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The Board, the Courts, and the National Labor Relations Act

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Elizabeth Manor, [116] the Board over-
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can show that it represented at
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NLRB 1531, 118 LRRM 1204 (1985), *over-*
RB 1375, 117 LRRM 1314 (1981). See also
oloying Unit: Successorship," for general

. 132 LRRM 1185 (1989). In that case, the
ale of *Bruckner Nursing Home,* 262 NLRB
used to allow the employer to bar an elec-
e of two competing unions. *See also* King
M 1318 (1991); Bridgeport Jai Alai, 227

, 148 LRRM 1049 (1994).
LRB 844, 151 LRRM 1345 (1996). *Accord*
LRRM 1070 (1996).
002).

In *Baseball Club of Seattle Mariners*[124] an employer's voluntary recognition of a union after an arbitrator's certification of the union's majority status pursuant to a written neutrality/card check agreement created a recognition bar to the processing of a decertification petition notwithstanding that the petition was supported by a 30 percent showing of interest.

A valid recognition agreement constitutes a bar only if the unit involved meets the requisite standard of appropriateness.[125] The unit need not be precisely described, however. In *Central General Hospital*[126] the Board held that the parties' recognition agreement covering "medical records employees" was not intended to establish a separate unit of those employees, which would have been inappropriate; rather, it found that the parties had merely intended the recognition agreement to add those employees to an existing unit. The resultant unit was considered "sufficiently appropriate" to render the recognition agreement a bar, since the Board permits parties "the broadest permissible latitude to mutually define the context in which collective bargaining should take place."[127]

[**Editor's Note**: On December 8, 2004, the Board granted review in *Shaw's Supermarkets,* 343 NLRB No. 105, 176 LRRM 1220 (2004). The regional director had dismissed the RM petition "finding that the Union's demand for recognition based on a lawful contractual 'after-acquired' clause does not entitle the Employer to demand an election under Section 9(c)(1)(B)."]

B. Pendency of Unfair Labor Practice Charges

Generally, unless the charging party requests the Board to proceed, the Board will decline to direct an election while unfair labor practice charges that affect the unit are pending. The rationale is

[124]335 NLRB 563, 168 LRRM 1219 (2001) (the Board distinguished *Smith's Food & Drug Centers,* 320 NLRB 844, 151 LRRM 1345 (1996), where there is no recognition bar when two or more unions simultaneously are conducting organizing campaigns).

[125]The Board has stated that nothing in the statute requires that the unit for bargaining be the "only" appropriate unit, or the ultimate unit, or the most appropriate unit; it need only be appropriate to ensure the employees in each case the fullest freedom in exercising the rights guaranteed by the Act. Morand Bros. Beverage Co., 91 NLRB 409, 26 LRRM 1501 (1950). *See* Chapter 11, "Appropriate Bargaining Units."

[126]223 NLRB 110, 91 LRRM 1433 (1976).

[127]*Id.* at 113.

that the charges, if true, would destroy the "laboratory conditions"[128] necessary to permit employees to cast their ballots freely and without restraint or coercion. This practice is not governed by statute, apart from the exceptional expedited election under Section 8(b)(7)(C), or by rules or regulations; rather, it lies within the Board's discretion as part of its responsibility to decide whether an election will effectuate the policies of the Act.[129] This *blocking charge* rule does not violate due process[130] and does not constitute an abuse of discretion by the Board.[131]

The blocking charge rule may be applied even where the charging party requests the Board to proceed, if the issues raised in the charge require resolution in an unfair labor practice proceeding before the holding of an election can be deemed appropriate.[132] Normally, however, when a *request to proceed* is filed the pendency of an unfair labor practice charge will not block an election. In *NLRB v. Tri-City Linen Supply*[133] the Ninth Circuit held that the Board did not abuse its discretion by scheduling an election during the pendency of unfair labor practice charges against the employer where a request to proceed had been filed by the union; the court also held that the investigation of the charges by a Board agent the day before the election did not adversely affect the voters or the Board's laboratory conditions.[134]

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[128] *See generally* Chapter 9, "Restrictions on Preelection Activity: 'Laboratory Conditions.' "

[129] American Metal Prods. Co., 139 NLRB 601, 51 LRRM 1338 (1962). NLRB Casehandling Manual ¶11730 sets forth the "Blocking Charge Rule" in detail.

[130] Hausley v. NLRB, 81 LRRM 2254 (E.D. Tenn. 1972).

[131] Gem Int'l v. Hendrix, 80 LRRM 3302 (W.D. Mo. 1972). *But see* Chapter 33, "Judicial Review and Enforcement," Section III.A. The "blocking charge" practice has not been without judicial criticism. *See, e.g.,* NLRB v. Gebhard-Vogel Tanning Co., 389 F.2d 71, 67 LRRM 2364 (7th Cir. 1968); NLRB v. Minute Maid Corp., 283 F.2d 705, 47 LRRM 2072 (5th Cir. 1960).

