V. UNIT ISSUES

The hearing officer must keep in mind the distinction between issues involving *unit scope* and those involving *unit composition*. The *scope* of the unit pertains to issues such as whether the unit should be limited to one facility rather than multi-facility or employer-wide or to one employer as distinguished from multiemployer. The *composition* of the unit relates to matters such as the inclusion or exclusion of disputed individuals or disputed employee classifications or categories or to unit placement in general. Issues relating to the scope of the unit are discussed below in Section B, while issues relating to the composition of the unit are discussed in Section C.

Note that unit scope and composition issues do not usually arise in decertification proceedings, where the unit for election purposes is the recognized or contractual unit. *Campbell Soup Co.*, 111 NLRB 234 (1955). For additional discussion of this principle, see *An Outline of Law and Procedure in Representation Cases*, Section 7–320.

Absent a relevant bargaining history, it is *essential* to examine scope and composition matters in the context of the unit in which a union seeks to be represented. Thus, there is nothing in the Act that requires the unit for bargaining be the *only*, *ultimate*, or *most* appropriate unit; rather, the Act requires only that it be *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). If the unit sought by the petitioner is an appropriate unit, an alternative appropriate unit will not be imposed. *Dezcon*, 295 NLRB 109 (1989). If the petitioned-for unit is *not* appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *Overnite Transportation Co.,* 331 NLRB 662, 663 (2000); *An Outline of Law and Procedure in Representation Cases*, Section 12–100 et seq.

A. Community of Interest

In considering both unit scope and unit composition issues, the major determinant revolves around a community of interest inquiry. In general, employees with common interests may appropriately be included in a single unit. Parties seldom litigate the unit placement or inclusion of employees whose community of interest is identical to that of other unit employees. Rather, the issue usually arises in one of two situations: (1) when a party contends that an employee or group of employees possesses a community of interest so close with that of other employees that the disputed employee(s) must be included in the unit; or (2) when a party contends that an employee or group of employees possesses a community of interest so disparate from that of other employees that the disputed employees cannot be included in a single unit. The same community of interest factors are examined in making these distinct inquiries. A petitioning union's desire as to the unit is relevant but it cannot be a dispositive consideration. (Section 9(c)(5) of the Act). Thus, a petitioned-for unit *including* a particular classification may be found to be *an* appropriate unit, while a petitioned-for unit *excluding* that same classification may also be found to be *an* appropriate unit. *Overnite Transportation*, 322 NLRB 723 (1996) (petitioned-for units of drivers and mechanics are found appropriate in

some cases, while petitioned-for units of drivers excluding mechanics are found appropriate in other cases, notwithstanding similar facts).

Many considerations enter into an examination of community of interest. In general, all of the incidents of the employment relationship are relevant to a community of interest inquiry.

1. Stipulations on Unit Issues

Stipulations entered into by the parties and made a part of the record which are aimed at excluding certain groups or categories of employees should be supported by a statement of sufficient facts in order to justify their approval by the Regional Director.

2. Presumptively Appropriate Units

Unit presumptions apply only where the presumptively appropriate unit is that which is petitioned-for; if a petitioner seeks a different unit, the presumptions have no application. *Capital Coors Co.*, 309 NLRB 322 (1992); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986). When the unit sought is presumptively appropriate, the burden is on the party opposing that unit to show that the unit is inappropriate. *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999). Conversely, when the unit sought is *not* presumptively appropriate, the burden is on the petitioner to present at least some evidence establishing the appropriateness of the unit, even where the employer takes no position as to the unit. *Allen Health Care Services*, 332 NLRB 1308 (2000).

Presumptively appropriate units are those specifically authorized in Section 9(b) of the Act, including:

(a) an overall (wall-to-wall) unit of all of the employer's employees, excluding only statutory and policy exclusions;
(b) a unit of all professional employees employed by the employer (or, conversely, a unit of all non-professional employees of the employer);
(c) a unit of all guards employed by the employer; and,

(d) a single facility or plant where an employer operates multiple facilities or plants.

Community of Interest Questions

The following are general community of interest questions a hearing officer should ask when unit issues arise. This section is referenced in many other sections of the manual where the manual instructs the hearing officer to ask community of interest questions.

1. Describe the employer's organizational and administrative framework, including its departmental or divisional groupings and how they interact or interconnect with each other. Explore such evidence with a view of establishing whether there is a functional integration of the employer's operation revolving around the goal of producing its

products or providing services. If possible, obtain for the record the employer's organizational chart.

2. Describe the physical layout of the employer's operations, including distances between facilities. For example, if the employer's maintenance employees work in a separate building, how and to what extent does this factor affect their contact and interchange with separately housed production employees?

3. Describe the employer's management and supervisory hierarchy, including whether and to what extent and at what level(s) there is any common supervision over the groups of employees involved in the proposed bargaining unit.

