9. CONTRACT BAR

347-4001-2575-5000

When a petition is filed for a representation election among a group of employees who are alleged to be covered by a collective-bargaining contract, the Board must decide whether the asserted contract exists in fact and whether it conforms to certain requirements. If the Board finds that the contract does exist and that the requirements are met, the contract is held a bar to an election. This is known as the contract-bar doctrine. *Hexton Furniture Co.,* 111 NLRB 342 (1955).

The major objective of the Board's contract-bar doctrine is to achieve a reasonable balance between the frequently conflicting aims of industrial stability and freedom of employees' choice. This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park,* 187 NLRB 517 (1970). "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures.'' *Seton Medical Center*, 317 NLRB 87 (1995).

For convenience, the contract-bar rules appear under a number of separate headings, although many of the subjects, notwithstanding the headings under which they are found, are necessarily interrelated.

9-100 Adequacy of Contract

347-4001-4300

To serve as a bar to an election, a contract must be a "collective'' agreement. *J. P. Sand & Gravel Co.,* 222 NLRB 83 (1976), and be the result of free collective bargaining. *Frank Hager, Inc*., 230 NLRB 476 (1977). The basic requirements are set out in *Appalachian Shale Products Co*., 121 NLRB 1160 (1958), the lead case in this area. They are:

9-110 Written Contract

347-4040-1720

347-4040-1760

347-4040-1790

347-4040-5001-5000

The contract must be reduced to writing. An oral agreement does not constitute a bar. *Empire Screen Printing,* 249 NLRB 718 (1980); *Sullivan & Sons Mfg. Corp.,* 105 NLRB 549 (1953). Nor does a written agreement which is extended orally. An agreement to arbitrate the provisions of a new agreement does not constitute a bar "for to constitute a bar, a contract must be in writing and signed by all the parties at the time the petition is filed." *Herlin Press*, 177 NLRB 940 (1969). Compare *Stur-Dee Health Products,* 248 NLRB 1100 (1980), in which the interested arbitration was to cover only economic conditions and all other terms were agreed upon.

The contract-bar doctrine does not require "a formal final document." It can be satisfied by a group of informal documents provided that they lay out substantial terms and conditions of employement and that they are signed. *Waste Management of Maryland*, 338 NLRB 1002 (2003) , and cases cited therein.

."[R]eal stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems." *Appalachian Shale Products Co*., supra at 1163. See *Raymond's, Inc.*, 161 NLRB 838 (1966), for an application of this rule; see also *Western Roto Engravers,* 168 NLRB 986 (1968). Compare *Seton Medical Center*, supra; and *St. Mary's Hospital*, 317 NLRB 89 (1995).

When the employer has not applied the contract to the employees covered, and the union has not sought to administer it as to them, the contract "does not establish the existence of a stabilizing labor agreement which bars a representation election." *Tri-State Transportation Co.*, 179 NLRB 310 (1969). This condition is not met when the contract is "in reality a set of identical individual contracts" between the employer and each signatory employee, because there is no evidence that the employees intended to be bound as a group by the product of the negotiations nor that the employer expected them to be so bound. *Austin Powder Co.,* 201 NLRB 566 (1973); *Cal-Western Van Storage Co*., 170 NLRB 67 (1968). See also *Brescome Distributors Corp*., 197 NLRB 642 (1972).

When a contract, which meets the contract-bar standards, includes an error through mutual mistake, and another document is later drafted and signed with the intention of reforming the written contract to the actual intention of the parties, the earlier contract, as reformed, constitutes a bar. *Gary Steel Supply Co.,* 144 NLRB 470 (1963); *Gaylord Broadcasting,* 250 NLRB 198 (1980); and *USM Corp*., 256 NLRB 996 (1981).

9-120 Signatures of the Parties

347-4020-3350

347-4040-1740 et seq.

