# 15. SPECIFIC UNITS AND INDUSTRIES

Treatment on a complete industry-by-industry or specific type-of-unit basis would necessarily enlarge this volume beyond manageable proportions. Moreover, the major principles and relevant factors under more general headings do tend, for the most part, to govern unit determinations in any event, regardless of the particular industry affected. We shall therefore use a selective basis, making certain, however, to include for consideration units which had been affected by policy changes or have been the subject of more-than-casual litigation, those which have constituted problem areas, and, of course, units in industries which in recent years have become the subject of Board jurisdiction. For convenience, we have arranged the units and industries in alphabetical order.

## 15-100 Architectural Employees

**440-1760-4340**

**177-9300**

The Board has found appropriate units of professional architectural employees. *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049 (1971); *Skidmore, Owings & Merrill*, 192 NLRB 920 (1971); *Hertzka & Knowles*, 192 NLRB 923 (1971); *Fisher-Friedman Associates*, 192 NLRB 925 (1971); *Frederick Confer & Associates*, 193 NLRB 910 (1971).

In *Wurster*, virtually all the employees were graduates of recognized architectural schools, although some had not yet become "licensed'' architects. Both classes of employees were found to be professionals within the meaning of the Act. Included in the unit was a graduate interior designer, also found to be a professional. The architectural employees were divided into two main groups, associates and nonassociates, the main distinction being that the associates receive higher pay, are on an annual salary as opposed to an hourly wage, share in a special fund set aside from the profits, and attend quarterly meetings with the firm's principals. However, as the nonassociates generally perform similar functions and share identical fringe benefits, creating a sufficient community of interest, they were included in the same unit. A job inspector and a modelmaker were excluded as nonprofessionals.

In *Skidmore*, employees in an "interior design and graphics department'' were excluded from the unit of architectural employees because they were not engaged in work which qualified them as professional employees within the statutory definition.

See the other cases cited above for peripheral issues.

## 15-120 Banking

**440-1720**

**440-3375**

In determining the scope of a unit in the banking industry, the Board follows the single location unit presumption. Thus, absent compelling evidence otherwise, a unit of branch bank employees is appropriate. *Wyandotte Savings Bank*, 245 NLRB 943 (1979); *Hawaii National Bank*, 212 NLRB 576 (1974); *Bank of America*, 196 NLRB 591 (1972); *Banco Credito y Ahorro Ponceno*, 160 NLRB 1504 (1966); *Central Valley National Bank*, 154 NLRB 995 (1965); and *Banco Credito y Ahorro Ponceno v. NLRB*, 390 F.2d 110 (1st Cir. 1968). But see *Wayne Oakland Bank v. NLRB*, 462 F.2d 666 (6th Cir. 1972).

Where, however, the evidence indicates significant employee interchange between branches, a unit encompassing several offices in a metropolitan area may also be appropriate. *Banco Credito y Ahorro Ponceno*, supra.

A branch unit will ordinarily be a "wall to wall'' unit particularly if a proposed exclusion would leave that group the only unrepresented employees. *Wyandotte Savings Bank*, supra at 945. For an

example of inclusion of various classifications in a branch unit, see *Banco Credito y Ahorro Ponceno*, supra at 1513–1514.

## 15-130 Construction Industry

**440-1760-9167 et seq.**

**440-5033**

**590-7500**

Prior to 1951, although the Board had asserted jurisdiction over the building and construction industry in both unfair labor practice and representation cases, at least since the enactment of the Taft-Hartley Act, the representation cases involved either multicraft units of construction employees on large projects of substantial duration or shop employees.

In *Plumbing Contractors Assn.*, 93 NLRB 1081 (1951), for the first time, the Board was confronted with the question of whether it should direct an election in a proposed single craft unit of employees in actual construction operations. It was recognized in that case that the construction industry involved a series of successive operations by each craft in a specified order, but the Board nonetheless found that the degree of integration in the industry was not comparable, for example, to assembly line operations, and, in light of the history of separate representation of the employees involved in that case (a unit of plumbers, plumbers' apprentices, and gasfitters), found the separate craft grouping to be an appropriate unit. The Board also found that employment in the unit had been sufficiently stable to permit the election to be held.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board set down new policies with respect to the application of Section 8(f) of the Act. Although it is an unfair labor practice case, *Deklewa* does provide guidance on certain representation case matters. *Deklewa* involved an employer who withdrew from a multiemployer 8(f) bargaining relationship. The Board noted that in such cases, notwithstanding the history of 8(f) bargaining on a broader basis, "single employer units will normally be appropriate.'' *Deklewa* at 1385. Nothing in *Deklewa* would, however, preclude a finding of a multiemployer unit where the parties agree or where there is a history of bargaining on that basis under Section 9 of the Act. The history of collective bargaining under Section 8(f) agreements is relevant, but not conclusive, to a unit determination under Section 9. *Barron Heating & Air Conditioning, Inc.*, 343 NLRB No. 58 (2004).

In circumstances where the expired 8(f) agreement covered only one employer, the unit will normally be that covered by the expired contract. But, see *Dezcon, Inc.*, 295 NLRB 109 (1989), in which the Board found the history of bargaining as well as the trend toward project-by-project agreements insufficient to overcome employee community of interest in making the unit determination. In *Wilson & Dean Construction Co.*, 295 NLRB 484 (1989), the Board used the *Daniel Construction Co.* formula (133 NLRB 264 (1961)) to determine eligibility to vote. In doing so, it rejected the employer's contention that it did not intend to use the hiring hall under the expired agreement as a source of employees. Thus, eligibility and unit scope were in that case governed by the coverage of the expired agreement. See also *P. J. Dick Contracting*, 290 NLRB 150 (1988), in which the Board found the bargaining history under the expired 8(f) agreement to be determinative in view of "the limited evidence presented.'' Note, however, that in this case, the parties did stipulate to common conditions of employment and centralized labor relations among multicounty worksites. Compare, *Longcrier Co.*, 277 NLRB 570 (1985), cited in *Dezcon* at fn. 12 in which the evidence supported separate project units.

As to geographic scope of unit in construction cases, the proper unit description is one without geographic limitation where the employer uses a core group of employees at its various jobsites regardless of location. *Premier Plastering, Inc.*, 342 NLRB No. 111 (2004). Compare *Oklahoma Installation Co.*, 305 NLRB 812 (1991), where the Board found a multisite unit appropriate. In doing so, it reaffirmed the use of traditional community-of-interest standards for deciding single versus multisite unit issues. The Board, in *Oklahoma*, also rejected a contention

that the unit should include work in a county in which the employer had never conducted business.

The Board has found appropriate separate units of plumbers and gasfitters, pipefitters and drain layers (*Denver & Contractors Assn.*, 99 NLRB 251 (1951)); plumbers, steamfitters, pipefitters, refrigeration men, and their apprentices (*Automatic Heating Co.*, 100 NLRB 571 (1951)); plumbers and pipefitters (*Air Conditioning Contractors*, 110 NLRB 261 (1955)); riggers (*Michigan Cartagemen's Assn.*, 117 NLRB 1778 (1957)); lathers (*Employing Plasterers Assn.*, 118 NLRB 17 (1957)); plumbers and pipefitters (*Daniel Construction Co.*, supra); truckdrivers (*Graver Construction Co.*, 118 NLRB 1050 (1957)); laborers (*R. B. Butler, Inc.*, 160 NLRB 1595 (1966)); and carpenters (*Dezcon, Inc.*, supra).

The laborers involved in *Butler* performed a type of work different from that of the other employees and had traditionally been represented by the petitioner or other locals of the petitioner's international in the same type of unit. They therefore constituted "a readily identifiable and homogeneous group with a community of interests separate and apart from the other employees.'' The fact that employees may perform duties not strictly within their classification does not render the unit inappropriate when these duties are secondary in nature. *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978). See also *Burns & Roe Services Corp.*, 313 NLRB 1307 (1994).

In *Del-Mont Construction Co.*, 150 NLRB 85 (1965), relied on by the Board in *Butler*, the holding, in effect, was that an appropriate unit in the construction industry did not have to be either a craft or departmental unit so long as the requested employees were a readily identifiable and distinct group with common interests distinguishable from those of other employees. See also *S. J. Graves & Sons Co.*, 267 NLRB 175 (1983); *Brown & Root, Inc.*, 258 NLRB 1002 (1981). But in *Brown & Root Braun*, 310 NLRB 632 (1993), the Board denied review of a Regional Director's determination that an ironworkers and helpers' unit was neither a craft unit nor a departmental unit.

The Board also stated in *Butler*, supra at 1599, that "in the construction industry, collective bargaining for groups of employees identified by function . . . has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged.'' For this reason, in *Hydro Constructors*, 168 NLRB 105 (1968), the Board concluded that a unit of laborers alone was appropriate, rather than a unit of laborers combined with dump truck drivers. The laborers were engaged, a substantial majority of their time, in laborers' duties (while the drivers were not), they were traditionally represented in this type of laborers' unit, and a pay differential existed between the laborers and the other employees. Thus, while two or more groups may each be separately appropriate, they cannot be arbitrarily grouped to the exclusion of others. *S. J. Graves & Sons Co.*, supra. Similarly, an overall unit may be the only appropriate unit where there is no basis for separate grouping *A. C. Pavement Striping Co.*, 296 NLRB 206 (1989).

In *New Enterprise Stone Co.*, 172 NLRB 2157 (1968), a unit of heavy equipment operators, together with the mechanics and oilers who maintain and service their equipment, was found appropriate as a distinct functional grouping of construction employees with a community of interest separate and apart from other employees.

In *Del-Mont Construction Co.*, supra, a separate unit consisting of operators of power-driven equipment, including crane, backhoe, shovel, bulldozer, compressor and pump operators, and mechanics, was found appropriate. In that case, another separate unit of laborers and truckdrivers was found appropriate. It should be noted that, unlike the situation in *Hydro*, supra, the laborers and drivers had related interests.

In *Johnson Controls, Inc.*, 322 NLRB 669 (1996), the Board found a unit of fitters, system representatives, and service specialists appropriate. The employer sold, installed, and services building environmental control systems and fire and security systems.

For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-600, and 10-700.

## 15-140 Drivers

## 15-141 The Koester Rule

### 440-1760-6200

Prior to 1961, Board policy was to require the inclusion of drivers or driver-salesmen in production and maintenance units unless the parties agreed to exclude them or another labor organization sought to represent them (see, for example, *Cooperative Milk Producers Assn*., 127 NLRB 785 (1960)).

But in *Plaza Provision Co*., 134 NLRB 910 (1962), a case involving driver-salesmen, the Board reconsidered the then existing policy, and in early 1962, in *E. H. Koester Bakery Co*., 136 NLRB 1006 (1962), which involved truckdrivers as well as driver-salesmen, it followed through with a full explication of the treatment it believed warranted for unit determinations involving drivers.

The Board recognized that the complexity of modern industry generally precludes the application of fixed rules for the unit placement of truckdrivers, that case experience demonstrates wide variation in employment conditions with respect to local and over-the-road drivers, between the various industries, and from plant to plant in a given industry. For these reasons, substantial weight is accorded to an established course of dealings as well as to the agreement of the parties. But when the parties disagree, and there is no bargaining history, and no union is seeking to represent them separately, the pertinent facts must be considered "to determine wherein the predominant interests of truckdrivers are vested.''

A reexamination of the policy convinced the Board that the automatic rule amounted to a refusal to consider on its merits an issue, the resolution of which the parties have been unable to reach on the basis of their collective experience. The Board stated (136 NLRB at 1011):

> We have therefore decided to abandon the blanket policy of including truckdrivers in more comprehensive units and to return to the approach of predicating their unit placement in each case upon a determination of their community of interest.