4. How many employees are employed at the facility? Which classifications do the parties seek to include and how many are in each classification? Which classifications do the parties seek to exclude and how many employees are in each excluded classification? If possible, secure the number of employees in each classification at the facility.

5. If any category of employees was excluded, would this result in employees being deprived of the opportunity for representation because they would not constitute a separate appropriate unit?

6. If any category of employees was excluded, ask the parties their positions as to the unit in which the excluded employees could obtain representation. Advise the parties to take a position about this issue, either at the hearing or in their briefs.

7. Compare the wages, hours and other terms and conditions of employment of any categories of employees whose unit placement is in dispute with those of the other categories of employees in the proposed bargaining unit, including in the following areas:

(a) Work duties, including the degree of common or interrelated duties and location(s).
(b) The nature of their supervision.
(c) Extent of common supervision.
(d) Work skills.
(e) The type(s) of equipment operated/utilized by the employee.
(f) The type(s) of products manufactured; similarities, differences.
(g) Education, training, and experience.
(h) Work schedules.
(i) Compensation, including the method of compensation for both regular and overtime work (e.g., salaried or hourly) and the salary or wage rates.
(j) Methods used to record their time (e.g., time clocks).
(k) Benefits, including any distinctions based on categories or groupings of the employees involved.
(l) The availability of the employer's facilities for their use.
(m) Whether there is any progression or promotional advancement from one position to another. Obtain evidence of specific examples.
(n) Degree of interchange and contact; describe the frequency and the type(s) of

interaction and contact (telephone, electronic, face-to-face, etc.). Obtain evidence of specific examples.
(o) Whether there is any substitution of one group of employees for another and the frequency of such. Obtain evidence of specific examples.
(p) Extent and frequency of interchange (transfers) from one position to another, both employees and supervisors, promotional opportunities from one group to another, permanent or temporary? If temporary, describe supervision, work performed and other terms and conditions of employment. Obtain evidence of specific examples.
(q) The nature and extent of similar or dissimilar working conditions.
(r) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.
(s) Any common seniority list(s).
(t) Work clothes, uniforms, insignia and badges.
(u) Have these employees been represented previously? If so, in what unit(s)? When?

B. Unit Scope

1. Multifacility Units

It is well established that a single-facility unit is presumptively appropriate for collective bargaining. However, a petitioner can alternatively seek a multifacility unit. Caution: a "single facility" can include more than a single building; e.g., a medical campus (*Child's Hospital,* 307 NLRB 90 (1992)) or a satellite facility. Where a multifacility unit is sought by a labor organization, the single-facility presumption does not apply. Hence, the presumption need not be overcome. *Capital Coors Co*., 309 NLRB 322 (1992).

If a union petitions for a single facility and the employer seeks to rebut the presumption, the Board evaluates the following factors:

(a) central control over daily operations and labor relations, including the extent of local autonomy;
(b) similarity of skills, functions and working conditions;
(c) degree of employee interchange;
(d) distance between locations; and
(e) bargaining history, if any.

New Britain Transportation Co., 330 NLRB 397 (1999).

If the union petitions for a multifacility unit, the Board evaluates the following factors:

(a) employees' skills and duties;
(b) terms and conditions of employment;
(c) employee interchange;
(d) supervision;
(e) geographic proximity;

(f) centralized control of management and supervision;
(g) functional integration; and
(h) bargaining history.

Alamo-Rent- a Car, 330 NLRB 897 (2000).

Also see *An Outline of Law and Procedure in Representation Cases*, Chapter 13.

Extensive evidence is not normally necessary when *all* of the employer's facilities are sought in a combined unit, for an employer-wide unit is a presumptively appropriate unit. When less than an employer-wide grouping is sought, ask the list of relevant questions below.

Relevant Questions:

1. Ask the following questions about the employer's organizational and supervisory structure (e.g., does the unit sought constitute a recognized administrative grouping?):

(a) What is the supervisory hierarchy of this location?
(b) To whom do these supervisors report?
(c) What employee functions are supervised locally, what centrally? Are interviewing, hiring, discharging, promoting, transferring, laying off and recalling done centrally or locally?
(d) What is the authority of local supervision? Are decisions of local supervisors subject to review?
(e) Is there any general overall supervision? If so, what is its character?

2. The extent of functional and product integration among the employer's locations:

(a) How are purchases made for each facility?
(b) What records are kept centrally? What locally? (Inquire about clerical, payroll, accounting and personnel records).
(c) Is the interviewing, hiring, discharging, promoting, transferring, laying off and recalling done locally or centrally? Obtain evidence of specific examples.
(d) Who determines rates of pay for this facility? From which office or facility are employees paid?
(e) What operations does each facility perform? How are these operations integrated?
(f) Is the product or service the same at each facility and what is the product or service mix at each facility?
(g) Is there similarity in the nature of the work performed, skills used and job classifications at each facility? Obtain evidence of specific examples.
(h) Do any of the location's product go to other facilities of the employer? If so, how much and what?

