Responding to NLRB Unfair Labor Practice Charges

Industrial Relations Department

Director Vance Zimmerman
What is the NLRB?

- The National Labor Relations Board is the federal agency that enforces the National Labor Relations Act.

- The National Labor Relations Act is a federal law that covers union representation and collective bargaining. The Postal Service and the APWU are covered by the NLRA.

- The Board’s five members are appointed by the President:

  John R. Ring  
  Chairman

  William J. Emanuel

  Marvin E. Kaplan

  Lauren McFerran

  Vacant
The NLRB General Counsel

• The General Counsel works separately from the Board and is appointed by the President.

• NLRB General Counsel Peter Robb, former partner at Downs, Rachlin and Marin in Vermont; appointed by President Trump on November 17, 2017

• The General Counsel prosecutes violations of the NLRA.

• The General Counsel delegates authority to 26 NLRB Regions across the United States. Each Region has a Regional Director who directs the investigation and prosecution of violations of the NLRA and implements the procedures of the NLRA.
The Unfair Labor Practice Charge Process - A Charge Against a Union

1. **Charge**
   - Filed at the NLRB Region

2. **Investigation**
   - Union can submit position statements, affidavits, documentary evidence

3. **Trial**
   - Before an Administrative Law Judge

4. **Board Review**
   - 3-member panel of NLRB in Washington, DC

5. **Court Appeal**
   - Federal Court of Appeals

Employee/Charging Party
Union/Charged Party

Board Agent investigates

NLRB General Counsel is the prosecutor

Reviews ALJ Decision and parties’ exceptions

Reviewing Board Order
Region’s Investigation of a Charge

• Region assigns an agent to investigate the ULP charge.

• The agent collects evidence from all parties about the allegations and other potential violations that arise in the investigation.

• The agent may ask for witness affidavits which are interview statements given under oath. You are not required to give an affidavit.
  
  • Witnesses can have a lawyer present, but typically no one else.
  
  • Witnesses can review and correct affidavit before signing.

• The agent presents investigatory findings to the Regional Director to decide whether to issue a complaint against the union.
If You Receive a Charge -

• DO NOT IGNORE LETTERS, EMAILS, PHONE CALLS FROM THE NLRB

• RESPOND PROMPTLY TO THE BOARD AGENT INVESTIGATING THE CHARGE AND COOPERATE AS MUCH AS IS REASONABLE IN THE INVESTIGATION

• DO NOT DO ANYTHING THAT CAN BE CONSTRUED AS RETAILATORY BY THE PERSON WHO FILED THE CHARGE

FAILING TO RESPOND WHEN YOU RECEIVE A CHARGE MAY RESULT IN A COMPLAINT BEING ISSUED AGAINST THE UNION
Charge Determination – No Merit

If the Regional Director finds there is NO merit to a charge:

• Charging Party can withdraw the charge

• Region can dismiss the charge
Charge Determination - Merit

If the Regional Director finds there IS merit to a charge, he/she:

• Can dismiss the charge on condition that no other violations occur in the next six months (Merit Dismissal)

• Can negotiate a settlement agreement with the Charged Party/Union

• Can issue a complaint and litigate the case against the Charged Party/Union before an Administrative Law Judge
Types of NLRB Settlements

1. *Non-Board Settlement:* A settlement agreement between the charging party and the union. The Region will dismiss the charge but may reinstate it if the settlement is violated.

2. *Informal Settlement:* A settlement between the NLRB and the union. If settlement is violated, Region will issue a complaint and go to trial.

3. *Formal Settlement:* A settlement between the NLRB and the union. If the settlement is violated, Region can enforce settlement without proving the merits of the underlying charge at a trial.
NLRB Administrative Law Judge Trials

- Region issues a **complaint** against the union; union must submit a written **answer** to the complaint.

- Trial is before an **Administrative Law Judge**; setting is informal, but the proceeding is similar to court with pre-hearing meetings, settlement conferences, motions, testimony, exhibits subject to federal rules of evidence, and post-hearing briefs.

- **Counsel for the General Counsel** is the prosecutor, Charged Party is the defendant. Charged Party can be represented by a lawyer.

- ALJ Decision goes to the Board:
  - Parties can file **exceptions** to raise specific issues for the Board to address
  - Board reviews ALJ decision and adopts, modifies or rejects it.
  - Board decision is the final agency decision of the NLRB.
The Duty of Fair Representation and the NLRA

• The *Duty of Fair Representation* is a union’s legal obligation to represent all bargaining unit employees fairly, in good faith, and without discrimination.

• It is an unfair labor practice under the NLRA for a union to violate the *Duty of Fair Representation*.

• DFR charges are usually filed by individual bargaining unit employees and prosecuted by the NLRB General Counsel through the NLRB Regions.

• DFR charges are the most common kind of NLRB charges filed *against* unions.
Common DFR claims by bargaining unit employees are that their union

- did not file a grievance;
- missed a grievance procedure deadline;
- refused to answer questions about a grievance; or
- settled a grievance in a way the grievant did not like

because of animus towards the employee or the union’s gross negligence
New NLRB General Counsel policy is to prosecute unions for technical violations regardless of reason or intent for:

- Not having a grievance tracking system
- Not responding to any inquiry from a bargaining unit employee
- Not responding to employee requesting information from the union

New DFR Prosecutorial Policy – What the NLRB is Looking For

Now, the NLRB is looking for unions to show they:

- Have a process/policy to track grievances
- Have a process or practice to communicate grievance/case status to grievants
- Documented phone calls—who called, date, time, and general summary of call
- Documented discussions with employees you represent about their grievances—especially any conversation where it is explained that a grievance is not being filed