orders; who may file; where to file; withdrawal.*—Whenever both an unfair labor practice charge and a representative 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 case. Such petition may be withdrawn at any time prior to the issuance of the Board's order.

Sec. 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, D.C. 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.

Sec. 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 section 102.114(b) of these rules.

Sec. 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, D.C. 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 section 102.114(b) of these rules.

Sec. 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, D.C. 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.

Sec. 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 on the parties. Any party desiring to file a brief shall file eight copies with the Board in Washington, D.C., with a statement that copies thereof are being served simultaneously on the other parties. Such brief shall be printed or otherwise legibly duplicated: *Provided, however*, That carbon copies shall not be filed and if submitted will not be accepted.

Subpart I—Service and Filing of Papers

Sec. 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 sec. 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 to a complaint or a backpay specification, and briefs; and

(2) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents. A party seeking to file such documents beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document shall not commence until

the date a ruling issues accepting the untimely document. In addition, cross-exceptions shall be due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

Sec. 102.112 *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 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.

Sec. 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 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 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 service permitted by these rules, including regular mail.

Sec. 102.114 *Filing and service of papers by parties; form of papers; manner and proof of filling or service; electronic filings.*—(a) Service of papers by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, or private delivery service. Service of papers 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 paper 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 102.113(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 8 1/2 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). Carbon copies shall not be filed and will not be accepted. 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 on the basis of a claim that transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(g) Facsimile transmissions of the following documents will not be accepted for filing: Showing of Interest in Support of Representation Petitions, including Decertification Petitions; 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 Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; 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 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

Sec. 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.

Sec. 102.116 *Signature of orders*.—The Executive Secretary or an 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

Sec. 102.117 *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, duplication, and review; 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 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 (vii) of this section are available 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.

(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 appropriate Regional Office of the Board or at the Board's office in Washington, DC, as the case may be. If the case or proceeding has been closed for more than 2 years, the appropriate Regional Office of the Board or the Board's office in Washington, DC, upon request, will contact the Federal Records Center to obtain the records.

(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 for records in the Office of the General Counsel and located in Washington, DC, it should be made to the Freedom of Information Officer, Office of the General Counsel, Washington, DC; if for records in the offices the Board or the Inspector General in Washington, DC, to the Executive Secretary of the Board, 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 paragraph (c)(2)(i) of this section shall be calculated from the date of receipt by the appropriate office. Requesters may be given an opportunity to discuss their request so that requests may be modified to meet the requirements of this section. In the case of records generated by the Inspector General and in possession of another office, or in the possession of the Inspector General but generated by another office of the Agency, the request may be referred to 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. Similar referrals may, in the Agency's discretion, be made between other offices.

(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 to the Executive Secretary 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 General Counsel's office, the Regional or Subregional Office, or the Executive Secretary's 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 Act; 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 (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 20 working days of the receipt by the person making the request of the notification of the adverse determination where the request is denied in its entirety; or, in the case of a partial denial, within 20 working days of the receipt of any records being made available pursuant to the request. If the adverse determination was made in a Regional Office, a Subregional Office, or by the Freedom of Information Officer, Office of the General Counsel, the appeal shall be filed with the General Counsel in Washington, DC. If the adverse determination was made by the Executive Secretary of the Board or the Inspector General, the appeal shall be filed with the Chairman of the Board in Washington, DC. 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 though 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 8 1/2 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 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 discloses no records responsive to the request, or if records located are determined to be exempt from disclosure.

(e) Subject to the provisions of sections 102.31(c) and 102.66(c), all files, 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.

(f) 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 Governmentwide Personnel Records published by the Office of Personnel Management, or in a Notice of Governmentwide 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, D.C. 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 (j) 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 (k) of this section.

(g) 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. 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, D.C. 20570. Reasonable verification of the identity of the requester; as described in paragraph (j) 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 of 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 (k) of this section.

(h) 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 (j) 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.

(i) 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, D.C. 20570. The requester must provide verification of identity as described in paragraph (j) 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 acknowledgement 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 (k) of this section.

(j) Verification of the identification of individuals required under paragraphs (f), (g), (h), and (i) 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.

(k)(1) Review may be obtained with respect to (i) a refusal, under paragraph (f) or (l) of this section, to inform an individual if a system of records contains a record concerning that individual, (ii) a refusal, under paragraph (g) or (l) of this section, to grant access to a record or an accounting of disclosure from such a record, or (iii) a refusal, under paragraph (i) of this section, to amend a record. 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 (f) or (l), 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 (g) or (l), 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), 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.

