1. JURISDICTION

1-100 Jurisdiction Generally

1774-700

177-5500

240-1700 et seq.

The National Labor Relations Board's jurisdiction under the National Labor Relations Act extends to enterprises whose operations affect interstate commerce. Section 2(6) of the Act defines "commerce" and Section 2(7) defines "affecting commerce." The Board's jurisdiction has been construed to extend to all such conduct as might constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. *NLRB v. Fainblatt*, 306 U.S. 601, 606–607 (1939). See *J. M. Abraham, M.D.*, 242 NLRB 839 (1979), in which statutory jurisdiction was established by receipt of Medicare funds and *Catalina Island Sightseeing*, 124 NLRB 813 (1959), in which regulation by another Federal agency under the commerce clause established statutory jurisdiction.

In its exercise of administrative discretion, the Board has limited the assertion of its broad *statutory jurisdiction* to those cases which, in its opinion, have a substantial effect on commerce. In doing so, the Board has adopted standards for the assertion of jurisdiction which are based on the volume and character of the business done by the employer. The Supreme Court has noted that Congress left it to the Board to ascertain whether prescribed practices would, in particular situations, adversely affect commerce. *Polish National Alliance v. NLRB*, 322 U.S. 643, 648 (1944). This is sometimes called *discretionary jurisdiction* and the Court has recognized that, even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 684 (1954).

a. History of jurisdictional standards

These broad principles, which delineate the basic law initially developed with respect to the Board's jurisdictional grant, have been affected by statutory changes made in 1959. Prior to 1950, the Board exercised its discretionary jurisdiction on a case-by-case basis. Since that year, it has defined in its decisions those categories of enterprises over which it would exercise discretionary jurisdiction. The standards under which the Board had been operating were substantially revised in July 1954, and again in October 1958. The Board's practice of establishing the standards under which it will assert jurisdiction was given a statutory basis by the Labor-Management Reporting and Disclosure Act of 1959, which added Section 14(c)(1) to the Act:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert Jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

Thus, while the Board may exercise its discretion to decline to assert jurisdiction over enterprises which meet the legal test of "affecting interstate commerce," it may not decline to assert jurisdiction over enterprises meeting its jurisdictional standards which were in effect on August 1, 1959.

A finding that the Board has statutory jurisdiction is necessary in all Board proceedings, even though no party contests that jurisdiction. *Clark Concrete Construction Corp.*, 116 NLRB 321 fn. 3 (1956).

Statutory jurisdiction can be challenged at any stage, but discretionary jurisdiction must be timely raised. *Anchortank, Inc*., 233 NLRB 295 fn. 1 (1977).

b. Board authority to cede jurisdiction

Section 10(a) of the Act permits the Board to cede jurisdiction to a State or Territory in:

> any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) . . . unless the provision of the State or Territorial statute . . . is inconsistent with the corresponding provision of this Act.

The Board has interpreted Section 10(a) to require that the state statutes provisions be parallel with the NLRA, if not substantially identical. In fact, notwithstanding the requests of some States, the Board has never made a cession agreement. See *Produce Magic, Inc*., 318 NLRB 1171 (1995), and cases cited therein.

1-200 The Jurisdictional Standards

The Board's jurisdictional standards are:

1-201 Nonretail

260-6744

260-3320-5000 et seq.

An annual outflow or inflow, direct or indirect, across state lines of at least $50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959) (see this decision for all the definitions under this heading).

Direct outflow refers to goods shipped or services furnished by an employer directly outside the State.

Indirect outflow refers to sales of goods or services within the State to users meeting any standard except solely an indirect inflow or indirect outflow standard.

An illustration of the application of this definition: An employer engaged in tree surgery and landscaping performed $170,000 worth of services in and out of the State for several public utilities. As under *Siemons*, indirect outflow refers to services to users meeting any of the Board's jurisdictional standards (except the indirect outflow or indirect inflow standard) and the employer's services to the public utilities who met the gross volume for utilities constituted indirect outflow within the *Siemons* definition. Thus, because these services were in excess of $50,000 annually, the employer met the standard for assertion of jurisdiction for a nonretail enterprise. *Labor Relations Commission of Massachusetts*, 138 NLRB 381 (1962) (an advisory opinion under Secs. 102.98 and 102.99 of the Board's Rules and Regulations). Note that the above definition of indirect outflow specifically refers to "users." This was explained in *St. Francis Pie Shop*, 172 NLRB 89, 90 (1968), one of many cases based on the *Siemons* decision (see specifically, *Siemons*, supra at fn. 12).

For purposes of indirect outflow, an exempt organization qualifies as a "user" in the same manner and to the same degree as a nonexempt enterprise. *Peterein & Greenlee Construction Co.*, 172 NLRB 2110 (1968). Direct inflow refers to goods or services furnished directly to the employer from outside the State in which the enterprise is located. Indirect inflow refers to the purchase of goods or services which originate outside the employer's State but which were purchased from a seller within the State. See *Food & Commercial Workers Local 120 (Weber Meats)*, 275 NLRB 1376 fn. 1 (1985). In *Combined Century Theatres*, 120 NLRB 1379 (1959), and *George Schuworth*, 146 NLRB 459 (1964), the Board found indirect inflow in circumstances when the goods had changed form.

For a further explication of these definitions, see *Better Electric Co.*, 129 NLRB 1012 (1961).

Nonrecurring capital expenses are included in assessing an employer's inflow if those expenses are not the only items of inflow. *East Side Sanitation Service*, 230 NLRB 632 (1977); *Arrow Rock Materials*, 284 NLRB 1 (1987).

As stated in *Siemons*, supra at 85, direct and indirect outflow may be combinedas can direct and indirect inflow. But, outflow and inflow may not be combined. See *Oregon Labor Management Relations Board*, 163 NLRB 17 (1967), combining the inflow of a contractor and its subcontractors.

The nonretail standard has been applied when services were provided directly to the consuming public but when the cost of these services were paid for by a commercial enterprise. *Bob's Ambulance Service*, 178 NLRB 1 (1969). See also *Carroll-Naslund Disposal*, 152 NLRB 861 (1965).

In *Hobart Crane Rental, Inc*., 337 NLRB 506 (2002), two companies that were allegedly a single employer did not together meet the outflow requirement in either of the two previous years.

1-202 Retail

260-6776

260-6768

260-6772

All retail enterprises which fall within the Board's statutory jurisdiction and do a gross annual volume of business of at least $500,000. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959).

There is a distinction between "retail" and "wholesale." In *Roland Electrical Co. v. Walling*, 326 U.S. 657, 764 (1946), the Court construed these terms precisely as they are used under the Fair Labor Standards Act. Thus, retail sales include sales to a purchaser who desires "to satisfy his own personal wants or those of his family or friends," while wholesale sales constitute "sales of goods or merchandise 'to trading establishments of all kinds, to institutions, industrial, commercial, and professional users, and sales to governmental bodies.'" *Bussey-Williams Tire Co.*, 122 NLRB 1146, 1147 (1959); *Taylor Baking Co.*, 143 NLRB 566 (1963). The construction and sale of residential homes exclusively is considered a retail enterprise. *DeMarco Concrete Block Co.*, 221 NLRB 341 (1975). If an employer is engaged in both wholesale and retail distribution, either standard applies. *DeMarco Concrete Block Co*., supra.

The retail standard, unlike that used for nonretail, is based on annual gross volume of business. Generally speaking, gross volume is easy to determine. But note that it does not include employers deductions from employee pay for tips. See *Love's Wood Pit Barbeque Restaurant*, 209 NLRB 220 (1974) and *Temptations*, 337 NLRB 376 (2001).

This gross volume test is predicated on a concept which was first used in 1950, and codified in 1954 when a revised set of jurisdictional yardsticks was adopted. Normally, meeting this type of standard will necessarily entail activities "affecting commerce," but, because gross volume, as distinguished from direct or indirect outflow or inflow used in nonretail operations, does not in and of itself indicate movement across state lines, evidence and a finding that the Board has statutory jurisdiction is required in addition to satisfying the gross volume requirement. Accordingly, whenever the gross volume standard is applied, including the retail standard, proof of statutory l jurisdiction is needed. See, for example, *Longshoremen ILWU (Catalina Island Sightseeing)*, 124 NLRB 813 (1960).

A typical illustration of the application of the retail standard: Annual out-of-state purchases constituting inflow to the employer brings its operations within the Board's statutory jurisdiction, while its combined annual gross volume of sales in excess of $500,000 satisfies the dollar volume

test for assertion of discretionary jurisdiction over retail enterprises. *Swift Cleaners*, 191 NLRB 597 (1971).

1-203 Instrumentalities, Links, and Channels of Interstate Commerce

260-6732

All enterprises engaged in furnishing interstate transportation of passengers or freight, and all other enterprises which function as essential links in the transportation of passengers or commodities in interstate commerce, deriving at least $50,000 annual gross revenue from such operations, or performing services valued at least at $50,000 for enterprises over which jurisdiction would be asserted under any standard except one based on indirect outflow or indirect inflow. *HPO Service*, 122 NLRB 394 (1959).