From then on, unit determinations were to depend on the following factors:

> (a) Whether the truckdrivers and the plant employees have related or diverse duties, the mode of compensation, hours, supervision, and other conditions of employment; and
> (b) Whether they are engaged in the same or related production processes or operations, or spend a substantial portion of their time in such production or adjunct activities.

If the interests shared with other employees are sufficient to warrant their inclusion, the truckdrivers are included in the more comprehensive unit. On the other hand, if truckdrivers are shown to have substantially separate interests from those of the other employees, they may be excluded upon request of the petitioning union. Compare *Calco Plating*, 242 NLRB 1364 (1979), and *Chin Industries*, 232 NLRB 176 (1977). See also *Overnite Transportation*, 331 NLRB 662 (2000), where the Board reversed a finding that a petitioned-for unit of dockworkers should include truckdrivers. Instead the Board found the unit should include all unskilled workers at the terminal.

In *Marks Oxygen Co*., 147 NLRB 228 (1964), the Board further clarified the *Koester* policy by announcing that it would continue to utilize relevant criteria in addition to job content in evaluating community of interest. It made it clear that, in *Koester*, it reversed the policy of requiring the inclusion of truckdrivers where there was disagreement, but that it did not reverse basic policies such as (a) a plantwide unit is presumptively appropriate; (b) a petitioner's desires as to the unit is always a relevant consideration; and (c) it is not essential that a unit be the most appropriate unit. Accord: *NLRB* v. *Southern Metal Services*, 606 F.2d 512 (5th Cir. 1979). See

also *Overnite Transportation Co*., 325 NLRB 612 (1998), rejecting the argument that consideration of petitioner's desires there violated the prohibition on making the extent of organization determinative. It is important to note here that more than one truckdriver unit may be appropriate and the union can seek an election in any appropriate unit. *Publix Super Markets, Inc.,* 343 NLRB No. 109 (2004).

In *Mc-Mor-Han Trucking Co*., 166 NLRB 700 (1967), the facts did not reveal such a community of interest between the drivers and mechanics as would render a proposed driver unit inappropriate. This holding was distinguished from that of *Marks Oxygen*, supra, in which the issue was not whether a separate unit of drivers was inappropriate, as in *Mc-Mor-Han*, but rather whether a requested unit combining drivers with production and maintenance drivers was appropriate. Thus, as we have seen, the Board, in *Marks Oxygen*, found the more comprehensive unit appropriate, but specifically reaffirmed certain basic policies which were left undisturbed by the *Koester* decision. See also *Airco, Inc*., 273 NLRB 348 (1984).

In *Tallahassee Coca-Cola Bottling Co*., 168 NLRB 1037 (1968), a unit of production and maintenance employees, which included driver-salesmen, was found appropriate. In the subsequent unfair labor practice proceeding, it was contended that the unit finding was erroneous and enforcement was resisted on that ground. The Fifth Circuit remanded the case to the Board, particularly as to its reliance on *Marks Oxygen*, supra, in relation to the *Koester* criteria. In its supplemental decision the Board expanded its rationale and adhered to its original decision. Ultimately, the court granted enforcement (*NLRB v. Tallahassee Coca-Cola Bottling Co*., 409 F.2d 201 (5th Cir. 1969)), concluding that the Board had adequately explained its rationale for this unit determination.

Truckdrivers were found so functionally integrated with plant employees as to preclude separate representation where (a) the drivers spent a substantial amount of time performing the same function as other employees at the terminals, some of whom performed driving duties; (b) the drivers had the same supervision, pay scale, and benefits as other employees; and (c) the drivers' conditions of employment were substantially the same as that of the others. *Standard Oil Co*., 147 NLRB 1226 (1964). See also *Philco Corp*., 146 NLRB 867 (1964). *Donald Carroll Metals*, 185 NLRB 409 (1970); *Trans-American Video*, 198 NLRB 1247 (1972); *Levitz Furniture Co*., 192 NLRB 61 (1971); and *Calco Plating*, supra.

In *General Electric Co*., 148 NLRB 811 (1964), employees, described as "motor messengers,'' drove vehicles in order to distribute mail but, apart from this function, exercised clerical functions similar to those of office clerical employees, shared the same wage basis and hours, and many had the same supervision and progression pattern. Of 21 such employees, only 5 spent the majority of their time in driving. The other 16 spent about 40 percent of their time driving and about 60 percent in clerical work not involving mail handling. In these circumstances, the driving functions of some were not considered such as to set apart the whole requested unit of motor messengers, mail handlers, and addressograph operators from other office clerical employees in the manner, for example, "that truckdrivers may be considered to have interests distinct from production and maintenance employees.'' See also *National Broadcasting Co*., 231 NLRB 942 (1977).

In *Container Research Corp*., 188 NLRB 586 (1971), two over-the-road drivers were excluded from a plantwide unit, although sought by the petitioning union. Thereafter, in *Fayette Mfg. Co*., 193 NLRB 312 (1971), the Board overruled *Container Research Corp*. to the extent that decision was inconsistent with *Fayette* and in contravention of *Marks Oxygen*, discussed above.

Summing up the flexibility which exists in this policy area, the Board in *Lonergan Corp*., 194 NLRB 742, 743 (1972), a case in which it found appropriate a unit excluding truckdrivers, cited *NLRB v. Tallahassee* Coca-*Cola Bottling Co*., supra, 409 F.2d 201, and stated:

> The above facts present an overall picture which is similar to many cases involving the inclusion-exclusion problem with respect to truckdrivers, i.e., these truckdrivers have what amounts to a dual community of interest with some factors supporting their exclusion from an overall production and maintenance unit and some factors supporting their inclusion in the broader unit. As the Board has frequently noted, in such a situation and where no other labor organization is seeking a unit larger or smaller than the unit requested by the Petitioner, the sole issue to be determined is whether or not the unit requested by the Petitioner is an appropriate unit. Accordingly, while we agree that certain factors may support the Regional Director's conclusion that a unit including the truckdrivers is an appropriate unit, in our view the unit requested by the Petitioner which would exclude the truckdrivers is an appropriate unit and it is therefore irrelevant that a larger unit might also be appropriate.

Similarly, the Board concluded that a unit of drivers was an appropriate one and rejected the finding of the Regional Director that the unit should include mechanics. *Overnite Transportation Co*., 322 NLRB 347 (1996). The Board denied a motion for reconsideration of this decision in *Overnite Transportation Co*., 322 NLRB 723 (1996), and then expanded its discussion of these unit decisions in *Overnite Transportation Co*., 325 NLRB 612 (1998) and *Novato Disposal Services*, 330 NLRB 632 (2000);. See also *Home Depot USA*, 331 NLRB 1289 (2000) (drivers share interest with others but have sufficient distinct interests to warrant separate unit).

## 15-142 Scope of Driver Units

**440-1760-6200**

**440-3300**

Single-terminal units are presumptively appropriate. *Groendyke Transport*, 171 NLRB 997 (1968); *Alterman Transport Lines*, 178 NLRB 122 (1969); *Wayland Distributing Co*., 204 NLRB 459 (1973).

In *Alterman*, the employer's terminals in Miami, Tampa, and Orlando were separated by as much as several hundred miles; despite much centralization, a sufficient degree of autonomy had been vested in the managers of the individual terminals, and there was no history of collective bargaining at any of the terminals involved. In *Wayland*, there was little temporary interchange of drivers, very few transfers, no prior bargaining history, and no labor organization sought to represent the drivers on any basis. In these circumstances, rejecting an employer contention that the only appropriate unit would be a unit of all unrepresented drivers and shop employees wherever located, the Board found a unit appropriate of drivers "based in either Mobile, Alabama, or Pensacola, Florida.'' See also *Bowie Hall Trucking*, 290 NLRB 41 (1988); *Carter Hawley Hale Stores*, 273 NLRB 621 (1984); but compare *Dayton Transport Corp*., 270 NLRB 1114 (1984).

On the other hand, in *Tryon Trucking*, 192 NLRB 764 (1971), in which the petitioner had requested a drivers' unit employed at all of the employer's terminals in four States, the Board held that, while a single-terminal unit might be appropriate, the requested employerwide unit was also appropriate in view of common skills, integration of operations of all the terminals, and "the common unity of interests of all the drivers in employment by the same company.''

As the general principles applicable to multilocation unit issues are equally germane in any consideration of issues arising in the transportation industry, see chapter, ante, on Multilocation Units.

## 15-143 Local Drivers and Over-the-Road Drivers

**440-1760-6200**

Local drivers and over-the-road drivers constitute separate appropriate units where it is shown that they are clearly defined homogeneous and functionally distinct groups with separate

interests which can effectively be represented separately for bargaining purposes. *Georgia Highway Express*, 150 NLRB 1649, 1651 (1965); *Alterman Transport Lines*, supra. See also *Jocie Motor Lines*, 112 NLRB 1201, 1204 (1955); *Gluck Bros*., 119 NLRB 1848 (1958). Compare *Carpenter Trucking*, 266 NLRB 907 (1983).

## 15-144 Severance of Drivers

**440-8325-7562**

Drivers, under appropriate circumstances, are accorded the right of self-determination, notwithstanding a bargaining history on a broader basis, where it is found that they constitute a homogeneous, functionally distinct group entitled to severance. See *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137–139 (1962), in which the Board held that severance would depend on a consideration of all relevant community-of-interest factors. See also *Wright City Display Mfg. Co*., 183 NLRB 881 (1970); *Downingtown Paper Co*., 192 NLRB 310 (1971). In *Downingtown*, severance was granted to over-the-road truckdrivers on the basis of constituting a homogeneous, functionally distinct group. The Board noted that the drivers spent most of their working time away from the plant, did no plantwork, did not load or unload their trucks at the plant, and did not interchange with other drivers or production and maintenance employees. Moreover, their basis for compensation differed from the others, they were not permitted overtime work, and they did not work in other departments or for supervisors other than those in their department.

As is generally true of severance policy when the Board's requirements are not met, the request for a self-determination election is denied. *Hearst Corp*., 200 NLRB 475 (1973); *A. O. Smith Corp*., 195 NLRB 955 (1972) (reliance for dismissal was placed on the facts that the drivers spent a substantial amount of their time performing in-plant work and shared the same immediate supervisor); *Western Pennsylvania Carriers Assn*., 187 NLRB 371 (1971) (the requested employees in 42 petitions did not constitute "a functionally distinct department or departments for which a tradition of separate representation exists''); *Consolidated Packaging Corp*., 178 NLRB 564 (1969); *Rockingham Poultry Cooperative*, 174 NLRB 1278 (1969) (over-the-road drivers denied severance on the grounds, among others, of overall unit bargaining history and performance in substantial respects of duties similar to other drivers not sought by the petitioner and similar working conditions, fringe benefits, and supervision as other employees); *Fernandes Super Markets*, 171 NLRB 419, 420 (1968) (whatever separate community of interests the employees in question may have had was "submerged into the broader community of interest which they share with other employees by reason of several years uninterrupted association in the existing overall unit and their participation in the representation of that unit for purposes of collective bargaining''). See also *Memphis Furniture Mfg. Co*., 259 NLRB 401 (1981).

For a discussion of severance in its broader context involving crafts and departmental units, see chapter on Craft and Traditional Departmental Units, infra.

## 15-145 Driver-Salespersons

**440-1760-6200**

**440-1760-7200**

Employees who drive trucks or automobiles and distribute products of their employer from their vehicles have varying duties, depending on the employer's sales and distribution policies and practices. Where employees engaged in selling their employer's products drive vehicles and deliver the products "as an incident'' of their sales activity, they are regarded as essentially salespersons with "interests more closely applied to salesmen in general than to truckdrivers or to production and maintenance employees or warehouse employees.'' *Plaza Provision Co.*, 134 NLRB 910 (1962). Thus, route salesmen were excluded from a driver's unit, being differentiated from employees with little or no function in making or promoting sales of the employer's products.