3. The extent of centralized control over working conditions and labor relations policies:

(a) Who is in charge of labor relations? Overall and on a day-to-day-basis?
(b) Who sets labor relations policy, including terms and conditions of employment, for the location involved? Where is this person located? If not at the

facility involved, describe the frequency and nature of the individual's contacts with the facility.
(c) Are the same labor relations policies maintained at all locations?
(d) How is this enforced? Obtain evidence of specific examples.
(e) Who establishes policies concerning interviewing, hiring, discharging, promoting, transferring, laying off, recalling, etc.?
(f) Compare working conditions, wages, hours, privileges and benefits at facilities involved. Obtain evidence of specific examples.
(g) Compare opportunities for advancement and training programs for employees at the facilities.

4. Specific evidence regarding the extent of interchange or transfer of employees among facilities:

(a) How frequently does each occur? Obtain evidence of specific examples.
(b) What is the duration of the interchange or transfer? Obtain evidence of specific examples.
(c) If the interchange or transfer is temporary, how are supervision and terms and conditions of employment affected?
(d) Which and how many employees have been involved in each?
(e) What locations or departments have been involved?
(f) If job openings exist at a facility, are employees of that facility or other facilities given priority for bidding? Is there a common seniority list?
(g) Are there bumping rights or other transferable rights (e.g., seniority) between facilities? Obtain evidence of specific examples.

5. Describe the extent of employee contact among facilities. Describe the nature and frequency of this contact. Give specific examples. How frequently do employees of one facility have contact with employees at another facility? What is the nature of the contact (in person, by telephone, electronic, etc.)? What is the duration of the contact?

6. Is the unit a geographically cohesive unit?

(a) How far apart geographically are the locations?
(b) Is the unit coextensive with a recognized geographical boundary (e.g., a state, county, metropolitan area, etc.)?

7. Applicable bargaining history:

(a) Are any of the unit employees currently represented? Have any of the unit employees been represented previously?
(b) If so, in what unit(s)? When?
(c) Was the recognition based on a Board certification or a voluntary recognition? If by certification, was it via Stipulated Election Agreement or Decision and Direction of Election? Put the unit description and documents on the record, to the extent available.

8. Does a union seek to represent the employees in a broader unit?

9. Differences, if any, in the skills and functions of employees at the different locations, including:

(a) Work duties, including the degree of common or interrelated duties and location(s).
(b) The nature of their supervision.
(c) Extent of common supervision.
(d) Work skills.
(e) The type(s) of equipment operated/utilized by the employees.
(f) The type(s) of products manufactured; similarities.
(g) Education, training and experience.
(h) Work schedules.
(i) Compensation, including the mode of compensation for both regular and overtime work.
(j) Benefits, including any distinctions based on categories or groupings of the employees involved.
(k) The availability of the employer's facilities for their use (e.g., break room or locker room).
(l) Whether there is any progression or promotional advancement from one position to another. Obtain evidence of specific examples.
(m) Degree of interchange and contact; describe the frequency and the type(s) of interaction and contact (telephone, electronic, face-to-face, etc.). Obtain evidence of specific examples.
(n) Whether there is any substitution of one group of employees for another and the frequency of such. Obtain evidence of specific examples.
(o) Extent and frequency of interchange (transfers) from one position to another; permanent or temporary? If temporary, describe supervision, work performed and other terms and conditions of employment. Obtain evidence of specific examples.
(p) The nature and extent of similar or dissimilar working conditions.
(q) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.
(r) Any common seniority list(s).

(s) Have these employees been represented previously? If so, in what unit(s)? When?

2. Multiemployer Units

The Board has held as a general proposition that a multiemployer unit, unlike other types of bargaining units, is consensual in nature. The essential element warranting the establishment of multiemployer units is clear evidence that the employer unequivocally intends to be bound in collective bargaining by group rather than individual action. *W.L. Miller Co.*, 284 NLRB 1180, 1185 (1987); *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978); *Weyerhaeuser Co.*, 166 NLRB 299 (1967). However, a brief history of multiemployer bargaining may be insufficient to rebut the presumption in favor of single employer units. See *West Lawrence Care Center*, 305 NLRB 212, 217 (1991). Withdrawal from a multiemployer association (either by the union or by an employer) is permitted only when adequate written notice is given prior to the date set by the contract for modification or to the agreed upon date set for the commencement of multiemployer negotiations. *Retail Associates*, 120 NLRB 388, 395

(1958). Once the negotiations have begun, absent mutual consent or unusual circumstances, the Board will not permit withdrawal from multiemployer bargaining.