In *HPO*, the employer was engaged in the transportation by bus of mail under contract with the United States Post Office originating both within and outside the State of West Virginia, and over $50,000 of its annual gross revenue was received for such transportation of mail destined for delivery in States other than West Virginia. Where exact figures are not available, the Board may, in appropriate circumstances, infer from the nature of the employer operations that some revenue is derived from interstate travel. *Margate Bridge Co.*, 247 NLRB 1437 (1980).

The *HPO* standard has been applied to a variety of operations.

In *Carteret Towing Co.*, 135 NLRB 975, 977 (1962), it was applied to a company operating tugboats which, among other things, functioned as a link in the transportation of passengers and freight in interstate commerce, from which it received over $50,000 per year, and provided annual services in excess of that figure to companies over which the Board would assert jurisdiction.

In *Andes Fruit Co.*, 124 NLRB 781 fn. 2 (1959), it was applied to a company which received over $50,000 a year for stevedoring services performed for another company which imported products from a foreign country.

A *bank* partakes of the nature of an instrumentality of commerce and is so treated. *Amalgamated Bank of New York*, 92 NLRB 545 (1951), see also *NLRB v. Bank of America National Trust & Savings Assn.*, 130 F.2d 624 (9th Cir. 1942).

For further examples of enterprises described as "essential links," see *United Warehouse & Terminal Corp.*, 112 NLRB 959 (1955) (warehouse activities); *Etiwan Fertilizer Co.*, 113 NLRB 93 (1955) (shipping terminal operations); *Kenedy Compress Co.*, 114 NLRB 634 (1956) (warehouse and shipping); *Peoria Union Stock Yards Co.*, 116 NLRB 263 (1956) (public stockyard); *Aurora Moving & Storage Co.*, 175 NLRB 771 (1969) (packing and crating); and *Boston Cab Assn.*, 177 NLRB 64 (1969) (starter service); and *Open Taxi Lot Operation*, 240 NLRB 808 (1979) (airport station or dispatch services).

Note that in *Kenilworth Delivery Service*, 140 NLRB 1190 (1963), revenue from interstate transportation of commodities was combined with revenue from services performed within the State for enterprises which met the jurisdictional standards. In doing so, the Board explained that the purport of this standard was to equate transportation directly out of the State with within-state transportation services to other enterprises directly engaged in interstate commerce and to apply the $50,000 standard applicable to either category by adding the amount realized from each. This is consistent with Board policy in adding direct and indirect outflow or direct and indirect inflow.

In *Greyhound Terminal*, 137 NLRB 87 (1962), the Board included all revenue related to a bus terminal including rentals from a taxistand and restaurant in determining jurisdiction because these services were an integral part of the terminal but incidental thereto. In *Jarvis Cafeteria*, 200 NLRB 1141 (1972), the Board declined jurisdiction under the essential link standard where the sale of bus tickets was a minor incidental aspect of the employees' total operations which included a restaurant.

See also *Superior Travel Service, Inc*, 342 NLRB No. 51 (2004), holding that a travel agency qualifies as an "essential links."

1-204 National Defense/Federal Funds

260-6736

280-9706

Enterprises as to which the Board has statutory jurisdiction and whose operations exert a substantial impact on national defense, irrespective of the Board's other jurisdictional standards. No annual gross volume of business yardstick is used. *Ready Mixed Concrete & Materials*, 122 NLRB 318 (1959).

Illustrative of enterprises over which jurisdiction has been asserted under this standard: a company primarily engaged in transporting defense materials (*McFarland & Hullinger*, 131 NLRB 745 (1961)); a company which performed services for defense contractors (*Colonial Catering Co.*, 137 NLRB 1607 (1962)); a company which engaged in a substantial amount of research and development for the United States Government under contract (*Woods Hole Oceanographic Institution*, 143 NLRB 568 (1963)); and a company which hauled garbage away from Government missile sites and related housing units (*Disposal Service*, 191 NLRB 104 (1971)), and a company which provides janitorial services to the U.S. Marine Corps. *Castle Instant Maintenance/Maid, Inc*., 256 NLRB 130 (1981). See also *Pentagon Barber Shops*, 255 NLRB 1248 (1981); and *Fort Houston Beauty Shop*, 270 NLRB 1006 (1984), in which the national defense standard was not applied.

The Board will assert jurisdiction over an enterprise that derives substantial amounts of revenue from Federal funds even in the absence of evidence of interstate inflow or outflow. *Mon Valley United Health Services*, 227 NLRB 728 (1977), and *Community Services Planning Council*, 243 NLRB 798 (1979). See also *Electrical Workers Local 48* (*Kingston Constructors)*, 332 NLRB 1492 (2000).

1-205 Plenary Jurisdiction

220-7533-5000

Plenary jurisdiction is exercised over enterprises in the District of Columbia and over which the Board would otherwise have statutory jurisdiction. *Westchester Corp.*, 124 NLRB 194 (1959); *M. S. Ginn & Co.*, 114 NLRB 112 (1956); *Catholic University*, 201 NLRB 929 (1973).

1-206 Territories

220-7533-7500

Section 9(c)(1) of the Act provides that the Board shall direct an election in those cases where it has determined that "a question of representation affecting commerce exists." Section 2(6) of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

"Territory," as used in Section 2(6), has been interpreted by the Board to include Puerto Rico (*Ronrico Corp. Co*., 53 NLRB 1137 (1943)), the Virgin Islands (*Virgin Isles Hotel*, 110 NLRB 558 (1955); *Caribe Lumber & Trading Corp.*, 148 NLRB 277 (1964)); and Guam (*RCA Communications*, 154 NLRB 34 (1965)). In *Van Camp Seafood Co.*, 212 NLRB 537 (1974), the Board found that American Samoa is a territory as that term is used in Section 2(6) of the Act and exercised jurisdiction. See also *Micronesian Telecommunications Corp.*, 273 NLRB 354 (1984), where the Board exercised jurisdiction over the trust territory of the Northern Mariana Islands.

In *Facilities Management Corp.*, 202 NLRB 1144 (1973), the Board declined to assert jurisdiction over Wake Island. Assuming, arguendo, that it had statutory jurisdiction, the Board nonetheless declined to exercise it, particularly due to the fact that Wake Island "has no local permanent residents and is remote, difficult of access, and contains nothing but a military installation." See also *Offshore Express*, 267 NLRB 378 (1983), under Foreign Flag Ships, Foreign Nationals, and Related Situations, section 1-501, infra. For foreign policy considerations, the Board declined to exercise its statutory jurisdiction in the Panama Canal Zone. *Central Services*, 202 NLRB 862 (1973).

1-207 Labor Organizations

260-6796

28-8630

177-1683-8750

A labor organization, "when acting as an employer vis-a-vis its own employees, is an employer within the meaning of Section 2(2) of the Act, and subject to the Board's jurisdiction over that industry." *Variety Artists (Golden Triangle Restaurant)*, 155 NLRB 1020 (1965). In its role as an employer, the same jurisdictional standards are applied to a labor organization as to any other employer. *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1958); *Laundry Workers Local 26*, 129 NLRB 1446 (1961). See also *Teamsters Local 2000*, 321 NLRB 1383 (1996), where the Board rejected a contention that a union representing airline employees was not itself an employer under the Act.

1-208 Multiemployer Groups and Joint Employers

260-3360-6700

530-5700 et seq.

All members of a multiemployer group who participate in, or are bound by, multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes. *Insulation Contractors of Southern California*, 110 NLRB 638 (1955). Jurisdiction is asserted if the standards are satisfied by any member of the association (*Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543 (1959)), or by a total of the business of association members collectively without regard to that of the individual members (*Federal Stores*, 91 NLRB 647 (1950); *Checker Cab Co.*, 141 NLRB 583 (1963); *Transportation Promotions*, 173 NLRB 828 (1969)).

Although neitherthe informality of the association nor the absence of an advance agreement to be bound by the negotiations does not preclude the assertion of jurisdiction on these grounds (*Fish Industry Committee*, 98 NLRB 696, 697–698 (1951)), the mere adoption by an employer of an area contract negotiated by an association of employers with which the employer is not connected is not sufficient to satisfy the standards (*Gordon Electric Co.*, 123 NLRB 862 (1959); *Greater Syracuse Printing Employers' Assn.*, 140 NLRB 217 (1963)).

It should be emphasized that multiemployer bargaining is predicated on the consent of the parties. See discussion in *Marty Levitt*, 171 NLRB 739 (1968), see also *Evening News Assn.*, 154 NLRB 1482 (1966), affd. sub nom. *Detroit Newspaper Publishers Assn.*, 372 F.2d 569 (6th Cir. 1967).

As in the case of multiemployer groups, such as employer associations, on a finding of a joint employer relationship, the Board will combine the gross revenues of the employers for jurisdictional purposes. *CID-SAM Management Corp*., 315 NLRB 1256 (1995); *Central Taxi Service*, 173 NLRB 826 (1969); *Checker Cab Co.*, 141 NLRB 583 (1963), enfd. 367 F.2d 692 (6th Cir. 1966); *NLRB v. Marinor Inns*, 445 F.2d 538 (5th Cir. 1971), enfg. 181 NLRB 467 (1970).