347-4040-1780

The contract must be signed by all the parties before the rival petition is filed. *DePaul Adult Care Communities,* 325 NLRB 681 (1998), and *Freuhauf Trailer Co*., 87 NLRB 589 (1949). The signatures do not however have to be on the same formal document. *Holiday Inn,* 225 NLRB 1092 (1976); *Liberty House*, 225 NLRB 869 (1976). Although the terms of the agreement are applied retroactively, contracts signed after the filing of a petition do not serve as a bar. *Hotel Employers Assn. of San Francisco*, 159 NLRB 143 (1966). Thus, an undated contract was not recognized as a bar where the evidence as to the date of its execution was vague, ambiguous, and inconsistent. *Road & Rail Services,* 344 NLRB No. 43 (2005), and *Roosevelt Memorial Park*, supra. However, the absence of an execution date in the contract does not remove it as a bar if the date of execution was before the petition and that date can be established. *Cooper Tanks & Welding Corp.*, 328 NLRB 759 (1999). A belatedly introduced document, newly signed, and especially prepared at the employer's request to replace its original copy which had been lost or misplaced, was held insufficient to bar an election. *Baldwin Auto Co*., 180 NLRB 488 (1970).

The contract must be signed by an authorized person. See *Wickly*, *Inc.*, 131 NLRB 467 (1961); *Overhead Door Co*., 178 NLRB 481 (1969). The authorized person in the case of a joint representative is the spokesman for the joint representative and not the respective agents of the individual locals. *Pharmaseel Laboratories*, 199 NLRB 324 (1972).

Unless a contract signed by all the parties precedes a petition, it does not bar an election even though the parties consider it properly concluded and have put into effect some or all of its provisions. This does not mean that contracts must be formal documents or that they cannot consist of an exchange of a written proposal and a written acceptance. *Georgia Purchasing*, 230 NLRB 1174 (1977). It does mean that in such instances the informal document or the documents that are exchanged must be signed by all the parties in order to serve as a bar to an election. *Appalachian Shale Products Co*., supra; *Waste Management of Maryland*, supra; *Yellow Cab,* 131 NLRB 239 (1961); *United Telephone Co. of Ohio,* 179 NLRB 732 (1969); *Permanente Medical Group*, 187 NLRB 1033 (1971). Similarly, these documents must establish the identity and the terms of the agreement. See *Branch Cheese*, 307 NLRB 239 (1992). The initials of the parties satisfies the signature requirement. *Gaylord Broadcasting,* supra.

A requirement for approval by an international union which is not a named party to the contract is not a substantial requirement necessary to achieve stability in the bargaining relationship of the parties and is therefore not a condition precedent to the functioning of the contract as a bar. *Standard Oil Co*., 119 NLRB 598 (1958). Compare *Crothall Hospital Services*, 270 NLRB 1420 (1984), in which the named party had not signed and contract therefore held not to be a bar. However, if the contract by its terms makes approval by the international union a condition precedent, the terms may be such that the approval need not be given in writing. *Western Roto Engravers,* supra.

9-130 Substantial Terms and Conditions

347-4040-5000

The contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. It will not serve as a bar if limited to wages alone, or to one or several provisions not deemed substantial by the Board. *Appalachian Shale Products Co.,* supra; *Artcraft Displays*, 262 NLRB 1233 (1982); cf. *Leone Industries,* 172 NLRB 1463 (1968); *Southern California Gas Co.,* 178 NLRB 607 (1969). Presumably a contract that is no longer applied to the terms of employment will not act as a bar. See *Visitainer Corp.*, 237 NLRB 257 (1978), in which the Board found that it was being applied.

Thus, where a main agreement exempted certain employees from its coverage and a letter did not include them, the letter stating only the "position" of one of the parties, the letter was held not to have met the standards for the valid assertion of a contract bar. "Although the Board does not require that a contract must be embodied in a formal document if it is to serve as a bar, an asserted contract, if it is to meet minimal bar standards, must at least be signed by the parties and must contain terms and conditions of employment sufficiently substantial to stabilize the bargaining relationship." *Hotel Employers Assn. of San Francisco,* supra. See also *Waste Management of Maryland*, supra.

But, the Board does not require that an agreement delineate completely every single one of its provisions in order to qualify as a bar. *USM Corp.,* supra at fn. 18, and cases cited therein. Similarly, an agreement was held to be a bar when the parties had agreed to all matters except economic conditions and had agreed to interest arbitration on those matters. *Cooper Tanks & Welding Corp.*, 328 NLRB 759 (1999); *Stur-Dee Health Products,* supra. Cf. *Herlin Press,* supra. In *Madelaine Chocolate Novelties*, 333 NLRB 1312 (2001), the Board found no bar arising from an agreement to adopt the fourth year prior agreement as the first year of a successor agreement. Because the agreement did not provide terms for later years, the Board found no substantial terms.