Driver- salespersons are excluded from a unit of plant employees where (a) they deal directly with customers whom they must satisfy in order to retain their patronage; (b) their value to the employer is therefore based on qualities not required of plant employees; and (c) their interests and working conditions are substantially different from the plant employees. *Gunzenhauser Bakery*, 137 NLRB 1613 (1962). Compare *Wilson Wholesale Meat Co.*, 209 NLRB 222 (1974).

See also *Southern Bakeries Co*., 139 NLRB 62 (1962) (driver- salespersons excluded from a unit of transport drivers); *E. Anthony & Sons*, 147 NLRB 204 (1964) (separate units of "district managers'' who promoted sales and serviced subscriptions; and truckdrivers who were principally delivery men, the distinction between delivery men and those who drive vehicles only as an incident to their sales activity thus being preserved); *Kold Kist, Inc*., 149 NLRB 1449 (1964) ("demonstrators'' working primarily at off-plant locations and under separate supervision regarded as performing functions relating to sales rather than production of products, and therefore excluded from a unit of production and maintenance employees and truckdrivers); *Walker-Roemer Dairies*, 196 NLRB 20 (1972) (wholesale route salespersons combined with retail route salespersons in a single unit, despite certain distinct interests, because of "strong interests they share'' in common; tank truckdrivers and van drivers excluded from the unit); *Dr. Pepper Bottling Co*., 228 NLRB 1119 (1977).

## 15-146 Health Care Institution Drivers

**470-1795**

**470-8300**

Drivers are not one of the units found appropriate in the health care rules. See section 15-170, Health Care Institutions, infra, and Health Care Rulemaking, as reported at 284 NLRB 1516. While it can be expected that they will be included in the "Other Non-Professionals Unit,'' 284 NLRB 1516, 1565, it may be that they share sufficient community of interest to warrant inclusion in another unit. See *Michael Reese Hospital*, 242 NLRB 322 (1979), and *North Medical Center*, 224 NLRB 218, 220 (1976), decided prior to the health care unit rules. In *Duke University*, 306 NLRB 555 (1992), decided after the rules, the Board decided that busdrivers were not health care employees, even though they spent over half their time servicing the employer's medical center.

## 15-150 Funeral Homes

**440-1720-3300**

**440-1760-9900**

An overall unit of funeral home employees would, like any other overall unit, be presumptively appropriate. *Riverside Chapels*, 226 NLRB 2 (1976). In considering petitions for units of less than all employees, the Board has found that those employees whose duties relate to embalming and other direct funeral services show a sufficient community of interest to warrant a separate appropriate unit. *NLRB v. H. M. Patterson, Inc*., 636 F.2d 1014 (5th Cir. 1981). Compare *Oritz Funeral Home Corp*., 250 NLRB 730 (1981), in which clerical employees were included in a unit of employees performing funeral services because the nature of their work was closely related to and included funeral service responsibilities.

## 15-160 Gaming Units

Units of gaming casino employees have been found appropriate prior to 1965 when jurisdiction over this type of enterprise was exercised on the basis of being part of a hotel operation (see, for example, *Hotel La Concha*, 144 NLRB 754 (1963)), and thereafter directly, regardless of hotel affillatlon (*El Dorado Club*, 151 NLRB 579 (1965)).

In *Crystal Bay Club*, 169 NLRB 838 (1968), the Board was faced with the question whether the interests of casino employees are so different from those of culinary and bar, office, and maintenance employees as to require their exclusion from an overall unit where there has been no

stipulation to exclude them. It held that a unit consisting of all employees was appropriate because of the fact that the same union was seeking to represent all, the lack of any substantial bargaining history, and "particularly the closeness of all the departments which function for the most part to support the casino operations.'' Compare *Holiday Hotel*, 134 NLRB 113 (1962), in which casino employees were found to have interests sufficiently different from those of other hotel employees to justify honoring the parties' stipulation to exclude them. See also *North Shore Club*, 169 NLRB 854 (1968).

Although in one case slot machine mechanics were found skilled craftspersons, therefore constituting an appropriate unit, excluding all other employees (*Freemont Hotel*, 168 NLRB 115 (1968)), they were not found to be craftspersons in other cases (*Hotel Tropicana*, 176 NLRB 375 (1969); *Nevada Club*, 178 NLRB 81 (1969); *Aladdin Hotel*, 179 NLRB 362 (1969)). Thus, it was pointed out in *Aladdin*, for example, that the facts in *Freemont* were distinguishable, as in the latter the mechanics were the only unrepresented group in the casino, there was a formal apprentice program for them, they did not interchange with other employees, and they were the only employees who worked on the machines. See also *Bally's Park Place*, 255 NLRB 63 (1981), in which a slot department composed of mechanics and attendants was found appropriate.

Slot mechanics are included in the gaming unit rather than with the maintenance department employees where it appears that their contacts are basically with other gaming unit employees and casino patrons; some of their duties are the same as those assigned to the employees in the gaming unit; their work is related solely to the casino operations; and, unlike the maintenance employees, they are not concerned to any degree with other maintenance or repair functions incidental to the employer's operations. *Club Cal-Neva*, 194 NLRB 797 (1972); *Harold's Club*, 194 NLRB 13 (1972).

Separate units of change personnel and booth cashiers were rejected as comprising neither a separate homogeneous group of employees with special skills, nor a functionally distinct department. *Horseshoe Hotel*, 172 NLRB 1703 (1968). However, self-determination elections were granted to voting groups of casino cashiers to determine whether they desired to be added to an existing croupiers' unit represented by the petitioner. *El San Juan Hotel*, 179 NLRB 516 (1969); *El Conquistador Hotel*, 186 NLRB 123 (1970).

In *Bally's Park Place*, 259 NLRB 829 (1982), the Board rejected a petition seeking separate or combined units of hard (coins) and soft (currency) employees. The employer there contended that only an accounting department unit was appropriate. The Board dismissed the petition without commenting on the appropriateness of the employer's proposed unit.

Separate units limited to all gaming employees and all maintenance employees, respectively, are appropriate. *Silver Spur Casino*, 192 NLRB 1124 (1971); cf. *Harrah's Club*, 187 NLRB 810 (1971); *El Dorado Club*, supra.

In *Florida Casino Cruises*, 322 NLRB 857 (1997), the Board affirmed a finding that a unit of the ship's personnel was appropriate on a casino cruise ship. The employer had sought a "wall to wall'' unit including the gaming and food personnel.

## 15-170 Health Care Institutions

### 470-0000

## 15-171 Acute Care Hospitals

On April 21, 1989, the Board set out the appropriate units for acute care hospitals in a rulemaking proceeding, reported at 284 NLRB 1515, et seq. The Rule (Sec. 103.30) provides that except in extraordinary circumstances, the following units and only these units are appropriate in an acute hospital.

1. All registered nurses.
2. All physicians.

3 All professionals except for registered nurses and physicians.
4. All technical employees.
5. All skilled maintenance employees.
6. All business office clerical employees.
7. All guards.
8. All other nonprofessional employees.

The Rule provides that a petitioning union can request a consolidation of two or more of the above units and, absent a statutory restriction, e.g., guards and nonguards in the same unit, such a combined unit may be found appropriate. Characterizing the issue as novel, the Board approved a decision by a Regional Director ordering a self-determination election for nurses. The choice was between separate representation, inclusion in a unit of all professionals and, then, inclusion with nonprofessionals. *Dominican Santa Cruz Hospital*, 307 NLRB 506 (1992).

For a discussion of residual units under the Rule, see 12-400, supra.

The Board's Rule provides one example of an extraordinary circumstance, a unit of five or fewer employees. The fact that such a unit would be an extraordinary circumstance means that the Board will consider alternative unit contentions by the parties. It does not mean that the Board's ultimate unit determination will necessarily be at variance with the units found appropriate in the Rule.

In *St. Margaret Memorial Hospital*, 303 NLRB 923 (1991), the Board reaffirmed the position stated in the Rule that a party urging "extraordinary circumstances'' bears a "heavy burden.'' Compare *Child's Hospital*, 307 NLRB 90 (1992), where the Board found extraordinary circumstances where there was a physical joinder of a nursing home and a hospital.

The Rule also excepts from its coverage "existing nonconforming units.'' See *Crittenton Hospital*, 328 NLRB 879 (1999), for a discussion of the meaning of this exception. In *Pathology Institute*, 320 NLRB 1050 (1996), the Board found a nonconforming unit and evaluated it, not under the Rule, but under "traditional representation principles.''

In *Rhode Island Hospital*, 313 NLRB 343 (1993), the Board rejected a contention that the research areas of a hospital are not part of an acute care hospital for purposes of application of the Rule.

## 15-172 Other Hospitals

**177-9700**

**470-0100**

The Board did not include psychiatric and rehabilitation hospitals in the Rule. Thus, determination as to appropriate units in these health care institutions is left to adjudication on a case-by-case basis. The Board's Rule for acute care hospitals is based on "a reasonable, finite number of congenial groups displaying both a community of interests within themselves and a disparity of interests from other groups,'' and it may be that this will be the test for unit determinations in other health care cases. In *Mount Airy Psychiatric Center*, 253 NLRB 1003 (1981), the Board did reach a different unit determination in a psychiatric hospital than it would have in an acute care facility.

For a discussion of units in psychiatric hospitals, see the discussion below of *Park Manor Care Center*, 305 NLRB 872 (1991), and related cases. See also the Board's denial of review in *Holliswood Hospital*, 312 NLRB 1185 (1993), in which review of a finding of an RN unit in a psychiatric hospital was denied.

## 15-173 Nursing Homes

Nursing homes were initially considered in the rulemaking proceeding. The units suggested in the initial proposal were (1) all professionals, (2) all technicals, (3) all service, maintenance and clericals, and (4) all guards. After consideration of the comments and evidence received, the Board excluded these institutions from the health care rule and the determination of appropriate units in nursing homes is left to a case-by-case approach. 284 NLRB 1567, 1568.

The Board's experience in nursing home units predates the 1974 health care amendments and by 1970 the distinction between proprietary and nonproprietary nursing homes was eliminated. *Drexel Home*, 182 NLRB 1045 (1970).

In *Park Manor Care Center*, supra, the Board announced that henceforth it would apply a community-of-interest test in nursing homes together with "background information gathered during rulemaking and prior precedent.'' The Board reaffirmed its decision to decide nursing home units by adjudication with the "hope that . . . certain recurring factual patterns will emerge and illustrate which units are typically appropriate.'' For an example of this policy see *Hebrew Home & Hospital*, 311 NLRB 1400 (1993), affirming on review the decision of the Acting Regional Director approving a separate skilled maintenance unit at a nursing home.

The Board has also applied *Park Manor* to psychiatric hospitals. *McLean Hospital Corp*., 309 NLRB 564 fn. 1 (1992); *Brattleboro Retreat*, 310 NLRB 615 (1993); and *McLean Hospital Corp*., 311 NLRB 1100 (1993), where the Board denied request for review of finding that RN unit was appropriate. In *Charter Hospital of Orlando South*, 313 NLRB 951 (1994), the Board affirmed an RD finding of a professional (RN's) and nonprofessional units at a psychiatric hospital. But in *Stormont-Vail Healthcare, Inc*., 340 NLRB No. 143 (2003), the Board noted that psychiatric nurses are not automatically excluded from an RN unit in an acute care hospital. Applying traditional community of interest standards, the Board included psychiatric RN nurses at outlying facilities in a unit comprised of RNs and other psychiatric RNs at the central facility.