In making a joint-employer finding, substantial reliance is placed on the employers holding themselves out to the public as a single-integrated enterprise (*Transportation Promotions*, 173 NLRB 828 (1969); *Operating Engineers Local 428 (Bee Slurry)*, 169 NLRB 184 (1968); *Bloch Enterprises*, 172 NLRB 1678 (1968), and also on the extent of control over the other employer's operations in particularly critical areas (*Hamburg Industries*, 193 NLRB 67 (1971)).

For further discussion of multiemployer associations and joint employers, see Chapter14.

1-209 Enterprises Falling Under Several Standards

260-6768

260-6772

260-3360-8400

If an enterprise is of such nature to be classified within several of the categories for which different standards have been established, jurisdiction is asserted if it satisfies the standards of any one of the categories within which it may be classified. *Country Lane Food Store*, 142 NLRB 683 (1963).

Thus, when an employer engages in both retail and nonretail operations, if the nonretail aspect is not de minimis, the Board asserts jurisdiction where the employer's operations meet either standard. See, for example, *Indiana Bottled Gas Co.*, 128 NLRB 1441 (1960), and *Man Products*, 128 NLRB 456 (1960).

See also *Phipps Houses Services*, 320 NLRB 876 (1996), where the Board discusses the exception to the policy of examining each function if the operation meets the highest standard the Board applies to any enterprise.

1-210 Postal Service Employees

480-0125

240-1775

280-4310

Under the Postal Reorganization Act of 1970 (Pub. L. 91-375, 91st Cong.), the National Labor Relations Act was made applicable the United States Postal Service (USPS) and postal employees. The Board was specifically empowered to decide appropriate units, entertain representation petitions, conduct elections, and certify bargaining representatives for employees in theUSPS.

1-211 Jurisdiction in an 8(a)(4) Situation

240-0167-1700

240-0167-8300

In a unique situation in which the Board, although finding legal jurisdiction, found that the respondent's operations failed to meet the Board's discretionary standards, it nonetheless fashioned an 8(a)(4) remedy. The case involved Section 8(a)(1), (3), and (5), as well as Section 8(a)(4). The 8(a)(4) remedy was predicated on the discharge of employees for having met with and given evidence to a Board agent. In these circumstances, while dismissing the 8(a)(1), (3), and (5) portions of the complaint on jurisdictional grounds, the Board nonetheless held that it would effectuate the policies of the Act to assert jurisdiction for the purpose of remedying the respondent's unlawful interference with the statutory right of all employees to resort to and participate in the Board's processes and granted an 8(a)(4) remedy. *A A Electric Co.*, 177 NLRB 504 (1969). The Eighth Circuit refused enforcement originally of this case on other grounds, 435 F.2d 1296 (1971). The Supreme Court reversed the circuit court and remanded the case, saying that the court of appeals could "canvass" the "marginal" jurisdiction of the Board. 404 U.S. 821 (1971). The Eighth Circuit then enforced the Board's order in its finding of statutory jurisdiction.

80 LRRM 3055 (1972). See also *Pickle Bill's, Inc.*, 229 NLRB 1091 (1977), in which the Board processed an election petition involving an employer who did not meet the Board's discretionary standards. The Board did so because it had previously entered an 8(a)(4) order against the employer. It therefore processed the representation petition in order "to give full scope and effect" to that order.

1-212 Secondary Boycotts

260-3380

Although this outline is devoted solely to representation proceedings, the special rule adopting a standard for asserting jurisdiction in secondary boycott cases is included in order to make the statement of jurisdictional standards complete.

In cases in which a secondary boycott violation is alleged and the operations of the primary employer do not satisfy the jurisdictional requirements, the Board takes into consideration for jurisdictional purposes not only the operations of the primary employer, but also the entire operations of any secondary employers to the extent that the latter are affected by the conduct involved. *Teamsters Local 554 (McAllister Transfer)*, 110 NLRB 1769 (1955). Jurisdiction over an 8(b)(4) case gives the Board jurisdiction over a related 8(b)(7) case. *Plumbers Local 460 (L. J. Construction)*, 236 NLRB 1435 (1978).

For illustrations of the application of this standard, see *Hotel & Restaurant Employees Local 595 (Arne Falk)*, 161 NLRB 1458, 1461–1462 (1966); *Electrical Workers IBEW Local 257 (Osage Neon Plastics)*, 176 NLRB 424 (1969).

1-213 Indian Tribes

220-7567-7000

In *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), the Board embarked "on a new approach to considering Indian owned and operated enterprises." Finding that the special attributes of Indian sovereignty are not implicated by Board jurisdiction over Indian commercial enterprises that are par t of the national economy, the Board eschewed its previous on/off reservation dichotomy for determining whether or not to assert jurisdiction. Where, however, the enterprise is a traditional tribal or governmental function, the Board will decline jurisdiction. *Yukon Kuskokwim Health Corp*., 341 NLRB No. 139 (2004).

The Board had previously held that Indian tribes and their self-directed enterprises located on the tribal reservation are implicitly exempt as governmental entities within the meaning of the Act. See *Fort Apache Timber Co.*, 226 NLRB 503 (1976); and *Southern Indian Health Council*, 290 NLRB 436 (1988). However, the Board distinguished these cases and asserted jurisdiction where the tribal enterprise is located off the reservation. See *Sac & Fox Industries*, 307 NLRB 241 (1992); and *Yukon Kuskokwim Health Corp*., 328 NLRB 761 (1999) (jurisdiction asserted over hospital located off treaty reservation). The Board also asserted jurisdiction in cases where the enterprise, although located on the tribal reservation, is neither wholly owned nor controlled by the tribe. See *Devil's Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979). See also *Texas-Zinc Minerals Corp.*, 126 NLRB 603 (1960), in effect enforced in *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961), cert. denied 366 U.S. 928 (1961).

For a discussion of what constitutes reservation lands see *U.S. v John*, 437 U.S. 634 (1978).

1-300 Miscellaneous Categories in Which Jurisdiction Was Asserted

1-301 Architects

280-8910

An employer engaged in the practice of architecture, concededly in an operation over which the Board has statutory jurisdiction, was made subject to the Board's discretionary jurisdiction. "Architecture," the Board said, "plays an irreplaceable role in the construction industry, a major

factor in interstate commerce, and it is apparent that disputes involving architects could have serious and far-reaching effects upon that industry." The standard for nonretail business was applied. *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049 (1971); *Skidmore, Owings & Merrill*, 192 NLRB 920 (1971); *Fisher-Friedman Associates*, 192 NLRB 925 (1971).

1-302 Amusement Industry

280-7900

The retail standard applies to the amusement industry. *Ray, Davidson & Ray*, 131 NLRB 433 (1961); *Coney Island, Inc.*, 140 NLRB 77 (1963); and *Aspen Skiing Corp.*, 143 NLRB 707 (1963).

1-303 Apartment Houses

260-6704

280-6500 et seq.

The apartment house standard is a gross annual revenue of $500,000 or more. *Parkview Gardens*, 166 NLRB 697 (1967).

Parkview was, the first case to establish a jurisdictional standard in the residential apartment industry, viz., the operation of a garden-type apartment project composed of 592 units with an annual gross rental of $650,000.

In determining discretionary jurisdiction, the Board traditionally aggregates gross revenues derived from all residential buildings managed by the employer. *Riverdale Manor Owners Corp.*, 311 NLRB 1094 fn. 1 (1993). See also *CID-SAM Management Corp*., supra at fn. 4. Of course, there must also be a showing of statutory jurisdiction. Id. at fn. 5.

Historically, the Board asserts jurisdiction over the managing agent of buildings where the underlying buildings meet the necessary jurisdictional requirements. *Phipps Houses Services*, 320 NLRB 876 (1996).

1-304 Art Museums, Cultural Centers, and Libraries

280-8400

In a series of cases, the Board has applied a $1 million gross revenues standard for jurisdiction over employers which, although not education institution, themselves, do contribute to the cultural and educational values of the community. *Helen Clay Frick Foundation*, 217 NLRB 1100 (1975) (art museum); *Colonial Williamsburg Foundation*, 224 NLRB 718 (1976) (historical restoration and preservation); *Wave Hill, Inc*., 248 NLRB 1149 (1980) (environmental center); and *Rutland Free Library*, 299 NLRB 245 (1990) (private nonprofit library).

1-305 Bandleaders

280-7920

Bandleaders who "sell" music to ultimate purchasers, i.e., a sale (performance) to a purchaser to satisfy personal wants or those of family or friends, come under the retail standard. Bands which "sell" music to commercial enterprises, not to the ultimate consumers, are governed by the prevailing nonretail standard. *Marty Levitt*, 171 NLRB 739 (1968).

1-306 Cemeteries

280-6500

The Board will exert its jurisdiction over the operations of cemetery whose gross annual revenue exceeds $500,000 and whose annual out-of-state purchases are more than de minimis. *Catholic Cemeteries*, 295 NLRB 966 (1989), and cases cited therein.