(l) To the extent that portions of systems 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 Part 297, Subpart A, § 297.101, et seq., as promulgated by the Office of Personnel Management. To the extent that portions of systems of records described in notices of Governmentwide systems 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 (k) of this section.

(m) 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), and 29 CFR 102.117(c), (d), (f), (g), (h), (i), (j) and (k), insofar as the system contains investigatory material compiled for criminal law enforcement purposes.

(n) 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) and 29 CFR 102.117 (c), (d), (f), (g), (h), (i), (j), and (k), insofar as the system contains investigatory material compiled for law enforcement purposes not within the scope of the exemption at 29 CFR 102.117(m).

(o) Privacy Act exemptions contained in paragraphs (m) and (n) 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, and disclose investigative techniques and procedures. 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 because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the

scope of his/her jurisdiction. In the interest of effective law enforcement, OIG investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. 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.

(6) 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)(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 the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, OIG has published such a notice in broad generic terms.

(9) 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.

(10) 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. 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 exempted from those subsections of the Act.

(p) 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).

(q) The Privacy Act exemption set forth in paragraph (p) of this section is claimed on the ground that the requirements of subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of the Privacy Act, if applied to Agency Disciplinary Case Files, would seriously

impair the ability of the NLRB to conduct investigations of alleged or suspected violations of the NLRB's misconduct rules, as set forth in paragraphs (o) (1), (3), (4), (7), (8), and (11) of this section.

Sec. 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 section 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, D.C., 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, D.C., 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 of 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, D.C., 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, D.C., 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 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 adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, that person will, unless 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 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. Sec. 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. Sec. 552a(b)(1) through (11).

(b)(1) Notwithstanding the prohibitions of subsection (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 except that he may, in his discretion, decline to excise portions which, although not relating 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 withholding, 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 subsection (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to section 102.69(d) 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 subsection (b) of this section shall be exercised by the hearing officer presiding.

(d) The term "statement" as used in subsections (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.

Subpart L—Practice Before the Board of Former Employees*

Sec. 102.119 *Prohibition of practice before Board of its former regional employees in cases pending in Region during employment*.—No person who has been an employee of the Board and attached to any of its Regional Offices shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any Regional Office to which he was attached during the time of his employment with the Board.

Sec. 102.120 Same; application to former employees of Washington staff.—No person who has been an employee of the Board and attached to the Washington staff shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding pending before the Board or any Regional Offices during the time of his employment with the Board.

* Attention is directed to Public Law 87–849 (76 Stat. 1119) which amends chapter 11 of title 18, United States Code, entitled "Bribery, Graft and Conflicts of Interest" and which provides for the imposition of criminal sanctions under certain circumstances.

Subpart M—Construction of Rules

Sec. 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

Sec. 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 the Rules and Regulations, insofar as applicable, except that reference in subpart B 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.

Subpart O—Amendments

Sec. 102.123 *Amendment or rescission of rules*.—Any rule or regulation may be amended or rescinded by the Board at any time.

Sec. 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, D.C., 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.

Sec. 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

Sec. 102.126 *Unauthorized communications*.—(a) No interested person outside this Agency shall, in an on-the-record proceeding of the types defined in section 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 section 102.128, participating in a particular proceeding as defined in that section, shall (i) request any prohibited *ex parte* communications; or (ii) make or knowingly cause to be made any prohibited *ex parte* communications about the proceeding to any interested person outside this Agency relevant to the merits of the proceeding.

Sec. 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 sections 102.129 and 102.130.

Sec. 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 section 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 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) of the Act, in which a formal hearing is held, communications to the hearing officer, 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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.

Sec. 102.129 *Communications prohibited*.—Except as provided in section 102.130, *ex parte* communications prohibited by section 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 section 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.

Sec. 102.130 *Communications not prohibited.—Ex parte* communications prohibited by section 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.

Sec. 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.

Sec. 102.132 *Reporting of prohibited communications; penalties*.—(a) Any Board agent of the categories defined in section 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 section 102.133.

Sec. 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 in the proceeding of a party who knowingly makes a prohibited communication

or knowingly causes a prohibited communication to be made should be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) Upon notice and hearing, the Board may censure, suspend, or revoke the privilege of practice before the Agency of any person who knowingly and willfully makes or solicits the making of a prohibited *ex parte* communication. However, before the Board institutes formal proceedings under this subsection, it shall first advise the person or persons concerned in writing that it proposes to take such action and that they may show cause, within a period to be stated in such written advice, but not less than 7 days from the date thereof, why it should not take such action.