Some variance between the parties' agreement and the written contract may not be enough to remove the contract as a bar. *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998).

For an application of this rule in a case involving handwritten notes, see *Eastwood Nealley Co.*, 169 NLRB 604 (1968).

9-140 Coverage

347-4040-3300

347-4050

The contract must clearly by its terms encompass the employees involved in the petition. *Houck Transport Co*., 130 NLRB 270 (1961); *Bargain City, U.S.A.,* 131 NLRB 803 (1961); *Plimpton Press,* 140 NLRB 975 (1963); *Moore-McCormack Lines*, 181 NLRB 510 (1970). See also *United Telephone Co. of Ohio*, supra.

It should be noted that the precise wording used in the contract is not necessarily controlling. Thus, when the language was "purely descriptive and intended for the purpose of identifying the employer and not the scope of the contact's coverage,'' the contract was nevertheless upheld as a bar. *Simmons Co.,* 126 NLRB 656 (1960). Furthermore, the parties' intent regarding employee coverage may be elucidated by their bargaining history. *Trade Wind Transportation Co*., 168 NLRB 860 (1968); *Hyatt House Motel*, 174 NLRB 1009 (1969). See also *RPM Products,* 217 NLRB 855 (1975), in which testimony was admitted as to the scope of the unit.

When newly hired employees are normal accretions to the existing unit, the contract bars a petition. *Firestone Synthetic Fibers Co.,* 171 NLRB 1121, 1123 (1968).

A contract does not cease to be a bar because it refers to the employees at a particular establishment and there has since been a relocation of the establishment. See, for example, *Arrow Co.,* 147 NLRB 829 (1964).

In *G.L. Milliken Plastering*, 340 NLRB No. 138 fn. 4 (2004), the Board rejected a contention that limited geographic coverage affected contract bar quality.

9-150 Appropriate Unit

347-8000 et seq.

347-4001-5000

347-4040-3300

The contract must cover an appropriate unit. *Mathieson Alkali Works,* 51 NLRB 113 (1943); *Indianapolis Light Co*., 78 NLRB 136 fn. 4 (1948); *Moveable Partitions*, 175 NLRB 915 (1969). In considering the appropriateness question, the Board places great weight on bargaining history and "will not disturb an established relationship unless required to do so by the dictates of the Act." *Great Atlantic & Pacific Tea Co*., 153 NLRB 1549, 1550 (1965), quoted in *Canal Carting, Inc*., 339 NLRB 969 (2003). But, the Board said in *Mathieson Alkali Works*, supra at 115: "Where the parties contract on the basis of a unit different from that found appropriate by the Board their agreement is subject to any subsequent determination the Board may make, in a proper proceeding, with respect to the appropriateness of the unit. Otherwise, the parties could in effect set aside the Board's unit finding and foreclose the Board from performing its statutory duty of determining the appropriate unit."

The fact that several individuals were included who would not have been in an otherwise clearly appropriate unit, is insufficient to remove the contract as a bar. *C. G. Willis, Inc.,* 119 NLRB 1677 (1958) (supervisors); *Airborne Freight Corp*., 142 NLRB 873 (1963) (office clericals); *American Dyewood*, 99 NLRB 78, 80 (1952) (small group of guards in a nonguard unit). But see *Apex Tankers Co.,* 257 NLRB 685 (1981), in which the participation of supervisors in the union was extensive and the Board treated the union as if it were defunct because of the conflict of interest.

The statutory proscription in Section 9(b)(3) against certification of guard units in certain circumstances does not preclude the application of normal contract-bar rules to contracts covering such units. Mixed units of guards and nonguards are never appropriate and hence do not constitute bars. *Monsanto Chemical Co.,* 108 NLRB 870 (1950); and *Corrections Corp. of America,* 327 NLRB 577 (1999). However, if the unit is appropriate, e.g., was an all guards unit, and the contract is otherwise lawful, it serves as a bar. *Burns International Detective Agency*, 134 NLRB 451 (1962). *Burns* was reaffirmed in *Corporacion de Servicios Legales*, 289 NLRB 612 (1988), in which the Board found as a bar a contract containing a mixed unit of professionals and nonprofessionals and the professionals had not voted on inclusion in the unit. *Burns* and *Corporacion de Servicios Legales*, were reaffirmed in *Stay Security*, 311 NLRB 252 (1993).