In *Lifeline Mobile Medics*, 308 NLRB 1068 (1992), the community-of-interest standard was applied to an ambulance service, and in *Upstate Home for Children*, 309 NLRB 986 (1992), it was applied in a residential home for retarded children and a medical equipment and clinical services facility. *CGE Caresystems, Inc.*, 328 NLRB 748 (1999).

## 15-174 Application of the Health Care Rule

Shortly after the Supreme Court affirmed the Rule, the General Counsel issued two memoranda— General Counsel's Exhibit 91-3 gave the Regions procedural guidance on the procedures to be followed under the Rule and General Counsel's Exhibit 91-4 summarized case law on health care unit placement. Reproduction of these memoranda would unduly burden this book. Copies may be obtained from the Board's Division of Information.

In *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), the Board addressed the application of Rule to preexisting nonconforming units. In *Kaiser* the petitioner sought to sever skilled maintenance employees from a nonprofessional unit. The Board held that the Rule only applies to "new units of previously unrepresented employees which would be an addition to the existing units at a facility.'' Accordingly, the Board would not apply the Rule to a severance but instead analyzed the petition under traditional *Mallinckrodt* principles (see sec. 16-100 et seq.).

## 15-175 Registered Nurse Units

As noted earlier, the Board's Rule finds that units of registered nurses are appropriate. Issues of unit placement are determined on a case-by-case basis. Licensing is an important factor in determining whether a particular employee or group should be included in a RN unit. As the Board indicated:

> Although the Board has not included all RNs in a hospital RN unit regardless of function, the Board generally has included in RN units those classifications which perform

utilization/review of discharge planning work where an employer requires or effectively requires RN licensing for the job. *Salem Hospital*, 333 NLRB 560 (2001).

In *South Hills Health System Agency*, 330 NLRB 653 (2000), the Board denied a request for review of a Regional Director's decision finding a unit of RNs appropriate in a nonacute health care facility.

See 15-173, for discussion of unit placement of psychiatric RNs in acute care hospitals.

## 15-176 Other Health Care Issues

For discussions of other health care issues, see sections 1-315 (Jurisdiction), 12-400 (Residual Units), 13-1100 (Health Care), 15-146 (Health Care Institution Drivers), 16-300 (Skilled Maintenance-Health Care), 17-512 (Health Care Supervisory Issues), 19-460 (Business Office Clerical-Health Care), and 19-510 (Technical Employees-Health Care).

In *Rhode Island Hospital*, 313 NLRB 343 (1993), the Board decided a series of unit placement issues in health care. Specifically, the case involved business office clericals, technicals, skilled maintenance, and students (nursing, radiology, and pharmacy). The case also involved eligibility issues relating to employees who are involved in research that is funded by sources outside the hospital.

## 15-180 Hotels and Motels

The Board first asserted jurisdiction over enterprises in the hotel and motel industry in 1959 (*Floridan Hotel of Tampa*, 124 NLRB 261 (1959)), and a year later formulated a general rule of unit determination in this industry to the effect that all operating personnel have such a high degree of functional integration and mutuality of interests that they should be grouped together for purposes of collective bargaining (*Arlington Hotel Co*., 126 NLRB 400 (1960)).

Several years later, this rule was relaxed to some extent in situations in which a well-defined area practice of bargaining for less than a hotelwide unit was shown to exist. See, for example, *Water Tower Inn*, 139 NLRB 842 (1962); *Mariemont Inn*, 145 NLRB 79 (1964). A motel unit was approved that excluded office clerical employees, even though there was no bargaining history in the particular unit selected (*LaRonde Bar Restaurant*, 145 NLRB 270 (1963)). See also *Columbus Plaza Hotel*, 148 NLRB 1053 (1964).

Ultimately, in 1966, the rule established in *Arlington* was considered by the Board and overruled because of its rigidity. While *Arlington* took a valid principle, i.e., if functions and mutual interests are highly integrated an overall unit alone is appropriate, and fashioned from it an inflexible rule to be applied to all hotels and motels, Board experience had indicated that the operations of every hotel or motel were not so highly integrated nor all employees so similar as to negate the existence of a separate community of interest among smaller groupings. In these circumstances, the Board decided that it would thereafter "consider each case on the facts peculiar to it in order to decide wherein lies the true community of interest among particular employees'' of a hotel or motel. *Holiday Inn Restaurant*, 160 NLRB 927 (1966).

Thus the rule now is that the general criteria used for determining units in other industries, after weighing all the factors present in each case, are also applicable to the hotel and motel industry. These factors include distinctions in the skills and functions of particular employee groupings, their separate supervision, the employer's organizational structure, and differences in wages and hours. See *Omni International Hotel*, 283 NLRB 475 (1987).

Notwithstanding the former broad rule in *Arlington*, recognition had impliedly been given by the Board even in that decision to the difference which exists between clerical employees and manual operating personnel. This had been indicated also in other cases. See, for example, *Water Tower Inn*, supra; *Mariemont Inn*, supra; *LaRonde Bar & Restaurant*, supra; *Columbus Plaza Hotel*, supra.

Accordingly, while this decisional approach to hotel unit questions does not abrogate the Board's policy of treating clerical employees as "operating personnel,'' it nevertheless relegates that generic classification to the status of just one factor among many others, which the Board considers in making hotel unit findings. In short, generic classification in a hotel may not be the controlling factor any more than it would be controlling in the determination of an industrial unit. *Regency Hyatt House*, 171 NLRB 1347 (1968).

For other examples of the current case-by-case approach see *Westin Hotel*, 277 NLRB 1506 (1986), in which the Board rejected a separate maintenance unit because of the absence of unique skills and of separate supervision; *Hotel Services Group*, 328 NLRB 116 (1999), finding a unit of licensed massage therapists inappropriate; *Stanford Park Hotel*, 287 NLRB 1291 (1988), holding appropriate a separate unit of housekeeping and maintenance employees; *Omni International Hotel*, supra, and *Hilton Hotel*, 287 NLRB 359 (1987), finding a unit of engineering employees appropriate; and *Dinah's Hotel & Apartments*, 295 NLRB 1100 (1989), finding a unit of front desk employees appropriate. But see *Ramada Beverly Hills*, 278 NLRB 691 (1986), finding only an overall unit appropriate in view of the extent of the integration of the operation; and *Atlanta Hilton & Towers*, 273 NLRB 87 (1984).

## 15-190 Insurance Industry

Although at one time only a statewide or companywide unit of insurance employees was found appropriate, the normal unit principles applied in other industries are now used in determining bargaining units in the insurance industry. This question came to a head in 1965 when it reached the United States Supreme Court in *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965) (see discussion ante on Multilocation Units). Following a remand from that Court, the Board delineated its policy pertaining to unit determination in the insurance industry in *Metropolitan Life Insurance Co*., 156 NLRB 1408 (1966).

In general, a single district office is the basic appropriate unit for insurance agents. *Metropolitan Life Insurance Co.*, supra at 1418; *Western & Southern Life Insurance Co*., 163 NLRB 138 (1967), enfd. 391 F.2d 119 (3d Cir. 1968). See also *Allstate Insurance Co*., 191 NLRB 339 (1971), finding a districtwide unit requested by the petitioner to be appropriate.

Noting that not all companies have precisely the same administrative structure or office nomenclature, the Board stated that the basic appropriate unit for insurance claims' representatives or adjusters was "the smallest component of the Employer's business structure which may be said to be relatively autonomous in its operation'' and thus comparable to the district office involved in the Supreme Court *Metropolitan* decision. *State Farm Mutual Automobile Insurance Co*., 158 NLRB 925, 929 (1966). See also *American Automobile Assn*., 172 NLRB 1276 (1968).

Illustrative of the application of these principles, a unit of insurance adjusters limited to a single branch office was found appropriate. *Fireman's Fund Insurance Co*., 173 NLRB 982 (1969). Describing its approach as predicated on the presumption of the basic appropriateness of the single branch office, and finding that this presumption in the facts before it had not been overcome, the Board compared this with unit questions arising in the retail industry and pointed out that this presumption may be rebutted where it is shown that day-to-day interests shared by employees at a particular location have become merged with those of employees at other locations.

In setting out the principles governing its unit determinations in the insurance industry, the Board noted in *Metropolitan*, supra, that the fact that individual district offices qualified as separate appropriate bargaining units did not necessarily mean that a combination of such district offices into a broader more inclusive unit was to be ruled out. Accordingly, where a reasonable degree of geographic coherence existed among several locations within a proposed unit, a multilocation unit was found appropriate. *Allstate Insurance Co*., 171 NLRB 142 (1968); *State*

*Farm Mutual Automobile Insurance Co*., supra. Compare *American Automobile Assn*., 242 NLRB 722 (1979).

On composition of insurance industry units, the Board has held that underwriters, engineers, and adjusters generally perform duties of a technical, specialized nature, in which they are called upon to exercise considerable independent judgment. Although physically located near clericals, their work requires a higher level of responsibility. They therefore have interests sufficiently different to warrant exclusion from an overall-type unit. *Reliance Insurance Cos*., 173 NLRB 985 (1969). See also *Fireman's Fund Insurance Co*., supra; *North Carolina Life Insurance Co*., 109 NLRB 625 (1954); cf. *Farmers Insurance Group*, 164 NLRB 233 (1967). See also *Empire Insurance Co*., 195 NLRB 284 (1972), in which an all-employee unit, including clerical employees, was found to be appropriate.

## 15-200 Law Firms

**440-1720-3300**

**440-1760-4300**

**440-1760-9940**

Since the Board's decision to extend jurisdiction over law firms in 1977 (*Foley, Hoag & Eliot*, 229 NLRB 456 (1977)), the majority of reported cases have centered on organizing efforts in legal services corporations. In *Wayne County Legal Services*, 229 NLRB 1023 (1977), the Board decided to treat legal services corporations like law firms for jurisdictional purposes. The unit issues presented by these cases have involved the placement of paralegals, law school graduates not yet admitted to the bar and supervisory issues.

Clearly, a unit of all professionals, i.e., attorneys, is appropriate. Similarly, a unit of all employees, professional and nonprofessional, may be appropriate provided that the professional employees agree after a separate vote to be included in the overall unit. *Neighborhood Legal Services*, 236 NLRB 1269 (1978).

Employees who are law school graduates but not as yet admitted to the bar have been held to be professional employees. *Wayne County Legal Services*, supra. Law students on the other hand have been found not to be professionals and would be included in a clerical employee unit if they share a sufficient community of interest with the clericals. Cf. *Legal Services for the Elderly Poor*, 236 NLRB 485 fn. 15 (1978). Generally paralegals do not have the full range of responsibility and education to qualify for inclusion in the professional unit. *Neighborhood Legal Services*, supra. Whether or not they are included in a clerical unit depends on their community of interest with those employees. In both *Twentieth Century Fox Film Corp*., 234 NLRB 172 (1978), and *Stroock, Stroock & Lavan*, 253 NLRB 447 (1981), the Board found insufficient community to warrant inclusion.

The Board has rejected the contention that employees of a law firm are "confidential'' since they handle labor relations matters and information for the firm's clients. In *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1981), the Board held that employees are confidential only if they handle confidential matters concerning labor relations for their own employers.

## 15-210 Licensed Departments

### 15-211 In General

**177-1633-5033**

**177-1650**

Licensed departments are operations conducted under a lease or license agreement between a store owner and lessee under which the latter does business on the premises of the owner. The cases involving licensed departments generally pose (1) the initial question whether or not the

lessor and lessee are joint employers, and (2) the ensuing question, depending on the outcome of the first, whether the employees of the lessee have a sufficient community of interest to be included in the unit of the other store employees. Although these questions arise mostly in retail or discount retail store contexts, the issues posed are not necessarily limited to that segment of business enterprise.