Note: A petition concerning a unit of a single employer's employees will not be dismissed on the ground that it is not coextensive with the multiemployer unit if a petition is filed after the employer's timely withdrawal. *Arrow Uniform Rental*, 300 NLRB 246 (1990). Moreover, an employer whose several locations were part of a multiemployer unit, but who timely withdrew from the multiemployer group, will not be bound by its prior bargaining history on a multilocation basis in circumstances where the several locations would not have constituted an appropriate unit in the first instance. *Albertson's, Inc.*, 273 NLRB 286 (1984), supplementing *Albertson's, Inc.,* 270 NLRB 132 (1984).

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board held that in cases involving employers governed by Section 8(f) of the Act, it would no longer automatically merge into a multiemployer unit the employees of a single employer who joins a multiemployer association for the purposes of collective bargaining. Rather, in processing petitions filed during the life of an 8(f) agreement, the appropriate unit normally will be the single employer's employees covered by the agreement. The Board specifically noted in footnote 42 of *Deklewa* that employees of a single employer would no longer be precluded from expressing their representational desires simply because their employer has joined a multiemployer association. See also *Stack Electric*, 290 NLRB 575 (1988). In *Comtel Systems Technology*, 305 NLRB 287, 291 (1991), the Board held that the merger of 9(a) and 8(f) bargaining units into a multiemployer unit does not convert the 8(f) relationship into a 9(a) relationship.

Also see *An Outline of Law and Procedure in Representation Cases*, Chapter 14.

Note: Multiemployer bargaining stands in contrast with situations involving contingent employees supplied by a supplier employer. See S*turgis* discussion in Section VII, H, Contingent Employees.

Relevant Questions:

1. Is the employer a member of a multiemployer association that exists for the purposes of representing members in collective bargaining? Introduce into evidence any constitution/bylaws, as well as other relevant documentation, pertaining to the purposes of the association.

2. Develop in the record the details surrounding the employer's joining the multiemployer association.

3. Is the employer "an employer engaged primarily in building and construction industry" as defined under Section 8(f) of the Act? Develop particulars in the record. If any party contends that the employer is not engaged in the construction industry, see

comments in Section VII, B, Construction Industry Formula.

4. Were there any Board-conducted elections or voluntary grants of recognition to a union premised on its demonstration of majority support in either a particular single-employer unit or in a multiemployer association's unit? Develop particulars in the record.

5. In the absence of any demonstration of majority support, describe the circumstances surrounding the voluntary grant of recognition.

6. In cases not involving building and construction industry employers, develop the history of multiemployer bargaining.

7. With respect to a merger of single-employer units into a single multiemployer association unit, develop in the record the facts necessary to determine whether there was an unequivocal intention to be bound by group bargaining. Be as precise as possible, including developing all relevant dates and circumstances.

8. How was the union put on notice concerning the employers' intent to engage in group bargaining? Develop for the record the parties' actions supporting or belying the conclusion that there was an unequivocal intention to be bound by group bargaining. By the union's actions, did it consent to such a relationship?

9. Is there a designated representative or committee established to represent the group? How are the representatives selected? Do all members of the association participate in negotiations?

10. By whom is the agreement executed? Is a single contract document executed by a representative on behalf of all association members; or is a single contract signed by each of the association members?

11. In circumstances in which there are individually executed agreements, has the union been informed that these agreements would be binding on all association members? Develop the particulars for the record.

12. To what extent, if at all, have employers in the group refused to accept the agreement negotiated by the group? What was the outcome? Develop the particulars in the record.

13. Does the contractual recognition clause describe the unit as being a multiemployer unit?

14. Is there any history of strikes/lockouts? Were such actions taken simultaneously against/by all members of the multiemployer group?

15. Does any employer claim to have left the multiemployer group or rescinded its delegation of bargaining authority to the association? Develop for the record the

particulars involved in the rescission of such delegation of authority. For example:

(a) In what manner was rescission accomplished?
(b) Did the rescission occur prior to the established date for the commencement of negotiations for a new agreement and before the date on which such negotiations actually began?
(c) Were all parties, including the union, notified of the rescission? If so, how and when?
(d) Are there any contractual requirements or requirements established by virtue of constitution/bylaw provisions? Were they met?

16. Did the other parties expressly consent or acquiesce in the withdrawal from multiemployer bargaining? If so, how and when? Develop for the record the particulars of the parties' actions and reactions.

17. As in all cases where the unit is in dispute, ensure that the record reflects information dealing with the particular job classifications, the numbers of employees in each such classification for each employer and the numbers of employees in the asserted multiemployer unit.

C. Unit Composition

The following categories may not be included in bargaining units determined by the Board:

(1) Confidential employees.
(2) Statutory supervisors.
(3) Independent contractors.
(4) Agricultural laborers.
(5) Domestic servants of any family or person at his home.
(6) An individual employed by his parent or spouse.
(7) An individual employed by an employer subject to the Railway Labor Act.
(8) An individual employed by a person who is not an employer as defined in Section 2(2) of the Act.
(9) Temporary and casual employees. (But see Section VII, H, Contingent Employees, and (F) Temporary Employees).