[132] E. & R. Webb, 194 NLRB 1135, 79 LRRM 1163 (1972). The election would have been barred by the agreement between the employer and incumbent union unless the employer's recognition of the incumbent was itself unlawful and violative of §§8(a)(2) and 8(b)(1)(A) and (2) of the Act. The Board reasoned that to make such a determination in the representation case would be contrary to established Board policy that unfair labor practice allegations are not properly litigable in a representation proceeding. *See also* Mistletoe Express Serv. of Tex., 268 NLRB 1245, 115 LRRM 1153 (1984). *But see* Conair Corp. v. NLRB, 721 F.2d 1355, 114 LRRM 3169 (D.C. Cir. 1983), *cert. denied sub nom.* Ladies' Garment Workers (ILGWU) Local 222 v. NLRB, 467 U.S. 1241, 116 LRRM 2632 (1984).

[133] 579 F.2d 51, 98 LRRM 2155 (9th Cir. 1978), *enforcing* 226 NLRB 669, 93 LRRM 1431 (1976).

[134] *See also* Bishop v. NLRB, 502 F.2d 1024, 87 LRRM 2524 (5th Cir. 1974).

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oe applied even where the charg- oceed, if the issues raised in the air labor practice proceeding be- be deemed appropriate.[132] Nor- *oceed* is filed the pendency of an t block an election. In *NLRB v.* cuit held that the Board did not n election during the pendency ainst the employer where a re- the union; the court also held by a Board agent the day before the voters or the Board's labora-

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RM 1163 (1972). The election would the employer and incumbent union mbent was itself unlawful and violative Act. The Board reasoned that to make case would be contrary to established ions are not properly litigable in a rep- ress Serv. of Tex., 268 NLRB 1245, 115 LRB, 721 F.2d 1355, 114 LRRM 3169 Garment Workers (ILGWU) Local 222 34).
. 1978), *enforcing* 226 NLRB 669, 93

, 87 LRRM 2524 (5th Cir. 1974).

Various exceptions have developed as a result of the Board's common practice of directing elections forthwith as a means of effectuating the policies of the Act. Factors on which the Board has relied to proceed with a representation case, despite the pendency of unfair labor practice charges, include the following: (1) the length of time the proceeding has been pending, (2) the fact that employees in the unit have been without an election during that period, (3) the dismissal of earlier charges that were grounded upon the same basic pattern of conduct as the pending charges, (4) "eleventh hour" filing of the charges, (5) the existence of a strike, or (6) a past practice by the charging party of using the filing of charges as a tactic to delay representation proceedings.[135]

The Board has also directed an immediate election on a union's petition notwithstanding the employer's pending Section 8(e) charge against the union.[136] The charge was based on an allegedly unlawful hot-cargo contract between the union and an employer association. The Board noted that in contrast to Section 8(a) and (b) cases, a Section 8(e) charge deals only with the terms of an agreement between an employer and a labor organization. Such an agreement, even if prohibited, would not necessarily restrain or coerce employees or in any other way prevent the holding of a fair election or influence the employees' choice of a bargaining representative.

The Board has also directed an immediate election, despite pending charges, in order to hold the election within 12 months of the beginning of an economic strike so as not to disenfranchise economic strikers.[137]

In 1995, in *Douglas-Randall, Inc.*,[138] the Board overruled *Passavant Health Center*[139] and its progeny and held that an employer's agreement to settle outstanding unfair labor practice charges and

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[135]NLRB v. Typographical Union No. 570 (Lawrence), 376 F.2d 643, 65 LRRM 2176 (10th Cir. 1967); Surprenant Mfg. Co., 144 NLRB 507, 54 LRRM 1097 (1963); West-Gate Sun Harbor Co., 93 NLRB 830, 27 LRRM 1474 (1951); Columbia Pictures Corp., 81 NLRB 1313, 23 LRRM 1504 (1949); Bercut Richards Packing Co., 70 NLRB 84, 18 LRRM 1336 (1946).

[136]Holt Bros., 146 NLRB 383, 55 LRRM 1310 (1964).

[137]Section 9(c)(3) of the Act provides: "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote . . . in any election conducted within twelve months after the commencement of the strike." *See* American Metal Prods. Co., 139 NLRB 601, 51 LRRM 1338 (1962). *See also* Chapter 19, "The Primary Strike," Section II.B.2.

[138]320 NLRB 431, 151 LRRM 1281 (1995).

[139]278 NLRB 483, 121 LRRM 1230 (1986); *see also* Island Spring, 278 NLRB 913, 121 LRRM 1280 (1986).