The general rule is that the licensor or lessor and its licensees are joint employers of the employees in the licensed departments where it is established that the licensor "is in a position to influence the licensee's labor policies.'' *Grand Central Liquors*, 155 NLRB 295 (1965); *Spartan Department Stores*, 140 NLRB 608 (1963); *Frostco Super Save Stores*, 138 NLRB 125 (1962); *Pergament United Sales*, 296 NLRB 333 (1989). For the corollary, where the licensors had not exercised substantial control of the licensees' labor policies and were therefore not joint employers, see, for example, *S.A.G.E., Inc*., 146 NLRB 325 (1964); *Esgro Anaheim, Inc*., 150 NLRB 401 (1965).

Almost invariably in these situations the lessor and lessee execute a trade agreement, one of the major purposes on their part being to create the appearance of an integrated department store. Their agreement normally provides for advertising and promotional activity; inspection of premises; store layout; audit of records; approval of alterations, fixtures, and signs; decisions as to which articles may be sold; pricing policies; customer complaints; sharing of overhead expenses (usually prorated); purchase of supplies; names on signs and labels; and, significantly, labor and personnel policies.

The Board has recognized that, in the lessor-lessee arrangement where two or more employers at one location, although retaining their separate corporate entities, cooperate to present the appearance of a single-integrated enterprise to obtain mutual business advantage, "the dominant entrepreneur will of necessity retain sufficient control over the operations of the constituent departments so that it will be in a position to take action required to remove any causes for disruption in store operations.'' *Disco Fair Stores*, 189 NLRB 456 (1971). However, such control has not in and of itself been sufficient justification for a joint-employer finding. Such a finding is generally made where it has been demonstrated that the lessor is in a position to control the lessee's labor relations. *S.A.G.E., Inc*., supra.

Where the lessor explicitly reserves such control in its lease arrangements, a joint-employer finding invariably results. See, for example, *S. S. Kresge Co*., 161 NLRB 1127 (1966); *Jewel Tea Co*., 162 NLRB 508 (1967).

But the Board has not limited itself to an explicit reservation of control over labor relations and has held, in effect, that the licensor's right to dissolve the relationship entirely, its retention of overall managerial control, and the extent to which it retained the right to establish the manner and method of work performance put it in a position to influence the lessee's labor policies, whether or not such power has ever been exercised. *Value Village*, 161 NLRB 603 (1966).

The Board said: "While we would not postulate the existence of a joint-employer relationship merely on the basis of such a need—[to control the operations and labor relations of the licensees] and so stated in *Value Village*, supra—we will make such a finding where the license arrangements objectively demonstrate a response to that need. Here there is ample proof of such a response.'' *Globe Discount City*, 171 NLRB 830, 832 (1968). In that case, the Board concluded that the lessor's power to control or influence the labor policies of its licensees, particularly as it occurred in the context of the same type of joint business venture as was present in *Value Village*, was substantially the same as the power retained by the licensor in the latter.

On the other hand, both *Value Village* and *Globe* were distinguished in a later case, *Disco Fair Stores*, supra, in which the joint employer issue was resolved by finding that no such relationship existed. The Board held that the lease, unlike those involved in the two earlier cases, contained no provisions denominating the lessees as in default of their obligations for failure to follow or conform to such rules and regulations as *Disco* may promulgate concerning personnel.

Nor did the lease arrangements give the lessor sufficiently specific control over labor relations of the lessees to warrant a joint employer finding.

## 15-211 Unit Composition–Licensed Departments

**420-7384 et seq.**

**440-3350-5000 et seq.**

Where no union seeks a more limited unit, a unit embracing the employees of the licensor and its licensed department employees is appropriate. *Value Village*, supra. However, even if the existence of a joint employer relationship is found, it does not necessarily follow that storewide units including all leased and licensed department employees would be the only appropriate unit. *Esgro Valley, Inc.*, 169 NLRB 76 (1968). As explicated in *Bargain Town U.S.A.*, 162 NLRB 1145, 1147 (1967): "While there are circumstances indicating that all employees working at the store share a common community of interest in certain respects, there are other significant factors which establish that the employees of the leased and licensed departments in other respects also have a community of interest separate and distinct from that of the other employees.'' See also *Collins Mart*, 138 NLRB 383 (1962); *Frostco Super Save Stores*, supra.

## 15-220 Maritime Industry

Generally, the Board considers a fleetwide unit appropriate in the maritime industry. *Inter-Ocean Steamship Co.*, 107 NLRB 330 (1954). In *Moore-McCormack Lines*, 139 NLRB 796 (1962), and *Keystone Shipping Co.*, 327 NLRB 892 (1999), the Board found a less than fleetwide unit appropriate.

In *Florida Casino Cruises*, supra, the Board found a unit of the ship's personnel appropriate rejecting a request for a "wall to wall'' unit.

## 15-230 Newspaper Units

The optimum appropriate unit in the newspaper industry is a unit comprising employees in all nonmechanical departments. *Salt Lake Tribune Publishing Co.*, 92 NLRB 1411 (1951); *Lowell Sun Publishing Co.*, 132 NLRB 1168 (1961); *Minneapolis Star & Tribune Co.*, 222 NLRB 342 (1976).

Thus, in the absence of a bargaining history of separate units of nonmechanical employees, the Board, based on sufficient community of interest, will grant a union's request to include all such employees in a single unit. *Dow Jones & Co.*, 142 NLRB 421 (1963); *Minneapolis Star & Tribune Co.*, supra at 343. A combined unit consisting of departments that do not do similar or coordinated work, and which does not include all nonmechanical employees, may be found inappropriate. *Peoria Journal Star*, 117 NLRB 708 (1957); *Lowell Sun Publishing Co.*, supra. See also *Salt Lake Tribune Publishing Co.*, supra.

A multidepartment unit is not, however, the only appropriate unit in every case. In each instance the question turns on the facts of the case, including the bargaining history, the employer's organizational structure, and the willingness of the labor organizations involved to represent the overall unit, a factor which may be considered although it cannot be controlling. It does not, however, turn on the ultimate desirability of the overall unit. *Peoria Journal Star*, supra. Thus, when the employer's operations are organized into separate distinct departments, separate departmental units may be found appropriate, even in the face of functional integration and control, interchangeability among employees, or uniformity of benefits and conditions of employment. See also *Chicago Daily News*, 98 NLRB 1235 (1951). Single major departments which have been held to constitute appropriate units are the news department (*Daily Press*, 112 NLRB 1434 (1955)), and the circulation department (*Times Herald Printing Co.*, 94 NLRB 1785 (1951)). See also *Evening News*, 308 NLRB 563 (1992), and *Leaf Chronicle Co.*, 244 NLRB 1104 (1979), in which a single-location unit was found appropriate.

In the newspaper industry, the Board usually finds separate units of the various mechanical department crafts appropriate. *American-Republican*, 171 NLRB 43 (1968); *Garden Island Publishing Co*., 154 NLRB 697 698 (1965). These units, however, may be joined where they share sufficient community of interest. *The Evening News* and *Leaf Chronicle Co*., supra. Where photoengraving employees engaged in the distinct, skilled work of making photoengraving plates under separate supervision, there was no transfer or interchange between their jobs and proofreading jobs, and their skills, training, hours, and wage scales were different, a unit limited to photoengravers was found appropriate. *American-Republican*, supra.

A combination of departments may constitute an appropriate unit when the departments perform closely related functions calling for similar skills (*Bethlehem's Globe Publishing Co.*, 74 NLRB 392 (1947); *Dayton Newspapers*, 119 NLRB 566 (1958)), and where there has been a history of bargaining for the employees of dissimilar departments (*Sacramento Publishing Co*., 57 NLRB 1636 (1944)), or where no union seeks to represent nonmechanical employees on a broader basis (*Philadelphia Daily News*, 113 NLRB 91 (1955)).

Mailroom employees in the newspaper industry are a well-defined functionally distinct group who have been traditionally represented on a separate departmental basis. See *Bakersfield Californian*, 152 NLRB 1683 (1965). The fact that outside helpers and carriers also do some work in the mailroom does not destroy that traditional basis for a separate mailroom unit. *Bakersfield*, supra; *Suburban Newspaper Publications*, 226 NLRB 154 (1976).

## 15-240 Public Utilities

**420-4000**

**420-4617**

**440-1720**

**440-3300**

The systemwide unit is the optimum bargaining unit in public utilities industries. *Colorado Interstate Gas Co*., 202 NLRB 847 (1973); *Deposit Telephone Co*., 328 NLRB 1029 (1999); *Louisiana Gas Service Co*., 126 NLRB 147 (1960); *Montana-Dakota Utilities Co.*, 115 NLRB 1396 (1956). The reason for this general principle lies in "the essential service rendered to their customers and the integrated and interdependent nature of their operations.'' *Colorado Interstate Gas Co*., supra. However as the Board noted in *Deposit Telephone* supra, "this policy does not require multi-departmental units in all instances." And, in *Verizon Wireless*, 341 NLRB No. 63 (2004), the Board rejected the systemwide unit for retail employees in the wireless telephone industry without passing on whether this industry is a public utility.

While public utilities, in comparison to other industries, may be more intimately interrelated and interdependent throughout a widespread system, each case must nonetheless be judged on its own merits in determining the appropriateness of bargaining units. *Idaho Power Co*., 179 NLRB 22 (1969); *Pacific Northwest Telephone Co*., 173 NLRB 1441 (1969). Where, on balance, all the relevant factors indicate that the administrative structure or geographic features of a public utility company's operations have created a separate community of interest for certain of the company's employees, a less than systemwide unit may be found appropriate. *PECO Energy Co.*, 322 NLRB 1074 (1997); *Monongahela Power Co*., 176 NLRB 915 (1969); *Michigan Wisconsin Pipe Line Co*., 164 NLRB 359 (1967); *Sanborn Telephone Co.*, 140 NLRB 512 (1963); *Mountain States Telephone Co*., 126 NLRB 676 (1960); *Western Light Telephone Co*., 129 NLRB 719 (1961); and *Southern California Water Co*., 220 NLRB 482 (1975).

As is true of other areas of unit determination, the history of collective bargaining and existing bargaining relationships and the fact that no labor organization seeks to represent a broader unit of the employees in question are relevant factors. *Deposit Telephone Co*., 328 NLRB 1029 (1999), and *Michigan Bell Telephone Co*., 192 NLRB 1212 (1971). *Deposit Telephone*

reversed *Red Hook Telephone*, 108 NLRB 260 (1967), and *Fidelity Telephone*, 221 NLRB 1335 (1976).

In the absence of a bargaining history on a more comprehensive basis, units have been found appropriate in the public utility industry which correspond to an administrative subdivision of the particular operation *PECO Energy Co.,* supra; *Mountain States Telephone Co*., supra, reflecting geographical lines of demarcation (*Philadelphia Electric Co*., 110 NLRB 320 (1955)), and reflecting operational integration of the subdivision as a separate administrative entity. *Montana-Dakota Utilities Co.*, supra. See also *Connecticut Light & Power Co*., 222 NLRB 1243 (1976); *Southern California Water Co*., supra; *New England Telephone Co*., 242 NLRB 793 (1979).

The fact that it was not shown by "satisfactory or documented evidence'' that a work stoppage in one district would have a substantial impact on the operations of other districts within the division was taken in consideration. *United Gas*, 190 NLRB 618 (1971); *Southwest Gas Corp*., 199 NLRB 486 (1972); *Southern California Water Co*., supra.