The following categories of employees typically are excluded from a unit including other employees, but may be represented in a separate unit:

(1) Office clerical employees (see Section VIII, F, Clerical Employees).
(2) Professional employees, unless the union seeking to organize the employees seeks a combined unit of professional and nonprofessional employees and the professional employees choose to be represented in a combined unit after being afforded a self-determination (*Sonotone*) election (see Section VIII, A, Professional Employees).
(3) Guards (see Section VI, C, Guards).

Questions as to whether employees in any particular classification should be included in a petitioned-for unit are determined by applying the community of interest

test. (see Section V, A, 2, for community of interest questions). Whether or not the petitioned-for unit seeks to exclude employees in a particular classification, any excluded employees must have an opportunity to be represented. Since it is Board policy not to create a residual unit, any excluded employees must either constitute or be able to be part of an appropriate unit. Part of the hearing officer's responsibility is to consider the unit placement of *all* employees of the employer. Thus, in cases where the petitioned-for unit does not include all of the employer's nonprofessional employees (except for categories excluded by statute or Board policy), it is incumbent on the hearing officer to ensure that the record includes a full description of all excluded classifications, sufficient to allow the Regional Director and the Board to determine their unit placement.

When a classification's inclusion in or exclusion from the unit is an issue for the hearing, cover the questions in Section V, A, Community of Interest.

D. Residual Units

A residual unit is a grouping of employees that does not itself constitute a separate appropriate unit. Groups of employees omitted from established bargaining units constitute a residual unit appropriate for an election, provided the unit includes all the unrepresented employees of the type covered by the petition.

See *An Outline of Law and Procedure in Representation Cases,* Section 12–400.

Relevant Questions:

1. Do one or more established bargaining units exist? Is the incumbent representative(s) for those established units a participant in this proceeding? What is its position?

2. Does the proposed residual unit include all the unrepresented employees of the type sought by the petition?

3. Are there any unrepresented employees at the facility or facilities in question who are not included in the proposed residual unit? If so, describe in detail. What is the basis for their exclusion?

4. Is there more than one person in the proposed residual unit?

5. Would denying fringe or residual employees representation in a separate unit preclude their opportunity to vote on being represented?

6. If the established unit is a multiemployer one, is the proposed residual unit also premised on a multiemployer basis?

E. Board Rule on Health Care Units

In 1989, the Board set out the appropriate units for acute care hospitals in a

rulemaking procedure, reported at 284 NLRB 1515 et seq. The Rule (Section 103.30) applies only to initial organizing in RM and RC situations; it does not apply to RD petitions. The Rule provides that except in extraordinary circumstances, the following units and only these units are appropriate in an acute care hospital:

(1) All registered nurses
(2) All physicians (including residents and interns—*Boston Medical Center Corp.,* 330 NLRB 152 (1999))
(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

GC Memorandum 91–3, dated May 9, 1991, contains guidelines concerning the application of the Health Care Rule and the issues which must be determined prior to hearing. Hearing officers should carefully review this memorandum prior to the hearing and bring it to the hearing.

GC Memorandum 91–4, dated June 5, 1991, provides a discussion of Health Care Unit Placement Issues, including case law citations as to specific placement issues. See Appendix C for a copy. Also see *An Outline of Law and Procedure in Representation Cases* for unit and placement issues involving health care institutions (Sections: 15–170, Health Care Institutions; 1–315, Jurisdiction; 15–146, Health Care Institution Drivers; 16–300, Skilled Maintenance; 17–511, Health Care Supervisory Issues; and 19–510, Technical Employees-Health Care).

Various sections in this manual also contain relevant questions concerning professional employees (Section VIII, A), technical employees (Section VIII, E), guards (Section VI, C) and supervisory issues (Section VI, E).

1. Existence of an Acute Care Hospital

Pursuant to the Board's Rule, an "acute-care hospital" is either:

(a) a short-term care hospital in which the average length of stay is less than 30 days *or*
(b) a short-term hospital in which over 50-percent of all patients are admitted to units where the average length of stay is less than 30 days (the average length of stay is determined by reference to the most recent 12-month period preceding receipt of a representation petition for which data are readily available).

Facilities that are primarily nursing homes, psychiatric hospitals or rehabilitation hospitals are excluded from the definition of acute care hospital. See 284 NLRB 1597.

If it is necessary to develop a record as to whether the facility is an acute care hospital, the hearing officer should formulate questions based on the above definition.

If there is disagreement as to whether the health care facility is an acute care hospital and the employer will not produce records sufficient for the Board to determine these facts, the hearing officer should issue a subpoena. (This should be discussed with your supervisor prior to the hearing.) If after the issuance of a subpoena, an employer does not produce records sufficient to determine the facts, the Board may presume the employer is an acute care hospital. Final Rule, 284 NLRB at 1591–1592.