(c) The Board may censure, or, to the extent permitted by law, suspend, dismiss, or institute proceedings for the dismissal of, any Board agent who knowingly and willfully violates the prohibitions and requirements of this rule.

Subpart Q—Procedure Governing Matters Affecting Employment-Management Agreements Under the Postal Reorganization Act (Chapter 12 of Title 39, United States Code, as Revised)

Sec. 102.135 *Postal Reorganization Act.*

(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, United States Code, as revised) shall be governed by the provisions of subparts A, B, C, D, E, 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. § 1203(c) and 1204," and (4) "section 9(b) of the Act" shall mean "39 U.S.C. § 1202."

Subpart R—Advisory Committees

Sec. 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 F.R. 12389–12391, to the extent applicable.

Subpart S—Open Meetings

Sec. 102.137 *Public observation of Board meetings*.—Every portion of every meeting of the Board shall be open to public observation, except as provided in section 102.139 of these rules, and Board Members shall not jointly conduct or dispose of Agency business other than in accordance with the provisions of this subpart.

Sec. 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.

Sec. 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 section 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. Sec. 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).

Sec. 102.140 *Action necessary to close meeting; record of votes*.—A meeting shall be closed to public observation under section 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 section 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 section 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 30 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 1 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 the meeting, or portion thereof, to public observation for any of the reasons specified in 5 U.S.C. section 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 Members participating in the meeting, upon request of any one of its Members, shall vote on whether to close such meeting, or a portion thereof, for that reason. A record of such vote, reflecting the vote of each Member of the Board participating in the meeting shall be kept and made available to the public within 1 day after the vote is taken.

(d) After public announcement of a meeting as provided in section 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 on the change shall be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to section 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.

Sec. 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 section 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 section 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.

(c) Within 1 day after the vote to close a meeting, or any portion thereof, pursuant to the provisions of section 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 has been made, 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 provisions of section 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.

Sec. 102.142 *Transcripts, recordings, or minutes of closed meetings; public availability; retention.*—(a) For every meeting or portion thereof closed under the provisions of section 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 section 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 therefor, 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. Sec. 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 section 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 1 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 2 years after such meeting.

Subpart T—Awards of Fees and Other Expenses

Sec. 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 sections 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 section 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 an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(f) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(g) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

(h) An applicant that participates in an adversary adjudication primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

Sec. 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 sought unjust.

Sec. 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 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.

Sec. 102.146 *Rulemaking on maximum rates for attorney or agent fees*.—Any person may file with the Board a petition under section 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).

Sec. 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 sec. 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 section 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.

Sec. 102.148 *When an application may be filed; place of filing; service; referral to administrative law judge; stay of proceeding*.—(a) An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding. The application for an award shall be filed in triplicate with the Board in Washington, D.C., together with a certificate of service. The application shall be served on the Regional Director and on all parties to the adversary adjudication in the same manner as other pleadings in that proceeding, except as provided in section 102.147(g)(1) for financial information alleged to be confidential.

(b) Upon filing, the application shall be referred by the Board to the administrative law judge who heard the adversary adjudication upon which the application is based, or, in the event that proceeding had not previously been heard by an administrative law judge, it shall be referred to the chief administrative law judge for designation of an administrative law judge, in accordance with section 102.34, to consider the application. When the administrative law judge to whom the application has been referred is or becomes unavailable the provisions of sections 102.34 and 102.36 shall be applicable.

(c) Proceedings for the award of fees, but not the time limit of this section for filing an application for an award, shall be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision in that proceeding.

(d) For purposes of this section the withdrawal of a complaint by a Regional Director under section 102.18 of these rules shall be treated as a final order, and an appeal under section 102.19 of these rules shall be treated as a request for reconsideration of that final order.

Sec. 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 administrative law 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 section 102.150 or by section 102.152 shall be filed with the chief administrative law judge in Washington, D.C., the associate chief administrative law judge in San Francisco, California, or the associate chief administrative law judge in New York, New York, or 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.

Sec. 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, D.C., pursuant to section 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 section 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 section 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.

Sec. 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.

Sec. 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 submission, 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 sections 102.30 to 102.44 of these rules, except sections 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 section 102.26.

Sec. 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 sections 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 exceptions, any cross-exceptions or answering briefs as provided in section 102.46, and the record of the adversary adjudication upon which the application is based.