In *United Gas*, supra, the local distribution organization in question was likened to single-store units in retail operations and single district office units in the insurance industry. See *M. O'Neil Co*., 175 NLRB 514 (1969); *Metropolitan Life Insurance Co*., 156 NLRB 1408 (1966).

In a case litigated in the Tenth Circuit, the unit certified by the Board consisted of 10 employees in one department of a single telephone exchange in one State. There was no history of bargaining. Although the court pointed out that in a number of cases involving integrated telephone companies the Board had concluded that systemwide units are normally the appropriate unit, the court found the Board's action neither arbitrary nor capricious and that "the designated unit is a functioning, distinct and separate operation of a group of unrepresented employees who work in a single geographical location,'' and thus appropriate for purposes of collective bargaining. *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478 (10th Cir. 1962).

Illustrative of the type of situation encountered at times in public utility unit determinations is *Michigan Wisconsin Pipe Line Co*., 194 NLRB 469 (1972), in which a unit found appropriate in a 1967 decision involving a district of the company's system (164 NLRB 359) was held no longer appropriate due to administrative and operational changes which had since occurred. In arriving at this result, consideration was given to the facts that (1) the district encompassing the requested employees became one of three districts in a major administrative subdivision of the pipeline system; (2) to continue finding the initial unit appropriate would "fragmentize'' the pipeline employees; and (3) supervision of the district in question was closely coordinated with supervision in other districts in the area with the concomitant of a significant degree of employee interchange.

The opposite result follows, of course, when changes have no significant effect on the unit. Thus, where changes made since a merger had not materially affected the appropriateness of an existing unit, that unit remained appropriate and could not be absorbed into a systemwide unit unless the employees in it were accorded in a self-determination election. *Brooklyn Union Gas Co*., 123 NLRB 441 (1959); *Houston Corp*., 124 NLRB 810 (1959).

The reluctance of the Board to "fragmentize'' in establishing units for natural gas pipeline systems was a focal point in *Colorado Interstate Gas Co*., 202 NLRB 847 (1973). It found that requested districtwide units were too narrow in scope to be appropriate, relying on (1) the high degree of control exercised by the company's headquarters management over the operational districts; (2) evidence of substantial temporary interchange among the districts; (3) the systemwide procedures applied in posting and bidding for openings in higher paying positions; (4) the lack of substantial autonomy in the district superintendents with respect to day-to-day personnel matters; and (5) the uniformity of wages, hours, and conditions of employment throughout the company's system. See also *Tennessee Gas Pipeline*, 254 NLRB 1031 (1981); *Gas Pipeline Co. of America*, 223 NLRB 1439 (1976).

By way of contrast, there was no problem of "fragmentization'' in *Idaho Power Co*., supra, in which a proposed divisionwide unit was found appropriate relying on (1) geographic coherence;

(2) distinctiveness of functions; and (3) the relative autonomy of operation with which the divisional managing official had been entrusted. Similarly, in *PECO Energy Co*., 322 NLRB 1074 (1997), the Board found a less than systemwide unit, conforming its determination to the employer restructuring of its operations. This case contains a collection and discussion of the key utility unit cases.

## 15-250 Retail Store Operations

### 15-251 Scope

**440-1720**

**440-3300**

In our consideration of multilocation bargaining units, we singled out, in particular, unit determinations in retail store operations. We addressed the marked modification in policy effected, in 1962, by the Board's decision in *Sav-On Drugs*, 138 NLRB 1032 (1962), under which a proposed retail unit would no longer be the subject of a per se rule but would instead be found appropriate or not depending on the circumstances of each case. The per se rule which *Sav-On Drugs* abandoned was generally to determine appropriateness of unit in the retail industry on the basis of being extensive with the employer's administrative division or the geographic area in question. See chapter, ante, on Multilocation Units.

Thus, the basic rule is that single-store units are presumptively appropriate in retail merchandising. See *Haag Drug Co*., 169 NLRB 877 (1968), for a thorough review of the *Sav-On Drug* policy in affirming the prior holding.

This presumption may be rebutted where it is shown that the day-to-day interests of employees in the particular store may have merged with those of employees of other stores. *Food Marts*, 200 NLRB 18 (1973). For example, in that case the presumption was held rebutted where the Board found (1) lack of autonomy at the single-store level as reflected by the strict limitations of the store manager's authority in personnel, labor relations, merchandising, and other matters; (2) the extensive role played by officials at the main office in the daily operations of the store; (3) the geographical proximity of the store; and (4) the transfer of employees among them. See also *NAPA Columbus Parts Co*., 269 NLRB 1052 (1984); *Big Y Foods*, 238 NLRB 860 (1978). The presumption was not rebutted in *Foodland of Ravenswood*, 323 NLRB 665 (1997).

### 15-252 Selling and Nonselling Employees

**440-1760-7200 et seq.**

The bargaining pattern in the industry, the history of bargaining in the area, and a close examination of the composition of the work force in the industry "require the recognition of the existing differences in work tasks and interests between selling and nonselling employees in department stores.'' The Board therefore found separate units for the selling and the nonselling employees appropriate. *Stern's Paramus*, 150 NLRB 799, 806 (1965); *Arnold Constable Corp*., 150 NLRB 788 (1965); *Lord & Taylor*, 160 NLRB 812 (1966).

It was pointed out in *Stern's Paramus* that, although the storewide unit in retail establishments has been regarded as "basically appropriate'' (*I. Magnin & Co*., 119 NLRB 642, 643 (1958)), or the "optimum unit'' (*May Department Stores Co*., 97 NLRB 1007, 1008 (1951)), the single-comprehensive unit is not the *only* appropriate unit in such establishments (*Root Dry Goods Co.*, 126 NLRB 953, 955 (1960)).

However, combining various categories of nonselling employees into one proposed unit predicated "on the single negative characteristic that none of the included employees performs any selling functions'' is insufficient to overcome the diversity of interests among employees in an otherwise random grouping of heterogeneous classifications. *Beco Industries*, 197 NLRB 1105 (1972).

In *Levitz Furniture Co*., 192 NLRB 61 (1971), less-than-storewide units were found inappropriate due, among other things, to the small size and functional integration of the retail store and the community of interest shared by all of the store employees. For further discussion of *Beco Industries* and *Levitz,* see *Wickes Corp*., 231 NLRB 154 (1977).

In *Saks & Co*., 204 NLRB 24 (1973), a petition which sought a grouping of nonselling employees was dismissed on the basis of (1) lack of a separate community of interest, there being no similarity of job function among the employees sought; (2) a failure, as a nonselling unit, to include other nonselling employees; and (3) the close similarity of working conditions and benefits, and the close contact between the selling and nonselling employees, thus constituting an operation "more closely integrated than other retail establishments.''

In *Sears, Roebuck & Co*., 191 NLRB 398 (1971), employees of the service station, warehouse, store dock area, and retail store were held to constitute a homogeneous grouping whose common supervision, uniform working conditions, and overlapping job functions within the framework of a substantially integrated set of operations required that they be included in a single-bargaining unit. See also *J. C. Penney Co*., 182 NLRB 708 (1970); *Montgomery Ward & Co*., 225 NLRB 547 (1976); *Sears, Roebuck & Co*., 261 NLRB 245 (1982). See also *Sears Roebuck & Co*., 319 NLRB 607 (1995).

In *Sears, Roebuck & Co*., 182 NLRB 777 (1970), a petition for a unit of nonselling employees was dismissed as inappropriate because of the integration of all store functions and the arbitrary exclusion of some nonselling employees.

## 15-253 Bargaining History in Retail Industry

**420-1281**

**440-1760-7400**

A common thread which runs through unit discussion is bargaining history. It therefore becomes readily apparent that elections are normally directed in separate units of selling and nonselling employees where there has been a history of bargaining on that basis or, for that matter, where there has been agreement among the parties.

In *Bond Stores,* 99 NLRB 1029 (1951), the petitioning union sought an overall unit. But the Board directed an election in two units: a selling unit for which an intervening union had been bargaining and a nonselling unit, saying that "either an over-all unit of both selling and nonselling employees or separate units of each may be appropriate.''

In *Root Dry Goods Co*., supra, the Board directed a decertification election in a unit of selling employees that had been established by collective bargaining.

In *Supermercados Pueblo,* 203 NLRB 629 (1973), a request was denied for a proposed two-department group of meat and delicatessen employees, to be carved out from an established multistore unit composed of all nonsupervisory employees in a retail supermarket chain. A major factor in this denial was a 15-year amicable bargaining history on an overall, or "wall-to-wall,'' basis. Also considered in arriving at the ultimate result were factors such as functional interrelation of the work and the common interests and supervision of all the employees, the centralized control of labor relations policies, and the stabilized pattern of interwoven seniority rights and privileges within the overall unit. See also *Buckeye Village Market,* 175 NLRB 271, 272 (1969) (a 22-month bargaining history regarded as "substantial'').

Where there has been no bargaining on a broader basis, a geographic grouping of retail chain stores less than chainwide in scope, particularly where such grouping coincides with an administrative subdivision within the employer's organization, may be appropriate. *U-Tote-Em Grocery Co*., 185 NLRB 52 (1970); *Community Drug Co*., 180 NLRB 525 (1970). Hence, in the absence of a broader bargaining history, a geographic grouping of retail chain stores—eight downtown Los Angeles stores—was found appropriate. *White Cross Discount Centers,* 199 NLRB 721 (1972).

## 15-254 Retail Categories

**440-1740**

**440-1760-3600**

**440-1760-9900**

Where bargaining history on a broader basis or other factors are absent, differences in work and interest of many categories and occupations in retail stores have been accorded due recoguition in the form of smaller units. Examples of such units found appropriate are:

Alteration *department employees* comprising tailor shop employees, bushelmen-fitters, finishers, operators, rippers, and pressers, as "a basically highly skilled, distinct, and homogeneous departmental group.'' *Foreman & Clark, Inc*., 97 NLRB 1080 (1951). See also *Loveman, Joseph & Loeb*, 147 NLRB 1129 (1964).

*Bakery employees* employed in a department store. *Rich's, Inc*., 147 NLRB 163, 165 (1964). Compare *Jordan Marsh Co*., 174 NLRB 1265 (1969), and see in particular fn. 5 which distinguishes the facts in *Rich's*.

*Carpet workroom employees* as functional group having predominantly craft characteristics. *J. L. Hudson Co*., 103 NLRB 1378, 1381 (1953).

*Display department employees* sharing a substantial community of interest, apart from others, by reason of their skills and training and different working conditions. *Goldblatt Bros*., 86 NLRB 914 (1949). See also *W & J Sloane, Inc*., 173 NLRB 1387 (1969). But compare *John Wanamaker Philadelphia*, 195 NLRB 452 (1972), in which a unit of requested display department employees was held inappropriate because they had interests closely related to other selling and nonselling store employees, worked in many different areas of the store, had no special training or skills, and received the same wage rates and benefits as other employees. Compare also *Sears, Roebuck & Co*., 194 NLRB 321 (1972), in which any separate community of interest that the display employees might have enjoyed had been submerged into a broader community of interest.

*Grocery employees:* excluding meat department personnel, where the separate unit is sought. *R-N Market*, 190 NLRB 292 (1971). See also *Payless*, 157 NLRB 1143 (1966); *Allied Super Markets*, 167 NLRB 361 (1967); *Great Atlantic & Pacific Tea Co*., 162 NLRB 1182 (1967); and *Big Y Supermarkets*, 161 NLRB 1263, 1268 (1966).