2. Scope Issues

Except in "extraordinary circumstances," the above-described units are the appropriate units in an acute care hospital. The following are not considered to be "extraordinary circumstances" and deviation from the rule is not appropriate:

(a) Diversity of the industry, such as the sizes of various institutions, the variety of services offered, including the range of outpatient services and differing staffing patterns.
(b) Increased functional integration of and a higher degree of work contacts between employees as a result of the advent of the multi-competent worker, increased use of "team" care and cross-training of employees.
(c) Impact of nationwide hospital "chains."
(d) Recent changes within traditional employee groupings and professions, e.g., increase in specialization of RNs.
(e) Effects of various governmental and private cost containment measures.
(f) Single institutions occupying more than one contiguous building.

Examples of extraordinary circumstances where the Rule might not apply are described below. Final Rule, 284 NLRB 1573–1574. If a party argues that extraordinary circumstances exist requiring units that do not conform with the Rule, the party should make an offer of proof on the record. To keep the record short, offers of proof relating to extraordinary circumstances should not normally be presented through witnesses. The offers may be oral or written and should consist of a statement that, "if allowed to testify, the witness would state … ." The following are some examples of extraordinary circumstances where the rule might not apply:

(a) Is this a unit of five or fewer employees? If so, develop a record on the appropriateness of this unit, since it is considered to be an extraordinary circumstance and the Rule is inapplicable.
(b) Consolidation of two or more of the above-listed units (absent a statutory restriction, e.g., guards and nonguards in the same unit); such a combined unit may be found appropriate. In some circumstances, evidence as to the appropriateness of the combination may be required. Hearing officers should research Board law and consult with their supervisors in case of uncertainty.
(c) Residual units in the health care industry raise other issues. For a discussion of residual units under the Rule, see *St. Mary's Duluth Clinic Health System*, 332 NLRB 1419 (2000) (non-incumbent union may petition for separate residual unit of all unrepresented employees where there is a nonconforming unit); *Kaiser Foundation Health Plan*, 333 NLRB 557 (2001); St. *John's Hospital*, 307 NLRB 767 (1992).

3. Issues Which May be Litigated Notwithstanding Board Rule

(a) The placement of employee classifications within the appropriate units, e.g., whether laboratory technicians are technical or professional employees. (See GC Memo 91–4 for placement issues.)
(b) Supervisory and managerial status of certain classifications.
(c) Contract bar issues.
(d) Labor organization status.
(e) Eligibility issues (e.g., relatives of management, part-time employees).
(f) Single facility appropriateness. [**Note**: In *Manor Healthcare Corp.*, 285 NLRB 224 (1987), the Board announced that it would apply the single facility presumption to health care facilities. The presumption, however, can be "rebutted by a showing that the approval of a single-facility unit will threaten the kinds of disruptions to continuity of patient care that Congress sought to prevent when it expressed concern about proliferation of units." (See *Mercywood Health Building*, 287 NLRB 1114 (1988), for an application of this standard. Compare *West Jersey Health System*, 293 NLRB 749 (1989)). Under the Board's Rules on health care bargaining units, this issue is left to adjudication. 284 NLRB 1527, 1532 (1987). See also *Child's Hospital,* 307 NLRB 90 (1992) (hospital campus consisting of multiple buildings found to be a single facility).]

F. Craft Units/Construction Units

Issues concerning craft units may arise in two distinct situations: (1) when the petition seeks initial establishment of a craft unit; and (2) when the petition seeks to sever a craft group from an existing unit historically represented by a different union.

See *An Outline of Law and Procedure in Representation Cases,* Chapter 16.

Relevant Questions:

1. Does the proposed unit consist of a distinct and homogeneous group of journeymen craftsmen performing the functions of their craft?

2. What is the craft group sought?

3. What work is done by the craft employees?

4. Does their work require full use of craft skills?

5. Is any noncraft work done?

6. Do other employees do any of the alleged craft work?

7. What qualifications does the employer require for employment in the craft positions?

8. Have members of the proposed unit participated in an established apprenticeship

program?

9. Have members of the proposed unit been certified as journeymen craftsmen or been licensed or certified in any other manner?

10. Has a formal apprenticeship program been established by the employer?

11. Does the employer maintain any other training programs for employees in the proposed unit?

12. Are they required to pass a test?

13. What is the rate of employee turnover in the work force of the proposed unit?

14. What is the history of collective bargaining of the employees sought to be represented?

(a) Were the employees represented in the past and, if so, in what type of unit were they included?
(b) How long were they represented in this manner?
(c) Who represented them?