1-307 Colleges, Universities, and Other Private Schools

280-8220

260-6708

Private nonprofit colleges and universities which receive a gross annual revenue from all sources (excluding only contributions which are, because of limitation by the grantor, not available for use for operating expenses) of at least $1 million. National Labor Relations Board's Rules and Regulations, Section 103.1, published in 35 F.R. 18370, December 3, 1970.

This monetary yardstick was established by rulemaking and implemented the Board's decision in *Cornell University*, 183 NLRB 329 (1970), in which it decided to assert jurisdiction over nonprofit private educational institutions. In doing so, the Board overruled its earlier decision in *Columbia University*, 97 NLRB 424 (1951).

For illustrations of the application of this standard, see *Boston College*, 187 NLRB 133 (1971); *Leland Stanford Jr. University*, 194 NLRB 1210 (1972); and *Garland Junior College*, 188 NLRB 358 (1971). In *Syracuse University*, 204 NLRB 641 (1973), the Board asserted jurisdiction on the basis of gross annual revenues in excess of $1 million of which at least $50,000 was received from points outside the State of New York.

Because the Board no longer declines to assert jurisdiction over educational institutions as a class, it asserted jurisdiction over the Corcoran Art Gallery, a District of Columbia institution, on a plenary basis. *Corcoran Gallery of Art*, 186 NLRB 565 (1970).

As jurisdiction had been extended over private colleges and universities, no substantial justification remained for withholding the exercise of the Board's powers over employers "whose operations are adjunctive to the educational system." Thus, jurisdiction was asserted over a foundation operating radio stations on that basis. *Pacifica Foundation-KPFA*, 186 NLRB 825 (1970). But in *College of English Language*, 277 NLRB 1065 (1985), the Board applied the retail rather than the educational standard because the nature of the employer's operation was dissimilar from that of colleges or secondary schools.

In *Windsor School*, 200 NLRB 991 (1972), the Board concluded that it was no longer justified in applying different standards to purely educational institutions based solely on their being operated for profit or nonprofit. Accordingly, it applied the jurisdictional standard of $1 million annual gross revenue, which it had established for nonprofit secondary institutions, to similar for-profit secondary schools. See also *Shattuck School*, 189 NLRB 886 (1971).

The jurisdictional standard for private schools is $1 million. See *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975). Although this case predates *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1978) (see sec. 1-403), there is no reason to believe that the Supreme Court's decision there would affect this jurisdictional standard where it is applied to a nonreligious private school. For discussion of Religious Schools, see 1-403 and for Religious Organizations, see 1-503.

Where, however, a university, although a private institution, was made by state legislation "an instrumentality of the Commonwealth of Pennsylvania" with resulting increased state control over the affairs of the university, thus becoming "a quasi-public higher educational institution," the assertion of jurisdiction was declined. *Temple University*, 194 NLRB 1160 (1972), but see *Howard University*, 224 NLRB 385 (1976).

1-308 Communication Systems

280-4800 et seq.

Enterprises engaged in the operation of radio or television broadcasting stations or telephone or telegraph systems which do a gross annual volume of business of at least $100,000 come within the Board's discretionary jurisdiction. For statutory jurisdiction, the Board noted that the employer advertised national brand products and was a member of the Associated Press utilizing its wire service. *Raritan Valley Broadcasting Co.*, 122 NLRB 90 (1959).

The Board has applied its communication systems standard to community television antenna systems (CATV). *General Telephone & Electronics Communications*, 160 NLRB 1192, 1193 fn. 5 (1966).

The Board has, however, declined jurisdiction over a television station that operated for religious purposes alone. *Faith Center-WHCT Channel 18*, 261 NLRB 106 (1982). See also sections 1-403 and 1-503 supra.

1-309 Condominiums and Cooperatives

260-6704

280-6510

In *30 Sutton Place Corp.*, 240 NLRB 752 (1979), the Board reversed its decision in *Point East Condominium Owners Assn.*, 193 NLRB 6 (1971), and decided that it would assert jurisdiction over condominiums and cooperatives. The jurisdiction standard was set at gross annual revenues in excess of $500,000. See also *Imperial House Condominiums*, 279 NLRB 1225 (1986). In determining discretionary jurisdiction, the Board traditionally aggregates gross revenues derived from all residential buildings managed by the employer. *Riverdale Manor Owners Corp.*, 311 NLRB 1094 fn. 1 (1993).

For discussion of jurisdiction over managing agents see section 1-303, supra.

1-310 Credit Unions

280-6140

Credit unions (nonprofit corporations engaged in the extension of consumer credit), are within the Board's jurisdiction. Credit unions' operations, like those of many financial institutions, have aspects of both retail and nonretail enterprises. To the extent credit unions lend money to or secure deposits from individuals, their operations appear to be retail in nature. To the extent they invest their funds in Treasury notes or commercial ventures, their activities are nonretail in nature. Thus, the impact on commerce of credit union operations may be measured by either the retail or nonretail standard. *East Division, Federal Credit Union*, 193 NLRB 682 (1971).

1-311 Day Care Centers

260-6750

280-8350

In *Salt & Pepper Nursery School*, 222 NLRB 1295 (1976), the Board set a $250,000 annual revenue standard for day care centers for children.

1-312 Financial-Information Organizations and Accounting Firms

280-8930

Jurisdiction is asserted over employees engaged in the collection, compilation, editing, and disseminating of information in the areas of credit, finance, marketing, sales, economics, education, and research. *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971); *Credit Bureau of Greater Boston*, 73 NLRB 410 (1947). *Ernst & Ernst National Warehouse*, 228 NLRB 590 (1977).

1-313 Gaming

260-6724

280-7990

The retail standard applies to the gaming industry. *El Dorado Club*, 151 NLRB 579 (1965); *Harrah's Club*, 150 NLRB 1702 (1965), enfd. 362 F.2d 425 (9th Cir. 1966), cert. denied 386 U.S. 915 (1967).

The Board exercised jurisdiction in two cases involving casinos affiliated with racetracks, finding that the enterprises were predominently casinos and the employees predominently casino employees. *Prairie Meadows Racetrack & Casino*, 324 NLRB 550 and *Delaware Park*, 325 NLRB 156 (1997).

But see Horseracing and Dogracing, infra at section 1-502.

1-314 Government Contractors

260-3390

260-6736

280-9100 et seq.

In *Management Training Corp*., 317 NLRB 1355 (1995), a divided Board announced that henceforth it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act in deciding whether the Board will exercise jurisdiction over private sector employers who work under contracts with Federal, state, or local governments." This policy reversed the Board's prior practice of examining the relationship between the employer and the government entity to determine whether "the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." *National Transportation Service*, 240 NLRB 565 (1979); *Res-Care, Inc.*, 280 NLRB 670 (1986). In announcing the test in *Management Training*, the Board reversed *Res Care*, a policy which had itself overruled the "intimate connection" test of *Rural Fire Protection Co.*, 216 NLRB 584 (1975). The Sixth, Fourth, and Tenth Circuits have upheld the *Management Training* doctrine. See *Pikeville United Methodist Hospital of Kentucky v. NLRB*, 109 F.3d 1146 (6th Cir. 1997); *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997); and *Aramark Corp. v. NLRB*, 156 F.3d 1087 (10th Cir. 1998). See also *Jacksonville Urban League*, 340 NLRB No. 156 (2003), affirming the *Management Training* doctrine.

The Board referenced the *Management Training* doctrine in a jurisdiction case involving exempt entities under the Railway Labor Act. See, e.g., *D & T Limousine Service*, 320 NLRB 859, 860 fn. 3 (1996).

For a discussion of State or Political Subdivisions see section 1-401, infra**.** See also Comity to State Elections section 10-120.

1-315 Health Care Institutions

260-6752 et seq.

280-8000 et seq.

In 1974 Congress enacted Section 2(14) to give the Board jurisdiction over "health care institutions." These institutions are defined as "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility or other institution devoted to the care of sick, infirm or aged persons." In *East Oakland Health Alliance*, 218 NLRB 1270 (1975), the Board set discretionary standards for these institutions. For nursing homes, visiting nurses' associations, and related facilities, the standard was set at $100,000 in gross revenues and for hospitals and other institutions the standard is $250,000. The Board has applied the statutory definition for health care institutions to include patient care at outpatient hemodialysis units, *Bio-Medical of San Diego*, 216 NLRB 631 (1975); family planning clinics, *Planned Parenthood Assn.*, 217 NLRB 1098 (1975); facilities for the care and treatment of the mentally retarded, *Beverly Farm Foundation*, 218 NLRB 1275 (1975); doctors' offices, *Private Medical Group*, 218 NLRB 1315 (1975); and dentists' offices, *Jack L. Williams, DDS*, 219 NLRB 1045 (1975). The Board has held that a blood bank that performs some patient-related function is a health care institution. *Syracuse Region Blood Center*, 302 NLRB 72 (1991). Generally, the $250,000 standard has been deemed applicable.