*Meat department: in Scolari's Warehouse Markets*, 319 NLRB 153 (1995), the Board gave an extensive analysis of the separate meat department issue. The case collects some of the key cases in this area. See also *Ray's Sentry*, 319 NLRB 724 (1995); *Super K Mart Center (Broadview, Illinois)*, 323 NLRB 582 (1997). In *Wal-Mart Stores*, 328 NLRB 904 (1999), the Board rejected a meatcutters unit but found a meat department unit to be appropriate.

*Restaurant employees:* worked different hours, received additional benefits, had separate supervision, and were not subject to frequent transfers to other jobs. *Wm. H. Block Co*., 151 NLRB 318 (1965). See also *F. W. Woolworth Co*., 144 NLRB 307, 308–309 (1963). In *Washington Palm, Inc*., 314 NLRB 1122 (1994), the Board affirmed a Regional Director's finding that a unit of nontipped kitchen employees was appropriate. In doing so, the Regional Director rejected the employer's contention that the unit included all food and beverage employees.

*Service department employees:* an appliance service facility operated in conjunction with a retail department store. *Montgomery Ward & Co*., 193 NLRB 992 (1971). Compare *J. C. Penney Co*., 196 NLRB 446 (1972), and *J. C. Penney Co*., 196 NLRB 708 (1972); *Sears, Roebuck & Co*., 160 NLRB 1435 (1966); and *Montgomery Ward Co*., 150 NLRB 598 (1965).

*Wireless retail stores*: less than districtwide unit found appropriate based on geographic proximity, regular contact between employees, common terms and condition of employment, and transfers. *Verizon Wireless*, 341 NLRB No. 63 (2004).

## 15-260 Television and Radio Industry

**440-1720 et seq.**

**440-1760-3400**

**440-1760-9900**

In the television and radio industry either an overall program department unit or separate units of (1) employees regularly and frequently appearing before the microphone/camera, and (2) employees who do work preliminary to broadcasts or telecasts may be appropriate. *Radio & Television Station WFLA*, 120 NLRB 903 (1958). Where no labor organization is seeking to represent the performing and nonperforming employees separately, a single unit of the program department employees is appropriate. Ibid. See also *El Mundo, Inc*., 127 NLRB 538 (1960).

Consistent with this principle, employees directly involved in the staging and presentation of studio productions, including both those who perform on radio and television programs and those who contribute directly to such performances, constitute essentially a production and program unit. Their functional interrelationships creates a substantial community of interest and renders the combined unit appropriate. *WTAR Radio-TV Corp*., 168 NLRB 976 (1968).

Employees who regularly or frequently appear before the microphone constitute a homogeneous, readily identifiable cohesive group appropriate as a unit for collective bargaining. *Hampton Roads Broadcasting Corp.*, 100 NLRB 238 (1951). See also *WTMJ-AM-FM-TV*, 205 NLRB 36 (1973), *and Perry Broadcasting*, 300 NLRB 1140 (1990). Compare *KJAZ Broadcasting Co*., 272 NLRB 196 (1984), in which the Board found the on-air off-air distinction had broken down. In *Perry Broadcasting*, supra, the Board described *KJAZ* as a "narrow exception.''

The other major department in this industry is the engineering department. The employees in that department are generally skilled technicians who operate the electronic equipment and work in the control booth, control room, or at the transmitter sites. They are under the general supervision of a chief engineer, must have FCC licenses, and do not, as a rule, interchange with program department employees. They share many interests in common with one another, which are separate and apart from the other employees. See, for example, *Sarkes Tarzian*, 115 NLRB 535 (1956). In these circumstances, although an overall unit including the engineers may be appropriate, a unit which excludes them is also appropriate. *WTAR Radio-TV Corp*., supra. Moreover, a unit consisting of employees in the engineering and program departments of a television or radio station who contribute to the presentation of but do not appear on the TV or radio programs is also appropriate. *KMTR Radio Corp*., 85 NLRB 99 (1949); *Indiana Broadcasting Corp*., 121 NLRB 111 (1958).

A broadcasting station's production department alone does not constitute an appropriate unit when employees in another department (e.g., program planning) are essentially production employees and work in close contact with the employees in the production department proper. In such a situation, without the program planning employees, the production department constitutes only a segment of an appropriate unit. *WTVJ, Inc*., 120 NLRB 1180, 1188 (1958). A unit of television producers/directors has been found appropriate. *WTMJ Inc*., 222 NLRB 1111 (1976). See also *KFDA-TV Channel 10*, 308 NLRB 667 (1992) (reporters included in production unit).

A unit of radio and television newsmen is not appropriate if limited only to a portion of the integrated services performed by the newsmen. *American Broadcasting Co*., 153 NLRB 259, 266 (1965). See also *WLNE-TV*, 259 NLRB 1224 (1982), in which a unit of camera employees was not appropriate because of the working conditions they shared with other employees.

A unit of radio news editors, production assistants, and copyroom employees was found appropriate. Among the issues raised was whether the television newsroom operations should be considered as separate departments. The Board found that each is run as a separate department as indicated by different immediate supervision, different physical locations, different final

products, and little, if any, employee interchange. A unit confined to the radio news operations was therefore appropriate. *Post-Newsweek Stations*, 203 NLRB 522 (1973).

A proposed unit of traffic and compliance employees alone was held inappropriate as it comprised but a segment of the employees performing the same or similar work. *National Broadcasting Co*., 202 NLRB 396 (1973).

Artists have been included in program department units where they contribute directly to the station's program activities, but where they constituted an arbitrary segment of the unrepresented employees they were found not to be an appropriate voting group. *WPVI TV*, 194 NLRB 1063 (1972).

## 15-270 Universities and Colleges

In 1970, the Board, reversing a prior policy, asserted jurisdiction over private nonprofit universities and colleges. *Cornell University*, 183 NLRB 329 (1970). It later issued a rule establishing a jurisdictional standard. See chapter on Jurisdiction, ante, and 35 Fed.Reg. 18370; 29 C.F.R. 103.1.

In *Cornell University*, 183 NLRB 329 (1970), mindful of entering into "a hitherto uncharted area,'' the Board reiterated a number of established unit principles where an employer operates a number of facilities as "reliable guides to organization in the educational context as they have been in the industrial.'' These were described as: prior bargaining history, centralization of management particularly in regard to labor relations; extent of employee interchange; degree of interdependence or autonomy; differences or similarities of skills and functions of the employees; and geographical locations of the facilities in relation to each other.

## 15-271 Faculty

**420-9660**

**440-1760-4300**

**460-5033**

In *C. W. Post Center*, 189 NLRB 904 (1971), it was urged that various attributes of faculty status require the application of different principles from those applied by the Board in determining units involving other types of employees. But, as in *Cornell*, the Board could not discern from cases decided by state labor relations boards any clear-cut pattern or practice of collective bargaining in the academic field requiring the Board to modify its ordinary unit determination rules. A unit of professional employees was found appropriate, with certain specific inclusions and exclusions. See also *Long Island University*, 189 NLRB 909 (1971).

In 1975 the Supreme Court in NLRB v. *Yeshiva University*, 444 U.S. 672 (1980), held that the full-time faculty there were managerial and thus not employees within the meaning of the Act. The Supreme Court found that the Yeshiva faculty "exercise authority which in any other context unquestionably would be managerial,'' supra at 686. *Yeshiva* has had a substantial effect on Board unit considerations in higher education cases because of the extent of the inquiry that the *Yeshiva* case requires as to faculty authority. This inquiry includes the authority of faculty as to hiring, promotion, and tenure of themselves, and their authority in setting university policy including standards for admission and graduation. The fact that they may not have final authority over these matters does not preclude a finding of managerial. For cases in which the Board found managerial status see *University of Dubuque*, 289 NLRB 349 (1988); *Lewis & Clark College*, 300 NLRB 155 (1990); *Livingstone College*, 286 NLRB 1308 (1987); *Boston University*, 281 NLRB 798 (1986); *Duquesne University*, 261 NLRB 587 (1982); *University of New Haven*, 267 NLRB 939 (1983). See also *Elmira College*, 309 NLRB 842 (1992), where a divided Board denied review of a managerial determination of a Regional Director.

The Board has found employee rather than managerial status in other cases. See, e.g., *University of Great Falls*, 325 NLRB 83 (1997); *Cooper Union of Science & Art*, 273 NLRB

1768 (1985); *Kendall School of Design*, 279 NLRB 281 (1986); and *Lewis University*, 265 NLRB 1239 (1983).

The Board has included graduate and undergraduate faculty in the same unit. *Nova Southeastern University*, 325 NLRB 728 (1998).

In *Brown University*, 342 NLRB No. 42 (2004), the Board reversed *New York University*, 332 NLRB 1205 (2000), finding that graduate assistants are not employees. See sec. 20-400, infra. In cases predating *New York University*, the Board had held that the relationship between a faculty member and a graduate assistant is basically a teacher-student relationship which does not make the faculty member a supervisor. *Fordham University*, 193 NLRB 134 (1971).

The Board has held that since they are primarily students they do not share a sufficient community of interest with the regular faculty to warrant their inclusion. *Adelphi University*, 195 NLRB 639 (1972). Graduate assistants were distinguished in *Adelphi* from the "research associate'' included in the professional unit in *C. W. Post Center*, supra. See also *University of Vermont*, 223 NLRB 423 (1976). Unlike graduate assistants, the research associate already had a doctoral degree and was eligible for tenure. Graduate assistants were more comparable to the technical laboratory assistants who were excluded from a professional teaching unit in *Long Island University*, supra. See also *College of Pharmaceutical Sciences*, 197 NLRB 959 (1972). The viability of all these unit placement cases, after *New York University* may be in doubt.

Members of a religious order were excluded from a faculty unit where the order operates the university, *Seton Hill College*, 201 NLRB 1026 (1973), but are included if the university is operated by another order. *Niagara University*, 227 NLRB 313 (1977). See also *NLRB v. Universidad Central de Bayamon*, 793 F.2d 383 (1st Cir. 1986), in which an evenly divided First Circuit considered the application of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), to a university.

It will be recalled that in *Cornell* unit guidelines adapted from the industrial world were initially applied in the academic field, and that in *C. W. Post Center* a similar approach was used. But in *Adelphi University*, supra, the Board commented that "the industrial model cannot be imposed blindly on the academic,'' and in *Syracuse University*, 204 NLRB 641 (1973), in the context of such a reevaluation, it accorded individual treatment to a law school faculty, as a group, by directing a special type of election for them. The rationale for this was summarized as follows: "Granting a voice merely in determining whether such a group shall be swallowed up by the collective body or shall have separate representation will not answer. Rather it requires yet another choice, that of standing alone without representation regardless of the choice of the university body as a whole.'' The new type of election in *Syracuse* (see discussion, in chapter on Self-Determination Elections, infra), was directed within the framework of the holdings in *Fordham University*, supra, and *Catholic University*, 201 NLRB 929 (1973), of the separate unit status of law school faculty. The differences between professional school faculty and other faculty is often sufficient to support separate units absent a petition to include the entire faculty. See *Boston University v. NLRB*, 575 F.2d 301 (1st Cir. 1978).

The unit guidelines set out in *Cornell* for an employer operating a number of facilities—the same as those used in unit determinations in the industrial field—were nonetheless applied in *Claremont University Center*, 198 NLRB 811 (1972), which involved a petition for professional and nonprofessional employees of a college library. In that case, in keeping with these factors, the Board found the proposed unit of library employees an identifiable group with a separate community of interest, distinguishing on the facts the ruling in *Cornell* with respect to nonprofessional library employees. It was also pointed out that, since *Cornell*, the Board has found less than an overall unit appropriate where, as in *Claremont*, the work situation shows a homogeneous group of employees who share a close community of interest. See, for example, *Syracuse University*, supra; *Catholic University of America*, supra; *Fordham University*, supra (separate elections for faculty members in the law school of a university); *Leland Stanford Jr. University*, 194 NLRB 1210 (1972) (maintenance employees at a university; campus police at a

university; firemen at a university); and *California Institute of Technology*, 192 NLRB 582 (1971) (central plant employees comprising but a section of the physical plant department of a university).