15. Have the employees in the proposed unit established and maintained their separate identity?

(a) Do they have different wage rates, mode of payment, fringe benefits or hours of work?
(b) Do they have the same working conditions as other employees?
(c) Do they have separate immediate supervision?
(d) Does their immediate supervisor belong to some craft?
(e) Do different degrees or standards for supervision exist?
(f) Are their work assignments similar to those of each other, yet different from those of other employees?
(g) Is there any interchange or overlapping of job duties with other employees?
(h) Are they required to wear different uniforms, use different equipment or handle different products?
(i) Do they have a separate seniority list or promotion system?
(j) What is their relationship with customers compared to that of other employees?
(k) What is their position in the company's organizational scheme? Do they make up a separate department?
(l) During slack periods of work can the employees "bump" other employees or be "bumped" by other employees?

16. What is the history and pattern of collective bargaining in the industry involved?

(a) Has a similar unit previously been separately represented in the same industry?
(b) Has bargaining in such units been unsuccessful?
(c) Is such unit representation prevalent in the industry or are other such units looked on as unique situations?
(d) Has the industry enjoyed a stable bargaining situation under the pattern of

representation it has followed?
(e) What is the bargaining history at the employer's other plants?
(f) What is the bargaining practice in the area?

17. What is the degree of integration of the employer's production processes?

(a) To what extent does the production process depend on the performance of the employees in the proposed unit?
(b) How large is the plant?
(c) What is the size of the proposed unit?
(d) Do the employees work separately or among other groups of employees? To what extent do the employees have contact with other employees at facilities provided by the employer and/or by being mobile in the plant?
(e) How frequent is the interchange or transfer between employees of the proposed unit and other employees?
(f) How frequent is the interchange of equipment?

18. When the petitioner is seeking to sever a craft group from an existing larger unit, what is the history of collective bargaining in the existing unit?

(a) What has been the length of the bargaining history in the existing unit?
(b) Have there been successive collective-bargaining agreements between the employer and the incumbent union throughout this period?
(c) Has there been a stable bargaining relationship?
(d) Have there been any strikes or other interruptions to the stability of the bargaining relationship? When and for what duration?

19. When the petitioner is seeking to sever a craft group from an existing larger unit, have the petitioned-for craft employees participated substantially in maintaining the existing pattern of representation?

(a) How long have the craft employees been included in the existing unit?
(b) Have they joined the incumbent union and participated in its affairs?
(c) Have craft employees held positions as officers of the incumbent union?
(d) Have they served as stewards or in other similar positions?
(e) Have they been represented on the incumbent union's negotiating committees?
(f) Did the proposed unit have a chance to vote in a self-determination election?
(g) Have there been past efforts by the craft employees to obtain separate representation?
(h) Have the petitioned-for employees been members of a craft union? For how long?
(i) Have the petitioned-for craft employees acted as a separate group in dealing with the employer or the incumbent union?

20. When the petitioner is seeking to sever a craft group from an existing larger unit, have the petitioned-for craft employees been adequately represented by the incumbent union?

(a) Have the petitioned-for employees received periodic improvements in wages and benefits during the time they have been included in the existing unit?
(b) Has the incumbent union processed grievances on behalf of the petitioned-for employees?

(c) Does the incumbent union have a structure within its organization, such as a skilled trades department, for dealing with the special interests of employees of the type sought by the petition?

21. When the petitioner is seeking to sever a craft group from an existing larger unit, is the production process functionally dependent on the work of the craft employees?

(a) Would an interruption in production occur if the petitioned-for employees ceased their work?
(b) Does the employer contract out any of the craft work (thereby limiting the extent to which the production process is functionally dependent on the work of the craft employees)?

22. What are the qualifications of the union seeking severance, if such is the case?

(a) Is the union newly formed?
(b) What is the union's experience in representing employees like those in the proposed
unit?
(c) What is the union's experience in the industry involved?
(d) Is the union considered a "traditional union" for the situation presented?
(e) Is the union particularly qualified to deal with the special problems of the skilled employees involved?

G. Departmental Units

The hearing officer should review case law regarding departmental units in certain industries (e.g., meat departments in grocery stores; maintenance departments in hotels, universities and health care institutions; departmental units in the newspaper industry; selling and nonselling departments in the retail industry; and service and warehouse departments in the retail industry).

See *An Outline of Law and Procedure in Representation Cases,* Chapters 15 and 16.

Relevant Questions:

1. Name or designation given the department by the employer.

2. List all the classifications within the department and the number of employees in each classification.

3. Are all the employees in the group or department included in the proposed unit? If not, explain any exclusions.

4. Describe the functions or job duties of the group? Are these job functions and duties distinct from those of employees in other departments? If so, how?

5. Are employees in this group required to or do they in fact have any special skills or training?

6. Are employees in the group identified with trades or occupations distinct from those of other employees? Describe any duplication of skills or trades in other groups.

7. Who supervises the group? Are they separately supervised from other employees? To whom does that supervisor report and for what purpose?

8. Describe the relationship or flow of work between this group and other groups. Be specific.

9. Is the work performed by this group duplicated in other groups or departments? Explain.

10. Is there any interchange of employees in this group with employees in other groups or departments? If so, determine the reason for the interchange, the employees involved and the frequency of occurrence.