Health care facilities are held to be within the Board's jurisdiction even though they may be sponsored and administered by religious organizations; *Mid American Health Services*, 247 NLRB 752 (1980); *Saint Marys Hospital*, 260 NLRB 1237 (1982); *St. Elizabeth Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983). But see *Motherhouse of Sisters of Charity*, 232 NLRB 318 (1977), in which the Board did not assert jurisdiction because of the primarily religious purpose of that nursing home.

At one time, the Board found that a medical school did not come within the health care definition because its primary purpose was education rather than patient care. *Albany Medical College*, 239 NLRB 853 (1978). However, the Board reconsidered and overruled that result in *Kirksville College*, 274 NLRB 794 (1985), giving the term "health care institution" an expansive reading when the medical school was closely intertwined with its hospital. In *Duke University*, 306 NLRB 555 (1992), the Board declined to extend *Kirksville* to find that campus bus drivers are health care employees because they drive medical employees on campus routes.

For discussions of health care unit issues see section 15-170.

1-316 Hotels and Motels

260-6728

280-7010

Jurisdiction is asserted over hotels and motels that receive at least $500,000 in gross annual revenue. *Penn-Keystone Realty Corp.*, 191 NLRB 800 (1971).

Historic note: Initially, the standard for hotels and motels created a dichotomy between residential and transient property (see *Floridan Hotel of Tampa*, 124 NLRB 261 (1959)). This distinction was clarified in *Continental Hotel*, 133 NLRB 1694 (1961), but the dichotomy was nonetheless maintained. In *Penn-Keystone*, supra, the Board held that, because it no longer declined to assert jurisdiction over residential apartment buildings (*Parkview Gardens*, 166 NLRB 697 (1967), see supra at sec. 1-303), it was unnecessary to continue to distinguish between residential and transient hotels or motels. Thus, as *Penn-Keystone* received gross annual revenue in the sum of $500,000, it met the monetary standard for hotels and motels as well as the monetary standard—also $500,000—for the assertion of jurisdiction over residential apartment buildings established in *Parkview Gardens.*

1-317 Law Firms and Legal Service Corporations

280-8100

260-6734

The Board will assert jurisdiction over law firms *Foley, Hoag & Eliot*, 229 NLRB 456 (1977), and legal service corporations, *Wayne County Legal Services*, 229 NLRB 1023 (1977). The jurisdictional amount for law firms and legal services organizations is $250,000 in gross revenues. *Camden Regional Legal Services*, 231 NLRB 224 (1977).

1-318 Newspapers

260-6740

280-2710

The Board asserts jurisdiction over newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products, when the annual gross volume of the particular enterprise involves amounts of $200,000 or more. *Belleville Employing Printers*, 122 NLRB 350 (1959).

Thus, for example, where the employer published a newspaper which carried advertisements of nationally sold products amounting to $4000, purchased by national advertising agencies, and derived an annual revenue of over $294,000 from its operations, more than $98,000 of which it

derived from job printing, jurisdiction was asserted under this standard. *Berea Publishing Co.*, 140 NLRB 516 (1963).

1-319 Nonprofit Charitable Institutions

280-8670

In *St. Aloysius Home*, 224 NLRB 1344 (1977), the Board reversed its longstanding policy of not exercising jurisdiction over nonprofit institutions whose activities are essentially noncommercial in nature and are intimately connected with the charitable purposes of the institution. See, e.g., *Columbia University*, 97 NLRB 424 (1951), and *Ming Quong Children's Center*, 210 NLRB 899 (1974). The decision to reverse *Columbia University* and *Ming Quong* was grounded on the 1974 Health Care Amendments which deleted the reference to nonprofit hospitals in Section 2(2) of the Act. The *St. Aloysius* majority concluded that those amendments removed any validity for further excluding nonprofit organizations, whether health care related or not, from the coverage of the Act. In *Ohio Public Interest Campaign*, 284 NLRB 281 (1987), the Board applied this policy but declined jurisdiction over a nonprofit corporation engaged in consumer lobbying because of its local character. Jurisdiction was exercised over *Goodwill Industries of Denver*, 304 NLRB 764 (1991), reversing *Goodwill Industries of Southern California*, 231 NLRB 536 (1977). See section 20–630 for a discussion of the employee status of individuals working at these facilities.

Having removed the charitable or nonprofit distinction, the Board in *St. Aloysius* announced that the jurisdictional standard for these institutions would depend on its substantive purpose, e.g., the day care center standard would apply to nonprofit as well as to profit day care centers.

1-320 Office Buildings

260-6748

280-6510

280-6530

Enterprises engaged in the management and operation (whether as owners, lessors, or contract managers) of office buildings are within the Board's jurisdiction when the gross annual revenue derived from such office buildings amounts to $100,000, and when $25,000 is derived from enterprises whose operations meet any of the current standards, except the indirect inflow and outflow standards. *Mistletoe Operating Co.*, 122 NLRB 1534 (1959).

Thus, for example, where an employer was engaged in the business of renting offices and its gross annual revenue from office rentals exceeded the sum of $100,000 and at least $25,000 of that sum was derived from a tenant who during an annual period sold and shipped goods valued in excess of $50,000 directly to points outside the State, the office buildings standard was met. *Gulf Building Corp.*, 159 NLRB 1621 (1966).

For a discussion of jurisdiction over managing agents see section 1-303, and over shopping centers see section 1-325.

1-321 Private Clubs

260-6716

280-7990

The retail standard applies to private clubs. *Walnut Hills Country Club*, 145 NLRB 81, 82 (1964).

In determining whether the gross volume of business of an enterprise in this category meets the Board's retail standard, members' dues and initiation fees are not included as income derived from its retail operation. *Golf Course Inns*, 199 NLRB 541 (1972); *Rancho Los Coyotes Country Club*, 170 NLRB 1773 (1968); and *Woodland Hills Country Club*, 146 NLRB 330, 331 (1964).

1-322 Professional Sports

260-6784

280-7940

The Board asserted jurisdiction over the American League of Professional Baseball Clubs, finding that professional baseball is an industry in or affecting commerce and, as such, is subject to Board jurisdiction. No specific monetary standard was set "as the annual gross revenues of this Employer are in excess of all of our prevailing monetary standards, we find that the Employer is engaged in an industry affecting commerce, and that it will effectuate the policies of the Act to assert jurisdiction herein." *American League of Professional Baseball Clubs*, 180 NLRB 190, 192 (1970). In later cases the Board exercised jurisdiction over other professional sports but again did not set a monetary standard. See *Major League Rodeo, Inc*., 246 NLRB 743 (1979), and cases cited at fn. 7 therein.

1-323 Public Utilities

260-6760

280-4900 et seq.

The standard for public utilities is a gross annual volume of business of at least $250,000 or an annual outflow or inflow of goods, materials, or services, whether directly or indirectly across state lines, of $50,000. *Sioux Valley Empire Electric Assn.*, 122 NLRB 92 (1959); *Kingsbury Electric Cooperative*, 138 NLRB 577 (1962).

1-324 Restaurants

280-5800

The $500,000 annual gross volume standard, applicable to retail enterprises in general, also applies to restaurants. *City Line Open Hearth*, 141 NLRB 799 (1963).

In that case, the restaurant standard was met where its gross volume of business, projected on an annual basis, met the retail test and the employer's purchases of beverages, food, and supplies, produced and originating from outside the State, affected commerce under the Act and brought its operations within the Board's statutory jurisdiction.

See also *Denny's Restaurant*, 177 NLRB 702 (1969), in which jurisdiction was asserted on the basis of a single-integrated enterprise.

1-325 Shopping Centers

260-6780

280-6510

Shopping centers are treated the same as office buildings (see sec. 1-320). *Carol Management Corp.*, 133 NLRB 1126 (1961).

1-326 Social Services Organizations

280-8300 et seq.

260-6793

In *Hispanic Federation for Development*, 284 NLRB 500 (1987), the Board announced that it would apply a $250,000 gross annual revenue for all social service organizations other than those for which the Board has already set a specific standard for the type of activity in which they are engaged. In doing so, the Board noted that it had previously set a standard of $100,000 for homemaker services and for visiting nurses' associations. The $250,000 has been applied to organizations that solicit, collect, and distribute funds for charitable purposes. *United Way of Howard County*, 287 NLRB 987 (1988).

1-327 Stock Brokerage Firms

280-6200 et seq.

Employers engaged in the securities industry are subject to the Board's jurisdiction. A contention that the Securities Exchange Act precludes the Board from exercising its authority in cases involving this industry was rejected. *Goodbody & Co.*, 182 NLRB 81 (1970).

1-328 Symphony Orchestras

280-7920

The Board exercises jurisdiction over symphony orchestras which have a gross annual revenue from all sources (excluding only contributions which are because of limitations by the grantor not available for use for operating expenses) of not less than $1 million. Board Rules and Regulations, Section 103.2, published at 38 F.R. 6176, March 7, 1973.

1-329 Taxicabs

280-4120

260-6788

The retail standard of $500,000 or more annual volume of business is applied to taxicabs.

