

NLRB Requires that Statements of Positions in R cases must be timely filed

Under the new representation case rules, when a petition for representation or decertification is filed, both parties must submit a statement of position. See 29 C.F.R § 102.63. The statements must be filed by noon on the business day prior to the pre-election hearing. The purpose of this requirement is to identify the issues which need to be litigated and to allow the parties to prepare adequately for the hearing. If a Statement of Position is late, even by a few hours, that *party* is precluded from litigating any of the issues raised in its statement. See 29 C.F.R. § 102.66. This requirement is an effort to incentivize the parties to file their position statements on time.

In *Brunswick Bowling Products*, 364 NLRB No. 96 (August 25, 2016), the Board upheld the Regional Director's dismissal of an employer's decertification petition because of the existence of a contract bar. The Employer and the Union entered into a collective bargaining agreement, effective January 9, 2016 through January 11, 2019. On February 11, 2016, just two weeks after ratification of the agreement, the employer filed for decertification of "all employees covered under [the] current contract." The union raised the defense that the CBA was a bar to a decertification election, but its statement of position was not filed until 3:22 PM on the day before the hearing, approximately 3 hours late. Finding no prejudice as a result of the late submission and pointing out that the purpose behind the rule (notification) was adequately served, the hearing officer allowed the union to raise the arguments in their statement of position at the hearing. The Regional Director affirmed the hearing officer's ruling and dismissed the petition as barred by the CBA.

On review, the Board reversed the Regional Director's admission of the union's statement of position, upholding the need for the timeliness requirement. The rule does not include a requirement that untimely positions can be considered if they are not prejudicial. However, the Board emphasized that the Regional Director has the statutory authority under section 3(b) of the Act to consider any evidence it deems necessary to determine whether a question concerning representation exists. The new rule requiring statements of position does not change that. The rule only precludes a *party* from litigating its issues if its statement of position is untimely filed. It does not preclude the Regional Director from considering any evidence he or she considers important. In addition, the Board held that the issue of the contract bar could be introduced at the hearing because (1) the employer mentioned the contract on the face of the petition, and (2) both parties' stipulated to the existence of the CBA. The Board determined that, because its statement of position was late, the union was precluded from bringing its contract bar argument to the hearing. However, the Regional Director still properly considered the contract bar in dismissing the petition.

This reasoning was applied recently in Region 13 to direct an election. The union filed a petition to represent a unit of employees of Nalco. *Nalco Crossbow Water, LLC and Teamsters Local 781*, No. 13-RC-181397 (September 2, 2016). The employer failed to serve its statement of position on the union before noon on the day prior to the pre-election hearing, even though it had been timely filed with the Regional Director. At the hearing, the Union objected to the employer's evidence on the grounds that the employer's position statement had not been timely served upon the union. As a result, the Regional Director precluded the employer from litigating any of its objections to the petitioned for unit. Nevertheless, the Regional Director defined the unit as slightly modified from the union's petition, exercising his statutory authority to consider all relevant evidence. He then directed an election for September 13, 2016.

The Board appears to be interpreting Section 102.66 of the new rules very strictly by not allowing a party to litigate its issues at the hearing if its statement of position is not filed on time, even if it is late by just a few minutes or hours. However, that does not necessarily mean that the Regional Director will not consider similar evidence which may be favorable to that party in the decision whether or not to direct an election. Ultimately, the Regional Director has a statutory duty to consider any relevant evidence that will help determine whether a question concerning representation exists, regardless of the new statement of position requirement.

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