11. Describe any interchange or common use of tools and equipment and where these tools/equipment are located.

12. Describe the area where the employees work and if they are sent into other areas, identify these areas and the frequency of their being sent to these other areas.

13. Describe the prior bargaining history for the group, (e.g., have they been separately represented?)

14. Do employees in the proposed department share common fringe benefits, locker room, lunchroom?

15. How do wages of employees in the group compare with those of employees in other departments?

16. Do employees in this group wear uniforms? What about employees in other groups?

H. Expanding Units

In expanding unit cases, the test is whether the present complement is substantial and representative of the complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications. *MGM Studios of New York,* 336 NLRB No. 129 (2001). In addition, the Board examines whether the expansion was the result of a fundamental change in the nature of the employer's business. Id. In *Endicott Johnson de Puerto Rico,* 172 NLRB 1676 (1968), the Board stated that the yardsticks enunciated in *General Extrusion Co.,* 121 NLRB 1165 (1958) are applicable only to contract bar issues and were not intended to govern the propriety of granting an election in cases involving an expanding unit. Nevertheless, in general, the Board finds an existing complement of employees to be "substantial and representative"

when approximately 30-percent of the eventual employee complement is employed in approximately 50-percent of the anticipated job classifications. *Yellowstone International Mailing, Inc.,* 332 NLRB 386 (2000). In making this determination, the Board does not consider expansion that is too remote in time to be material. *Gerlach Meat Co.,* 192 NLRB 559 (1971).

See *An Outline of Law and Procedure in Representation Cases,* Section 10–600.

Relevant Questions:

1. Construction or operational changes:

   (a) How definite are the employer's plans to expand its operations? Are the plans merely speculative?
   (b) Are the projected changes within the control of the employer or a third party?
   (c) Did the employer already begin the construction or the operational changes? If so, when? Have prior delays occurred?
   (d) Will the size of the facility be expanded? Will additional facilities be added? When?
   (e) Describe in detail the operational changes being made, showing anticipated completion for each future 30-day or other period.
   (f) When will the final phase be completed?
   (g) What is the percentage of completion at this time?
   (h) Will all or part of the new operations be integrated with the old operations?
   (i) Will the changes result in a fundamental change in the employer's business operations?

2. Equipment:

   (a) Will the expansion of operations require the installation of new equipment?
   (b) Describe present machine installations.
   (c) Describe the machines to be installed.
   (d) Has any new equipment already been purchased?
   (e) Will the equipment be installed according to the construction phase?

3. Production:

   (a) Is the plant in production now? Describe.
   (b) What product is produced?
   (c) Will production increase on the installation of the new equipment?
   (d) Will a new product or products be produced? Will new services be provided?
   (e) Will the old product continue to be produced?
   (f) Describe fully any difference between the products now in production and the new product to be produced, i.e., method of production, skills involved.

4. Employees:

   (a) How many employees are presently employed in the unit?
   (b) What are the classifications of the present employees and the number of employees in each classification?
   (c) Describe the duties, qualifications and skills necessary for employment in the

present classifications?
(d) How many new classifications will be established as a result of the operational changes? What are they? Have any of the new classifications already been added? If so, which and how many? When will the rest of the new classifications be added?
(e) Describe the duties, qualifications, and skills necessary for employment in the new classifications. Will the duties, skills, and qualifications be significantly different from those required for the present classifications? What are the specific differences?
(f) Have new employees already been hired? Have prospective employees been interviewed? How many employees are expected to be hired? When will they come on?
(g) Will the new employees receive the same fringe benefits, such as vacations and holidays, as those employees presently employed? If not, what will their fringe benefits be?
(h) Will the new employees work substantially the same hours and receive the same rates of pay as those employees presently employed? If not, what will their hours and wages be?
(i) Will the new employees work under the same general supervision as present employees? If not, explain. Is there a projected increase in supervisory personnel?
(j) Will there be any interchange between the present employees and those expected to be hired? Explain fully.
(k) Will the new employees work in an area physically separated from the present employees?

I. Contracting Units

The Board has extended its expanding unit guidelines to cases where the unit is contracting; accordingly, with modification, the same questions will apply to both expanding and contracting units. *MGM Studios of New York,* 336 NLRB No. 129 (2001). In contracting unit cases, the test is whether a substantial and representative complement of employees will remain employed in a substantial and representative number of classifications. Thus, in general, the Board finds an existing complement of employees to be "substantial and representative" when approximately 30-percent of the present complement of employees and 50-percent of the present job classifications will remain after the contraction. In addition, the Board examines whether the contraction was the result of a fundamental change in the nature of the employer's business. *Douglas Motors Corp.*, 128 NLRB 307 (1960).

See *An Outline of Law and Procedure in Representation Cases,* Section 10–700.

Ask questions covered in Section H, Expanding Units.