In *Carolina Supplies & Cement Co*., supra, 122 NLRB 88 fn. 5, the term "retail enterprises" was deemed to include taxicabs. See also *Red & White Airway Cab Co.*, 123 NLRB 83 (1959), in which the Board relied on the cited language in the *Carolina* decision. But see taxicab dispatch and starter cases under Instrumentalities, Links, and Channels of Interstate Commerce, section 1-203 of this chapter.

1-330 Transit Systems

280-4100 et seq.

260-6792

Annual gross volume of business of $250,000 or more meets the Board standard for a private transit system. *Charleston Transit Co.*, 123 NLRB 1296 (1959).

This standard is distinguishable from the one described immediately above in that it embraces enterprises engaged in intrastate operations but which nonetheless affect substantially interstate commerce. Thus, in *Charleston*, the employer operated a local passenger transit system by bus in and around Charleston, West Virginia, carrying no freight or mail nor interchanging or sharing facilities with any other transit company. However, it carried more than 9 million passengers, including those using bus service to large plants, and its annually purchased fuel, tires, and parts produced out of the State in a sum exceeding $160,000.

Where an employer operated a local bus transportation business, deriving its revenue from contracts with local school boards for the transportation of school children the Board asserted jurisdiction under the *Charleston Transit* standards. See Government Contractors, section 1-314 of this chapter.

1-400 Jurisdiction Declined for Statutory Reasons

177-1683 et seq.

Section 2(2) of the Act specifically excludes certain enterprises from its definition of "employer" and for this reason jurisdiction is not asserted over those enterprises. Excluded are: the United States Government and wholly owned Government corporations or any Federal Reserve Bank; a state or a political subdivision of a State; persons subject to the Railway Labor Act; labor organizations (other than when acting as an employer); and anyone acting in the capacity of officer or agent of such labor organization. Because these are statutory limits on the

Board's jurisdiction, they can be raised at any time. *Chelsea Catering Corp.*, 309 NLRB 822 fn. 2 (1992).

1-401 State or Political Subdivision

177-1683-5000

260-3390

In determining whether an entity falls within the scope of the Section 2(2) exemption for "any State or political subdivision thereof," the entity must either be (1) created directly by the State so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general public. *Natural Gas Utility District of Hawkins County*, 167 NLRB 691 (1967), enfd. 427 F.2d 312 (6th Cir. 1970), affd. as to applicable standard only 402 U.S. 600 (1971).

(1) Creature of the State

An entity does not become a creature of the State by the mere receipt of revenue from a preestablished tax fund (see *Hotels & Motels (San Diego Facilities Corp.)*, 175 NLRB 161 (1969)), or by occupancy of city-owned property (*Trans-East Air, Inc*., 189 NLRB 185 (1971)), or because the employees are paid by the city where this is merely a convenient method for transferring funds to an association or society to which the latter is entitled (*Minneapolis Society of Fine Arts*, 194 NLRB 371 (1972)).

In *Jervis Public Library Assn.*, 262 NLRB 1386 (1982), the Board found that it lacked jurisdiction because the entity is an administrative arm of the State. See also *Rosenberg Library Assn.*, 269 NLRB 1173 (1984). In *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000), the Board dismissed a petition on jurisdictional grounds finding that the employer was created by the county Board of Supervisors pursuant to a State statute granting the authority for these agencies to Boards of Supervisors. The Board also noted that virtually all the Agency's funding came from State and Federal governmental services.

In *Research Foundation of the City Univ. of NY*, 337 NLRB 965 (2002), the Board found that an organization whose purpose is to administer grant awards was not a public employer because it was created by private individuals and was not responsible to the general public. In deciding this issue, the Board found it unnecessary to decide whether it lacked jurisdiction because the employer was a single employer with the City of New York because the Board found no bases for single-employer status.

The Board has rejected political subdivision contentions for Indian Tribes. *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), and *Yukon Kuskokwim Health Corp*., 340 NLRB No. 139 (2004), and 328 NLRB 761 (1999), and privately run prisons. *Correction Corp. of America v. NLRB*, 234 F.3d 1321 (D.C. Cir. 2000).

(2) Administered by Individuals Responsible to Public Officials or General Public

During the 1990's the Board considered the issue of what is necessary to establish that an entity is administered by individuals who were responsible to the general public. In *Enrichment Services Program, Inc*., 325 NLRB 818 (1998), the Board reversed prior holdings and ruled that the "individuals are responsible to the general electorate under *Hawkins County* only if the relevant electorate is the same as that for general political elections." In doing so, the Board overruled *Woodbury County Community Action Agency*, 299 NLRB 554 (1990); and *Economic Security Corp.*, 299 NLRB 562 (1990). In *FiveCap Inc.*, 331 NLRB 1165 (2000), the Board found that the governing body of a Head Start program was not responsible to the general electorate.

It must also be shown that the entity in question is administered by individuals who hold office not by virtue of the entity's own articles of incorporation, but by virtue of a state

requirement. *Fayetteville-Lincoln County Electric System*, 183 NLRB 101 (1970). See also *Cape Girardeau Care Center*, 278 NLRB 1018 (1986), finding jurisdiction where there was no direct accountability to public officials, *Concordia Electric Cooperative*, 315 NLRB 752 (1994), finding that electric cooperatives are generally not held to be political subdivisions and *Research Foundation*, supra.

Indian Tribes do not meet this prong of the political subdivision test. *San Manuel Indian Bingo & Casino*, supra.

For additional illustrations of the application of these tests for determining whether or not an entity is a political subdivision within the meaning of Section 2(2), see *Regional Medical Center at Memphis*, 343 NLRB No. 48 (2004); *City Public Service Board of San Antonio*, 197 NLRB 312 (1972); *Sis-Q Flying Service*, 197 NLRB 195 (1972); *Lewiston Orchards Irrigation District*, 186 NLRB 827 (1970), enf. denied 469 F.2d 698 (9th Cir. 1972); *Austell Natural Gas System*, 186 NLRB 280 (1970); *Detroit Institute of Arts*, 271 NLRB 285 (1984); *Pennsylvania State Assn.*, 267 NLRB 71 (1983); and *Columbia Park Assn.*, 289 NLRB 123 (1988).

Although jurisdiction has been asserted over private educational institutions, local school boards do not come within the definition of "employer" set out in Section 2(2). *Children's Village*, 197 NLRB 1218 (1972), and *Lima & Allen County Action Commission*, 304 NLRB 888 (1991).

For a discussion of Government Contractors see section 1-314 supra.

1-402 Employers Subject to the Railway Labor Act

177-1683-7500

240-6737

280-4000 et seq.

280-4500 et seq.

The Railway Labor Act, originally endowed with jurisdiction over common carriers such as railroads, had its coverage extended under Title II of that Act to common carriers by air engaged in interstate or foreign commerce.

Because of the nature of this type of jurisdictional question, it has been the Board's practice to refer the issue of jurisdiction to the National Mediation Board (NMB) in cases where the jurisdictional issue is doubtful. *Federal Express Corp*., 317 NLRB 1115 (1995). The Board gives "substantial deference" to NMB decisions. *DHL Worldwide Express*, 340 NLRB No. 122 (2003).

In making its determination on whether it has jurisdiction, the NMB has a two-pronged jurisdictional analysis: (1) whether the work is traditionally performed by employees of air and rail carriers; and (2) whether a common carrier exercises direct or indirect ownership or control.

When the NMB finds that the entity meets the definition of common carrier under the Act administered by it, the NLRB declines to assert jurisdiction. Compare *United Parcel Service*, 318 NLRB 778 (1995), where the Board decided the jurisdiction issue itself based on a prior history of NLRA coverage of the employer. See also *Phoenix Systems & Technologies*, 321 NLRB 1166 (1996), applying the same principle where the factual situations are similar. Accord: *Spartan Aviation Industries*, 337 NLRB 708 (2002). Where NMB has previously rejected jurisdiction, the burden is on the party asserting current NMB jurisdiction to establish jurisdictionally significant changes since the NMB decision, *D & T Limousine Service*, 320 NLRB 859 (1996), and *United Parcel Service*, infra.

In *Teamsters Local 295 (Emery Air Freight Corp.)*,255 NLRB 1091(1981), the Board found jurisdiction over an air freight forwarder declining to refer the matter to NMB because NMB had previously declined jurisdiction over air forwarders.

The NMB determined that it has jurisdiction over a company engaged in furnishing air travel service to its members (*Voyager 1000*, 202 NLRB 901 (1973)); a company engaged in air taxi,

charter, and on-demand and scheduled airline services plus refueling and maintenance work (*Skyway Aviation*, 194 NLRB 555 (1972)); a company engaged in servicing and storing aircraft, selling fuel, providing pilots and service to an aircraft club, and running an air taxi (*Mark Aero, Inc.*, 200 NLRB 304 (1972)); a company engaged in operating, servicing, and storing aircraft at a county airport (*International Aviation Services*, 189 NLRB 75 (1971)); a company engaged in cleaning airline terminals (*Globe Aviation Services*, 334 NLRB 278 (2001)), and a company providing rail loading services. (*Foreign & Domestic Car Service*, 333 NLRB 96 (2001).)