Librarians were found to be professional employees engaged in functions closely related to teaching and therefore included in a unit of faculty members. *Florida Southern College*, 196 NLRB 888 (1972). See also *C. W. Post Center*, supra; *Long Island University (Brooklyn Center)*, supra. These cases, however, do not hold that librarians and supporting personnel in a library system, which is not part of any of the colleges it serves, cannot organize themselves separately in an appropriate unit. See *Claremont University Center*, supra.

The Board is now convinced that the differences between full-time and part-time faculty members are so substantial in most colleges and universities that it should not adhere to its normal rationale concerning part-time employees. Accordingly, the Board excluded part-time faculty members who were not employed in "tenure track'' positions. *New York University*, 205 NLRB 4 (1973). See also *Bradford College*, 211 NLRB 565 (1974).

## 15-272 Other Categories

Turning to groupings other than faculty and those engaged in functions closely related to teaching, "the Board applies the rules traditionally used to determine the appropriateness of a unit in an industrial setting.'' *Livingstone College*, 290 NLRB 304 (1988); *Cornell University*, 183 NLRB 329 (1970). They are discussed here.

In *Yale University*, 184 NLRB 860 (1970), the Board dismissed a petition for a unit of nonfaculty, clerical, and technical employees in the Department of Epidemiology and Public Health. Relying on the *Cornell* guidelines, it was concluded that these employees did not share a sufficiently special community of interest which would justify creating a separate unit for them. Taken into consideration, inter alia, were the facts that they were subject to the same working conditions as all other Yale employees, their skills and techniques did not vary substantially from those of others doing parallel jobs, and the thorough integration of the EPH Department into the Yale School of Medicine and the University.

Food service employees were found appropriate in a separate unit. In *Cornell University*, 202 NLRB 290 (1973), the Board analogized the situation of a university which operates dining facilities for its students to a hotel which operates a restaurant for its guests (see, for example, *Denver Athletic Club*, 164 NLRB 677 (1967)). It concluded that the food service employees shared a substantial community of interest separate from that of other university employees on the Ithaca campus and may therefore constitute a separate bargaining unit. See also *ITT Canteen Corp.*, 187 NLRB 1 (1971). Compare *Harvard College*, 269 NLRB 821 (1984), in which the Board found insufficent bases for a separate unit of clerical and technical employees from the university's medical area.

Service employees were found appropriate in a separate unit. *Duke University*, 194 NLRB 236 (1972). In that case, the Board determined that, since the hospital operated by the employer was exempt from the Board's jurisdiction under Section 2(2), the unit of service employees would exclude any employees working more than 50 percent of their time within the hospital. (See distinction drawn on this point in the later case, *Duke University*, 200 NLRB 81 (1972). Describing a service and maintenance employees unit as "analogous to the usual production and maintenance unit in the industrial sphere,'' and therefore a classic appropriate unit, the Board directed an election in such a unit. *Georgetown University*, 200 NLRB 215 (1972). As this type of unit does not normally include office clerical or technical employees, they were excluded. The percentage rule applied to hospital employees, as first devised in *Duke University*, supra, was used in *Georgetown*. See also *Loyola University Medical Center*, 194 NLRB 234 fn. 5 (1971), and cases cited therein. "Library assistants'' were excluded as clerical employees, but "library aides'' and messenger clerks, as essentially "blue collar'' workers, were included with the service and maintenance employees.

Note: the 1974 Health Care amendments mooted the need for the 50-percent rule in *Duke.*

Applying the *Cornell* guidelines, a unit of bookstore employees was found inappropriate. *George Washington University*, 191 NLRB 151 (1971). In light of the basic criteria, these employees did not have a community of interest sufficiently separate and distinct from other nonacademic employees to justify the creation of a separate unit for them.

In *California Institute of Technology*, supra, a unit of central plant personnel was deemed a typical functionally distinct and homogeneous powerhouse departmental unit of the type customarily found appropriate where there is no collective-bargaining history on a broader basis. Self-determination elections were directed in (1) a voting group of central plant section personnel (powerhouse employees), and (2) all other employees of the physical plant department. More limited intermediate groups were found inappropriate.

In *Tulane University*, 195 NLRB 329 (1972), the operations of four facilities were found integrated and centralized and a community of interest shared by all the wage employees. A unit confined to the main campus was therefore held inappropriate, and an election was directed in a bargaining unit embracing the wage employees of all four facilities.

## 15-280 Warehouse Units

### 440-1760-6700

The Board has recognized a distinction between employees in the retail store industry who perform warehouse functions and those who perform other functions. *A. Harris & Co*., 116 NLRB 1628 (1957). The employer's organizational integration of its operations does not preclude the establishment of any unit less than storewide in scope where the operations of the unit sought are devoted essentially to the warehousing functions of servicing the main and branch retail stores and the employees' principal and regular duties consist of performing what were typically warehouse functions. See also *Esco Corp*., 298 NLRB 837 (1990), in which the Board noted that *Harris* did not apply to nonretail warehouses, overriding inconsistent cases. Later, in *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999), a divided Board answered the issue left open in *Esco* by holding that *Harris* does not apply in combination retail and wholesale operations.

The policy, adopted in *Harris*, may be spelled out as follows: A separate unit of warehouse employees is presumptively appropriate where (1) the warehouse operation is geographically separated from the retail store operations; (2) there is separate supervision of employees engaged in the warehousing functions; and (3) there is no substantial integration among the warehouse employees and those engaged in other functions. *A. Harris Co*., supra; *J. W. Robinson Co*., 153 NLRB 989 (1965).

Thus, where the warehouse employees were under supervision separate from the retail stores, performed their work in a building geographically separated from the retail stores, were not integrated with any other employees in the performance of their regular work, and had different hours and wage rates, they constituted an employee group of a type the Board has found appropriate as a bargaining unit, at least in the absence of a controlling bargaining history including employees in a broader unit. *Wigwam Stores*, 166 NLRB 1034 (1967).

On the other hand, where warehouse employees were sought, but they were not geographically separated from the retail store operations and were engaged in activities substantially integrated with other store functions, the Board found that the proposed unit failed to meet the criteria for a separate warehouse unit enunciated in the *Harris* decision. *Wickes Corp*., 201 NLRB 610 (1973). The Board pointed out, for example, in *Levitz Furniture Co*., 192 NLRB 61 (1971), that the *Harris* factors must be satisfied for a separate warehouse unit to be found appropriate. See also *Sears, Roebuck & Co*., 180 NLRB 862 (1965); *Wickes Corp*., 201 NLRB 615 (1973).

For a period of time, the Board construed the geographically separate requirement broadly. See *Wickes Corp*., 255 NLRB 545 (1981). However, in *Roberds, Inc*., 272 NLRB 1318 (1984), the Board announced that it would henceforth apply a narrow construction to the requirement.

In *Sears, Roebuck & Co*., 151 NLRB 1356 (1965), the Board held that the warehouse employees having a degree of functional difference and autonomy, including geographic and supervisory separateness within the overall complex of the employer's retail operations, clearly demonstrated a community of interest among the warehouse employees sufficient to warrant placing them in a separate unit. See also *City Stores Co*., 152 NLRB 719 (1965); *John's Bargain Stores Corp*., 160 NLRB 1519 (1966); *Sears, Roebuck & Co*., 201 NLRB 1057 (1973), the only issues in that case involved the composition of the warehouse unit, and the Board found a unit appropriate larger than that petitioned for and permitted the election subject to a sufficient additional showing of interest. In an unnumbered publication, however, the Board vacated its Decision and Direction of Election in this case on withdrawal by the petitioner. This withdrawal came after the Board, for grounds not stated, had granted the employer's motion for reconsideration. Thus, what parts, if any, of the case are suspect are unknown so the case should be cited with caution, if at all.

A proposed warehouse unit was rejected when the facts showed that shipping and receiving, the functions performed by warehouse department employees, had been integrated with the material-moving functions performed by other commissary department employees in production areas. *Frisch's Restaurants*, 182 NLRB 544 (1970). See also *Rexall Drug Co*., 156 NLRB 1099, 1101 (1966); and *Charrette Drafting Supplies*, 275 NLRB 1294 (1985), in which the Board found that some of the *Harris* criteria had been met and rejected a separate unit.

The fact that overlapping of work skills exists among some employees in the stores and in the warehouse does not, in and of itself, destroy the homogeneity and mutuality of interests of the warehouse employees in the warehouse. *H. P. Wasson & Co*., 153 NLRB 1499, 1500 (1965). See also *Famous-Barr Co*., 153 NLRB 341 (1965); *Sears, Roebuck & Co*., supra.

A retail warehouse unit should comprise employees performing "typical'' warehouse functions. *A. Harris Co*., supra at 1633. For this reason, all employees in radio repair workrooms, and those who work in the fur storage vaults, were excluded from a warehouse unit. *Famous-Barr Co*., supra at 344.

Relevant considerations are the absence of a bargaining history on a broader basis, as noted, for example, in *Wigwam Stores*, supra, and the fact that no union seeks a broader unit, as for example, in *Sears, Roebuck & Co*., 152 NLRB 45, 48 (1965).

The lead case, A. *Harris Co*., supra, dealt with warehouse units in the retail store industry, and the cases discussed were therefore those which arose in that industry. Cases have been decided, however, in other industries, involving other enterprises in which the Board considers "all relevant factors'' in determining whether a separate unit would be appropriate. *Esco Corp*., supra. See also *Vitro Corp*., 309 NLRB 390 (1992).

Thus, by way of illustration, where the employer was engaged in providing health, accident, medical, hospital, and physicians' reimbursement insurance, a warehouse was involved which served as a storage facility for various forms used in filing claims under medical insurance programs. The warehouse was geographically separate from any of the employer's other facilities; there was different immediate supervision; 6 of the 12 employees sought were in job classifications unique to the warehouse; few transfers into or out of the warehouse occurred; and there was no bargaining history at the warehouse. A warehouse unit was found appropriate. *California Blue Shield*, 178 NLRB 716, 719–720 (1969).

Where an insurance company operated a storage facility, located away from its main office, which was used as a repository for records as well as supplies and forms, and six employees performed the receiving, storage, and transportation duties, the Board was of the opinion that the employees working in the storage facility might appropriately be separately represented if sought on that basis. However, they were included in an overall unit since the petitioning labor

organization sought the more comprehensive unit. *Reliance Insurance Cos*., 173 NLRB 985, 986 (1969).

In *Scholastic Magazines*, 192 NLRB 461 (1971), an employer who manufactures and sells paperback books was involved. The petitioner sought a unit limited to the warehouse and maintenance departments. The Board found that the employer was engaged in a single highly integrated process and that the employees of the processing departments and warehouse employees participated equally and fully in the single process of filling customer orders. Therefore, for this reason and because no substantial distinctions could be drawn between the warehouse and maintenance departments and the processing departments with respect to wages, level of skills, supervision, benefits, and other conditions of employment, the comprehensive unit was found appropriate. Cf. *Garrett Supply Co*., 165 NLRB 561 (1967).

## 15-290 Research and Development Industry

The Board applies a traditional community-of-interest standard in determining bargaining units in the research and development industry. *Aerospace Corp*., 331 NLRB 561 (2000). In doing so, it considers "the nature of the business, i.e., testing to be a significant but not a determinative factor." and has rejected the contention that only facilitywide units are appropriate.