For further discussion of "guards" issues see section 18-200. For discussion of the history of collective bargaining in considering appropriate unit see section 12-220.

9-160 "Members Only"

347-4040-3367

A contract for "members only" does not operate as a bar. *Appalachian Shale Products Co*., supra; *G. C. Murphy Co.,* 80 NLRB 1072 (1949); see also *N. Sumergrade & Sons,* 121 NLRB 667, 669–670 (1958).

Section 9(a) of the Act provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." As the statute contemplates the representation of *all* employees, not just those who are union members, a contract for members only does not constitute a bar to an election. In *Bob's Big Boy Restaurant,* 235 NLRB 1227 (1978), the Board held that a contract clause that benefited "members only" removed the contract as a bar. But see *NLRB v. Bob's Big Boy Restaurant,* 625 F.2d 850 (9th Cir. 1980).

When ambiguity exists as to the intended coverage of a contract—whether for members only or equally to all employees regardless of membership—extrinsic evidence of intent and practice is admissible in the representation case hearing to establish the contract coverage. *Post Houses,* 173 NLRB 1320 (1969). See *A & M Trucking*, 314 NLRB 991 (1994), for an extensive analysis by the Board of a "members-only" contention.

9-170 Master Agreement

347-4040-1760-2500

A master agreement covering more than one plant or a multiemployer group is no bar to an election at one of the plants where by its terms it is not effective until a local agreement has been completed, or until the inclusion of the plant has been negotiated by the parties as required by the master agreement, and a petition is filed before these events occur. *Burns Security Services*, 257 NLRB 387–388 (1981). However, when the master agreement is found to be the basic agreement, and local supplement merely serves to fill out its terms as to certain local conditions, it will constitute a bar to an election. *Appalachian Shale Products Co.,* supra; *Pillsbury Mills*, 92 NLRB 172 (1951). When the master agreement and the supplemental agreement have different termination dates, the one to be considered for election-bar purposes is the agreement which embodies the basic terms and conditions of employment. *Tri-State Transportation Co*., supra.

A master agreement cannot be recognized for contract-bar purposes where its terms require, as a condition of extension of its terms to noncovered units, that the majority status of the signatory union in such a unit be evidenced by a card check and the record fails to establish that the condition was ever met. *Long Transportation Co.,* 181 NLRB 7 (1970).

9-180 Prior Ratification

347-4020-3350-5000

When ratification is a condition precedent to contractual validity by *express* contractual provision, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition. *American Broadcasting Co.,* 114 NLRB 7 (1956); *Kennebec Mills Corp.,* 115 NLRB 1483 (1956). But for this condition to be operative, it must be *express*, otherwise prior ratification is not required. *International Paper Co*., 294 NLRB 1168 fn. 1 (1989).

This question arises when a contract by its terms requires that the union membership must first ratify the contract before it is deemed valid, or when it is contended that the parties had orally agreed to make prior ratifications a condition precedent, or when, although no express provision for prior ratification is included in the contract, it is contended that prior ratification is required by the union's constitution or bylaws. Under this rule, prior ratification by the membership is required only when it is made an *express* condition precedent in the contract itself. *Appalachian Shale Products Co.,* supra. See also *Merico*, *Inc.*, 207 NLRB 101 (1973); *Aramark Sports & Entertainment Services,* 327 NLRB 47 (1998); and *United Health Care Services,* 326 NLRB 1379 (1998). In such circumstances, a report to the employer that the contract has been ratified is normally sufficient to bar a petition. *Swift & Co*., 213 NLRB 49 (1974).

9-200 Changed Circumstances Within the Contract Term

347-4050

347-4020-3350-1600

Contracts executed before any employees have been hired or prior to a substantial increase in personnel do not bar an election, since the contracting union does not in fact enjoy a true representative status, the real unit for purposes of representation still being in an inchoate stage. The lead decision for this general category is *General Extrusion Co*., 121 NLRB 1165 (1958).

9-210 Change in the Size of the Unit

The contract-bar rules involving changes in size of units within the contract term are:

9-211 Prehire Contracts

347-4020-3350-1600

347-4080

347-8020

A contract does not bar an election if executed before any employees have been hired. *Price National Corp.,* 102 NLRB 1393 (1953); *Potlatch Forests,* 94 NLRB 1444 (1951); *General Extrusion Co*., supra at 1167; *Western Freight Assn.,* 172 NLRB 303 (1968).