In other cases, the NMB determined that it has no jurisdiction over a company engaged solely in intrastate air transportation, thus not meeting the statutory definition in Section 201, Title II, of the Railway Labor Act (*Panorama Air Tour*, 204 NLRB 45 (1973)); a scheduled aircraft carrier between several locations in California which in a 5-year period made only one flight outside the State (*Air California*, 170 NLRB 18 (1968)); a company engaged in airport food catering operations (*Dobbs Houses v. NLRB*, 443 F.2d 1066 (6th Cir. 1971)); a company which trains pilots and flight engineers, maintains and services aircraft, and operates an air taxi service found to be "minimal" (*Flight Safety, Inc.*, 171 NLRB 146 (1968)); a company providing such ground services as airline booking, cleaning, and maintenance (*Evergreen Aviation Ground Logistics*, 327 NLRB 869 (1999)); a company providing sky cap services (*Servicemaster Aviation Services*, 325 NLRB 786 (1999), but see *Aviation Safeguards*, 338 NLRB 770 (2003); and a company which leases and operates an airport (*Trans-East Air, Inc.*, supra). For other NMB decisions see *Tri-State Aero, Inc.*, 262 NLRB 998 (1982); *Air Cargo Transport*, 289 NLRB 176 (1980); and *Eagle Aviation*, 290 NLRB 1149 (1988).

In *Ogden Ground Services*, 339 NLRB 869 (2003), the Board found NMB jurisdiction, noting that the NMB had found no NMB jurisdiction over other aspects of the Ogden operations.

The NMB will assert jurisdiction over companies providing services to airlines where these companies are under the control of the airline. Compare *Chelsea Catering Corp.*, 309 NLRB 822 (1992), and *TNT Skypack*, 311 NLRB 62 (1993).

NMB jurisdiction involves common carriers by air. For an extensive discussion of that term see *Phoenix Systems & Technologies*, supra, where, inter alia, the Board rejected the contention that the Air National Guard is a common carrier.

In *Teamsters Local 2000*, 321 NLRB 1383 (1996), the Board found that a union representing RLA covered employees is itself an employer under the Act.

For casehandling instructions, see CHM 11711.

1-403 Religious Schools

260-6708 et seq.

280-8200 et seq.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1978), the Supreme Court found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Accordingly, the Court concluded that there is no Board jurisdiction in these instances. The Court declined to reach "difficult and sensitive" constitutional questions presented by an application of Board jurisdiction.

The Board has not limited the *Catholic Bishop* principle to schools operated by a religious organization itself. Instead, the Board has found that it is the religious purpose and the employees' role in effectuating that purpose that prompted the Court's decision. See *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987). In *St. Joseph's College*, 282 NLRB 65 (1986), the Board concluded that the concerns of the *Catholic Bishop* court were applicable to colleges and universities, reversing a line of cases that had limited *Catholic Bishop* to elementary and secondary schools. Compare *Livingstone College*, 286 NLRB 1308 (1987), in which jurisdiction was found because although church-owned, the primary purpose of the college was secular. Although the Board in *Hanna Boys Center*, 284 NLRB 1080 (1987), distinguished

between jurisdiction over teachers at religious institutions and other employees of those institutions, it later characterized that decision as involving "a home for troubled boys" when it found no jurisdiction to process a petition for an election of custodians at a parochial school. *St. Edmund's High School*, 337 NLRB 1260 (2002).

In *University of Great Falls*, 331 NLRB 1663 (2000), the Board found that the Religious Freedom Restoration Act (RFRA) did not bar its jurisdiction over this university. Moreover, the Board rejected the contention that Catholic Bishop warranted a finding of no jurisdiction. Instead, the Board concluded that the school did not have a "substantial religious character." For a related RFRA case, see *Ukiah Valley Medical Center*, 332 NLRB 602 (2000).

The *Catholic Bishop* rule has not been applied to health care institutions where the primary purpose of the institutions is not religious or to a language school even though sponsored by the church when the school was not part of the Church religious mission, *Casa Italiana Language School*, 326 NLRB 40 (1998).

See Health Care Institutions, section 1-315 of this chapter for discussion of religiously sponsored health care institutions. See also Colleges, Universities, and other Private Schools (sec. 1-307) and Religious Organizations (sec. 1-503).

1-500 Jurisdiction Declined for Policy Considerations

240-0150

In its discretion, the Board, subject to the limitation imposed by Section 14(c)(1) of the Act, is empowered to decline to assert jurisdiction where the impact on commerce of a labor dispute would not be sufficiently substantial to warrant the exercise of its jurisdiction.

Illustrations of the administrative exercise of this discretion follow:

1-501 Foreign Flag Ships, Foreign Nationals, and Related Situations

240-0150-5000

240-0175

280-4410

177-1675 et seq.

The United States Supreme Court has ruled that the Act does not provide for Board jurisdiction over ships of foreign registration and employing alien seamen, although the ships regularly operate in American ports and are owned by a foreign corporation which is a wholly owned subsidiary of an American corporation. *McCulloch v. Sociedad Nacional de Marineros de Honduras (United Fruit Co.)*, 372 U.S. 10 (1963). Compare *NLRB v. Dredge Operators, Inc*., 19 F.3d 206 (5th Cir. 1994), where the Fifth Circuit upheld the Board's decision to conduct an election on American flagships working in Hong Kong.

A foreign government operating a commercial business within the United States presents different considerations. In *State Bank of India*, 229 NLRB 838 (1977), the Board overruled prior precedent and concluded that it has statutory jurisdiction over such operations and that there was no valid justification for declining jurisdiction. The *State Bank* policy has been applied to schools, *German School of Washington*, 260 NLRB 1250 (1982), to a cultural center owned and operated by the German government, *Goethe House New York*, 288 NLRB 257 (1988), and to a manufacturing plant, *S. K. Products Corp.*, 230 NLRB 1211 (1977). Cf. *C. P. Clare & Co.*, 191 NLRB 589 (1971).

In *Herbert Harvey, Inc.*, 171 NLRB 238 (1968), and *National Detective Agencies*, 237 NLRB 451 (1978), the Board found no jurisdiction over firms supplying services to the World Bank if the World Bank controlled their labor relations because the Bank enjoys "the privileges and immunities from the laws of the sovereignty in which it is located customarily extended to such organizations."

In *RCA OMS, Inc*., 202 NLRB 228 (1973), jurisdiction was declined in a situation involving employees at several sites in Greenland, particularly since Greenland is a possession of Denmark and governed as a county of that country. See also *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957). See also *Offshore Express*, 267 NLRB 378 (1983), in which jurisdiction was declined over tugboat operations for the U.S. Navy at Diego Garcia, an island in the British Indian Ocean Territory. Accord: *Computer Sciences Raytheon*, 318 NLRB 966 (1995) (American company doing business in Antigua, a sovereign nation, and Ascension, a possession of the United Kingdom) and *Range Systems Emergency Support*, 326 NLRB 1047 (1998) (military weapons testing operation in the Bahamas). Compare *Asplundh Tree Expert Co.*, 336 NLRB 1106 (2001), where the Board found jurisdiction over an American firm doing business outside the U.S. on a temporary basis. *Asplundh* is an unfair labor practice case where the issue was protected activity by employees on temporary assignment in Canada. The Third Circuit denied enforcement of the *Asplundh* decision on jurisdictional grounds. 365 F.3d 168 (2004).

For related discussion see section 1-206, supra.

1-502 Horseracing and Dogracing

260-6784

280-7940

In accordance with past rulings, the Board, pursuant to an exercise of its rulemaking authority, continued to decline to exercise its jurisdiction over the horseracing and dogracing industries. The Board's Rules and Regulations, Section 103.3, published in 38 F.R. 9507, April 17, 1973. But see *American Totalisator Co.*, 264 NLRB 1100 (1982), in which the Board asserted jurisdiction over an employer engaged in the manufacture, service, and repair of electronic equipment used in parimutuel wagering at racetracks.

Prior to this rulemaking determination which followed existing Board policy, the Board had concluded that racetrack operations, while exercising some impact on interstate commerce, was essentially local in character, and the effect of labor disputes involving racetrack enterprises was not sufficiently substantial to warrant assertion of jurisdiction. *Centennial Turf Club*, 192 NLRB 698 (1971); *Walter A. Kelley*, 139 NLRB 744 (1962); *Meadow Stud, Inc.*, 130 NLRB 1202 (1961); *Hialeah Race Course*, 125 NLRB 388 (1960); *Los Angeles Turf Club*, 90 NLRB 20 (1950).

In *Prairie Meadows Racetrack & Casino*, 324 NLRB 550 (1997), the Board extended jurisdiction over casinos that were affiliated with racetracks.

1-503 Religious Organizations

The Board will not assert jurisdiction over employees of a religious organization where the work of the employees is not sufficiently related to the Employer's commercial operations. *Riverside Church*, 309 NLRB 806 (1992); and *Faith Center-WHCT 18*, 261 NLRB 106 (1982). See also section 1-403 of this chapter.