Sec. 102.154 *Exceptions to administrative law judge's decision; briefs; action of the 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 sections 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.

Sec. 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

Sec. 102.156 Administrative offset; purpose and scope.
Sec. 102.157 Definitions.
Sec. 102.158 Agency requests for administrative offsets and cooperation with other

Federal agencies.
Sec. 102.159 Exclusions.
Sec. 102.160 Agency responsibilities.
Sec. 102.161 Notification
Sec. 102.162 Examination and copying of records related to the claim; opportunity for full explanation of the claim.
Sec. 102.163 Opportunity for repayment.
Sec. 102.164 Review of the obligation.
Sec. 102.165 Cost shifting.
Sec. 102.166 Additional administrative collection action.
Sec. 102.167 Prior provision of rights with respect to debt.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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).

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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. Administrative offset effected prior to 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.

Sec. 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.

Sec. 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.

Sec. 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.
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.

§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.

§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 warranting a hearing is raised, the matter may be submitted directly to the Board. If no answer is filed, then the allegations shall be deemed admitted.

(5) Sections 102.24 through 102.51, rules applicable to unfair labor practice proceedings, shall be applicable to disciplinary proceedings under this section to the extent that they are not contrary to the provisions of this section.

(6) 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.

(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.

Appendix A.—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.
Washington, DC ..... 8:15 a.m.–4:45 p.m.
6—Pittsburgh, PA ..... 8:30 a.m.–5 p.m
7—Detroit ..... 8:15 a.m.–4:45 p.m.
Grand Rapids ..... 8:15 a.m.–4:45 p.m.
8—Cleveland ..... 8:15 a.m.–4:45 p.m.
9—Cincinnati ..... 8:30 a.m.–5 p.m.
10—Atlanta ..... 8 a.m.–4:30 p.m
Birmingham ..... 8 a.m.–4:30 p.m.
11—Winston-Salem ..... 8 a.m.–4:30 p.m.
12—Tampa ..... 8 a.m.–4:30 p.m
Jacksonville ..... 8 a.m.–4:30 p.m.
Miami ..... 8 a.m.–4:30 p.m.
13—Chicago ..... 8:30 a.m.–5 p.m.
14—St. Louis ..... 8 a.m.–4:30 p.m
15—New Orleans ..... 8 a.m.–4:30 p.m.
16—Fort Worth ..... 8:15 a.m.–4:45 p.m.
Houston ..... 8 a.m.–4:30 p.m.
San Antonio ..... 8 a.m.–4:30 p.m.
17—Kansas City ..... 8:15 a.m.–4:45 p.m.
Tulsa ..... 8:15 a.m.–4:45 p.m.
18—Minneapolis ..... 8 a.m.–4:30 p.m.
Des Moines ..... 8 a.m.–4:30 p.m.
19—Seattle ..... 8:15 a.m.–4:45 p.m.
Anchorage ..... 8:15 a.m.–4:45 p.m.
Portland ..... 8 a.m.–4:30 p.m.
20—San Francisco ..... 8:30 a.m.–5 p.m.
21—Los Angeles ..... 8:30 a.m.–5 p.m.
San Diego ..... 8:30 a.m.–5 p.m.
22—Newark ..... 8:30 a.m.–5 p.m.
24—Puerto Rico ..... 8:30 a.m.–5 p.m.
25—Indianapolis ..... 8:30 a.m.–5 p.m.
26—Memphis ..... 8 a.m.–4:30 p.m.
Little Rock ..... 8 a.m.–4:30 p.m.
Nashville ..... 8 a.m.–4:30 p.m.

27—Denver ..... 8:30 a.m.–5 p.m.
28—Phoenix ..... 8:15 a.m.–4:45 p.m.
Albuquerque ..... 8:15 a.m.–4:45 p.m.
El Paso ..... 8:30 a.m.–5 p.m.
Las Vegas ..... 8:30 a.m.–5 p.m.
29—Brooklyn ..... 9 a.m.–5:30 p.m.
30—Milwaukee ..... 8 a.m.–4:30 p.m.
31—Los Angeles ..... 8:30 a.m.–5 p.m.
32—Oakland ..... 8:30 a.m.–5 p.m.
33—Peoria ..... 8:30 a.m.–5 p.m.
34—Hartford ..... 8:30 a.m.–5 p.m.
37—Honolulu ..... 8:00 a.m.–4:30 p.m.