Even prehire contracts in the construction industry under Section 8(f) do not constitute bars to a representation election under Section 9(c). This is due to the express language in Section 8(f) which, among other things, provides that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." *S. S. Burford, Inc*., 130 NLRB 1641, 1642 (1961); *John Deklewa & Sons*, 282 NLRB 1375 (1987). But a contract will be a bar if it is continued in effect after the conversion of the bargaining relationship from 8(f) to 9(a). *VFL Technology Corp*., 329 NLRB 458 (1999).

For other construction industry issues see sections 5–210, 9–1000, 10–600–10-700, and 15–130.

9-212 The Yardsticks

347-4010-2001-5000

347-8020-2025-3300 et seq.

A contract bars an election only if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. *General Extrusion Co*., supra; *Rheem Mfg. Co*., 188 NLRB 436 (1971); *Guy H. James Construction Co.,* 191 NLRB 282 (1971); *Cheney Bigelow Wire Works,* 197 NLRB 1279 (1972); *National Cash Register Co*., 201 NLRB 846 (1973); *A-1 Linen Service*, 227 NLRB 1469 (1977). In establishing the required percentage of employees, supervisors may not be counted. *Permaneer California Corp*., 175 NLRB 348 (1969). Trainees or probationary employees, however, may count as employees when the employer is committed to employ them in its operation on successful completion of their training. Performance of work even when full operations are in the preparatory stage has been held to be the equivalent of having positions in existence. *California Labor Industries*, 249 NLRB 600 (1980); *Kleins Golden Manor*, 214 NLRB 807, 815–816 (1974); and *Leone Industries*, supra.

These criteria are used in all cases where it must be decided whether a contract was prematurely executed. Originally, they were applied as of the time the new contract was executed. *Foremost Appliance Corp*., 128 NLRB 1033, 1035 (1960). Subsequently, the determinative date was found to be the date when the parties "agreed to apply the contract" to a new facility, and in such circumstances the actual date of the signing of the contract was not the determinative one. *H. L. Klion, Inc.,* 148 NLRB 656 (1964). But when the execution date is plainly set out in a contract and there is no reference to retroactivity from a later date of execution, parol evidence is inadmissible to establish that the new contract was agreed on when employer had a substantial and representative complement. *Consolidated Novelty Co*., 186 NLRB 197 (1970).

It should be noted that the 30-percent ratio articulated in *General Extrusion* is also relevant to the issue of the validity of a contract in an unfair labor practice proceeding. See *Herman Bros., Inc.,* 264 NLRB 439, 441 fn. 8 (1982).

9-220 Change in the Nature of the Unit

347-4050-0133

At times, between the execution of the contract and the filing of a petition, a change may occur in the *nature* of the operations, as distinguished from the *size* of the unit. The rules applicable to these situations are:

9-221 Merger

347-4050-0133-3300

347-4050-3300

A contract does not bar an election when a merger of two or more operations results in the creation of an entirely new operation with major personnel changes. *New Jersey Natural Gas Co.,* 101 NLRB 251, 252 (1953); *General Extrusion Co.,* supra at 1167; see also *Kroger* Co., 155 NLRB 546, 548–549 (1965), distinguishing *Bowman Dairy Co*., 123 NLRB 707 (1959). See also *Panda Terminals*, 161 NLRB 1215, 1222–1223 (1966), and *Massachusetts Electric Co*., 248 NLRB 155–157 (1980), where the two relatively equal groups to be merged were separately represented by different unions. See also *General Electric Co*., 185 NLRB 13 (1970). *General Electric Co.,* 170 NLRB 1272 (1968); and *General Electric Co*., 170 NLRB 1277 (1968). Compare *Builders Emporium*, 97 NLRB 1113 (1952), where two companies owned by a single employer were consolidated at the location of one of the companies and the Board found the contract at that location to bar an election.

9-222 Shutdown

347-4050-8300

When a plant is shut down for an indefinite period of time and operations resume with new employees at either the same or new location because the former employees were no longer available, a contract does not serve as a bar. *Sheets & Mackey*, 92 NLRB 179 (1951); *General Extrusion Co*., supra at 1167. When, however, the shutdown is temporary and the employer reopens at the same location with substantially the same business, the existing contract must be honored and will bar a representation petition. *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989).