In *Ecclesiastical Maintenance Services*, 320 NLRB 70 (1995), the Board advised that it would take jurisdiction over a cleaning service owned by a Catholic Archdiocese where the annual revenue was $1 million and direct inflow in excess of $50,000. Because this case was an Advisory Opinion, the Board declined to determine the religious affiliation jurisdictional issue. The Board later found jurisdiction over this same employer (325 NLRB 629 (1998)) where the company did not have a religious mission and even if it did, its employee perform secular, not religious duties. See also *Casa Italiana Language School*, 326 NLRB 40 (1998) (Board found jurisdiction where language school was not part of church's religious mission). But in *St. Edmund's High School*, 337 NLRB 1260 (2002), the Board distinquished *Ecclesiastical Maintenance* on the grounds that the school at which the custodians worked was closely integrated to the mission of the church.In *University of Great Falls*, 331 NLRB 1663 (2000), the Board rejected the contention of a religiously sponsored university, that exercise of Board

jurisdiction would violate the Religious Freedom Restoration Act. Accord: *Ukiah Valley Medical Center*, 332 NLRB 602 (2000), with respect to a hospital operated by the Seventh Day Adventist Church.

See also section 1-403 (Religious Schools) and section 1-308 (Communication Systems).

1-600 Rules of Application

1-601 Advisory Opinions

240-2500 et seq.

Section 102.98 of the Board's Rules and Regulations provides a procedure by which a State or Territorial agency or court may, in a case pending before the agency or court,request an advisory opinion (AO) from the Board as to whether the Board would decline to assert jurisdiction (1) on the basis of its current standards (1) over an employer involved in a case currently pending before the agency or court or (2) because the "employing enterprise" is not within the jurisdiction of the Act.

Earlier iterations of the rule permitted parties to request an advisory opinion but only as to current standards. That provision was repealed. Now the Board will only issue an opinion to the court or agency and it will consider both its current standards and whether an employer is a "political subdivision" or is otherwise exempt from the Board's statutory jurisdiction. See *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988); *University of Vermont*, 297 NLRB 291 (1989); *Correctional Medical Systems*, 299 NLRB 654 (1990). The Board will not give an advisory opinion on a preemption issue even at the request of a State court. *Townley Sweeping Service*, 339 NLRB 301 (2003).

Petitions filed under Section 102.98 require that the State agency or the parties provide the record information described in Section 102.99. *W.M.P. Security Service Co.*, 309 NLRB 734 (1992). See also *De Coster Egg Farms*, 325 NLRB 350 (1998), when a petition was dismissed because the the State agency had no evidence nor made any factual determination.

The Board will generally not provide the requested advice if there is either a pending representation case—*Humboldt General Hospital*, 297 NLRB 258 (1989), or unfair labor practice case—*American Lung Assn.*, 296 NLRB 12 (1989), unless it can be shown that there is a need for a more expeditious determination than the normal case procedures will provide. This rule applies even when the pending case and the advisory opinion involve different locations if the pending case would resolve the jurisdiction issue. *Inter-Neighborhood Housing Corp.*, 311 NLRB 1342 (1993).

In *Child & Family Sevice*, 315 NLRB 13 (1994), the Board found that a scheduled hearing before the State board provided sufficient warrant for expeditious determination.

A determination that the Board has jurisdiction over the employer under Section 102.98(a) is not a determination that the Board would certify the union in that matter. See, e.g., *Carroll Associates*, 300 NLRB 698 (1990).

The Board will not give an Advisory Opinion where there are factual disputes about jurisdiction. See *Brooklyn Bureau of Community Service,* 320 NLRB 1148 (1996); and *De Coster Egg Farms*, supra.

See CHM section 11709 for Regional Office procedures on the filing of an advisory opinion petition.

1-602 Declaratory Orders

240-2900

This is a little used procedure that is available only to the General Counsel. When there is an unfair labor practice charge and representation petition involving the same employer, and the General Counsel has a question about Board jurisdiction a petition for a Declaratory Order may be filed with the Board. See the Board's Rules and Regulations, Section 102.105 and *Trico*

Disposal Service, 191 NLRB 104 (1971). The Board will not issue a declaratory order where the facts are in dispute. *Latin Business Assn.*, 322 NLRB 1026 (1997).

These procedures for a Declaratory Order under Section 102.105 are to be distinguished from the procedures available under 5 U.S.C. § 554(e). See *Wilkes-Barre Publishing Co.*, 245 NLRB 929 (1979); and *Television Artists AFTRA*, 222 NLRB 197 (1976).

See CHM section 11710 for Regional Office procedures for a Declaratory Order under the Board's Rules.

1-603 Tropicana Rule

240-0167-6700

260-3320-8700

Under this rule, in any case where an employer refuses, on reasonable request by a Board agent, to provide information relevant to the Board's jurisdictional determination, jurisdiction will be asserted without regard to whether any jurisdictional standard is shown to be satisfied, if the record at a hearing establishes that the Board has statutory jurisdiction. *Tropicana Products*, 122 NLRB 121, 123 (1959); *Major League Rodeo, Inc*., 246 NLRB 743 (1979); and *Continental Packaging Corp.*, 327 NLRB 400 (1998). This principle has been applied also in situations where the employer was unable to produce relevant information and subpoenaed drivers failed to respond and testify or gave incredible testimony. *Supreme, Victory & Deluxe Cab Co.*, 160 NLRB 140 (1966).

The *Tropicana* rule is applicable in unfair labor practice cases. *J.E.L. Painting & Decorating*, 303 NLRB 1029 (1991); *Bell Glass Co*., 293 NLRB 700 (1989); and *Strand Theatre*, 235 NLRB 1500 (1978).

For discussion of procedures see CHM 11704.

1-604 Totality of Operations

260-3320-0137

It is the totality of an employer's operations which determines whether jurisdiction should be asserted. *Siemons Mailing Service*, 122 NLRB 81, 84 (1959); see also *T. H. Rogers Lumber Co.*, 117 NLRB 1732 (1957).

In *Bloch Enterprises*, 172 NLRB 1678 (1968), Board combined the revenues of two operations because of their close relationship even though it found the two were not a single employer.

1-605 Integrated Operations

260-3360-3300 et seq.

If the enterprise is integrated, jurisdiction is exercised when the activities are diverse (*Potato Growers Cooperative Co.*, 115 NLRB 1281 (1956); *Country Lane Food Store*, 142 NLRB 683 (1963)), as well as when they are of like nature (*Kostel Shoe Co.*, 124 NLRB 651, 654 (1959)).

1-606 Computation of Jurisdictional Amount

260-2300 et seq.

The dollar volumes are expressed in annual terms, computation being based on the most recent calendar or fiscal year or on the figures of the immediately preceding 12-month period. The inclusion in the computation of unusual or nonrecurrent business transactions which brought the employer within the standards is not a ground for declining to assert jurisdiction (*Imperial Rice Mills*, 110 NLRB 612 (1955)), except that jurisdiction will not be asserted on the basis of nonrecurrent capital expenditures alone (*Magic Mountain, Inc.*, 123 NLRB 1170 (1959)). The fact that the employer does not have title to the goods does not exclude those goods from the computation of gross volume. *Pit Stop Markets*, 279 NLRB 1124 (1986).

If no annual figures are available, figures for a period of less than 1 year may be projected to obtain an annual figure. *Carpenter Baking Co.*, 112 NLRB 288 (1955). Projections can include income from the past year projections of income for new business or combinations where both established and new businesses are involved. *Pet Inn's Grooming Shoppe*, 220 NLRB 828 (1975). The Board will take into account the experience of the predecessor in projecting what the revenues of a successor will be. See discussion in *Northgate Cinema, Inc.*, 233 NLRB 586 (1977).

In *Hickory Farms of Ohio*, 180 NLRB 755 (1970), in determining how much annual income the employer would have derived from his operations but for picketing, the Board used the revenues received by it during the 12-month period preceding the picketing. It reiterated the rule that a drop in volume of business as a result of picketing cannot be taken into consideration as a factor in defeasance of the Board's jurisdiction. (*Cox's Food Center*, 164 NLRB 95 (1967); see also *Hygienic Sanitation Co.*, 118 NLRB 1030 (1957); *Carpenters District Council (Fairmount Construction)*, 95 NLRB 969 (1951)). But the Board will not presume that an employer will have met the Board's jurisdictional standards but for picketing which began on the employer's first day in business. *Stage Employees IATSE Local 330 (Western Hills Theatres)*, 204 NLRB 1057 (1973).

For another example of projection, see *Powerful Gas No. 1*, 181 NLRB 104 (1970).

Where the employer performs services on goods owned by another, it is the value of the employer's sales and services, and not the value of the goods worked on, which is considered in determining whether to assert jurisdiction. *Devco Diamond Rings*, 146 NLRB 556 (1964).

1-607 Relitigation of Jurisdiction

For discussion of this subject see "Finality of Decisions," section 2-400, infra.