9-223 Relocation

347-4050

347-8020-2050

347-8020-8000

A mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit, does not remove the contract as a bar. *Builders Emporium,* 97 NLRB 1113 (1951); *General Extrusion Co*., supra; *Electrospace Corp.,* 189 NLRB 572 (1971). And see *Rock Bottom Stores*, 312 NLRB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995).

Thus, when one of two operations is closed and the employees are transferred to the other operation, the changed circumstances are not sufficient in themselves to remove the contract as a bar. *Jones & Laughlin Steel Corp.,* 130 NLRB 259 (1961). See also *Arrow Co*., 147 NLRB 829 (1964) (new warehouse merely a relocation and consolidation of facilities in two other cities); and *H. L. Klion, Inc*., supra (employer and intervenor had agreed to apply existing written contract as modified to new facility). In both *Arrow* and *Klion,* the existing contract barred an election. See also *Pepsi-Cola General Bottlers*, 173 NLRB 815 (1969). In *Electrospace Corp*., supra, the employer moved a portion of its operation producing civilian goods to another nearby building together with 50 to 60 employees who had been performing this work. The latter were transferred without any changes in their jobs and without any changes in wages, benefits, seniority, or any other conditions of employment. These transferred employees also produced the same products and utilized the same skills as they had at the old location. Compare *Consolidated Fibres, Inc*., 205 NLRB 557 (1973), where the relocation resulted in an entirely new operation.

In determining whether a relocation has been accompanied by a transfer of a considerable portion of employees from the old to the new plant, the number of these transferees at the time of the hearing is a relevant factor. *Montville Warehousing Co*., 158 NLRB 952 (1966); *Arrow Co.,* supra. See *Harte & Co*., 278 NLRB 947 (1986), where the Board set an approximate figure of 40 percent of the work force

transferring as the standard for determining whether the existing contract remains in effect assuming the operations remain substantially the same.

When the new employees hired at the relocated facility are not normal accretions to the unit covered by the existing contract, the Board will not find a bar. *Towmotor Corp*., 182 NLRB 774 (1970); *Public Service Co.*, 190 NLRB 350 (1971). This holds even if an arbitrator should decide that the existing contract was intended to cover such employees. Cf. *Beacon Photo Service*, 163 NLRB 706 (1967); *Textron, Inc*., 173 NLRB 1290 (1969). The contract-bar claim has also been rejected where there was no evidence that employees in a new department created at the new facility were actually represented by the intervenor. *Flint Steel Corp*., 168 NLRB 271 (1968).

A storewide contract was held no bar to a petition for the employees in a particular department when, at the time of the employer's negotiations with the incumbent union, the department was not yet in existence, the incumbent did not wish to represent the employees in the new department and has not theretofore bargained for them, and the department was a functionally distinct and homogeneous unit. *J. C. Penney Co.,* 151 NLRB 53 (1965).

When a contract exists between an employer and an incumbent in a multistore unit, its coverage may be extended to a subsequently established store only if it is an accretion to the existing unit. Otherwise the contract covering the multistore unit does not constitute a bar. *Melbet Jewelry Co.,* 180 NLRB 107 (1970); *Kroger Co*., 219 NLRB 388 (1975), and *Almacs Inc*., 176 NLRB 670 (1969).

9-224 Assumption of Contract

347-4050-3300 et seq.

530-4850-6700

The assumption of the operations by a purchaser in good faith, who had not bound itself to assume the bargaining agreement of the prior owner of the establishment, removes the contract as a bar. *General Extrusion Co*., 121 NLRB 1165, 1168 (1958). In addition, the Board has required that, for contract-bar purposes, such an assumption of a prior contract by a new employer must be express and in writing. *American Concrete Pipe of Hawaii*, 128 NLRB 720 (1960); *M. V. Dominator,* 162 NLRB 1514, 1516 (1967). This policy has been reaffirmed since *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). See *Great Atlantic & Pacific Tea Co*., 197 NLRB 922 (1972); and *Trans-American Video*, 198 NLRB 1247 (1972). Finally, at the time of the assumption agreement, the original employer must have employed at least 30 percent of those employed on the date of the hearing. *Baggett Bulk Transport,* 193 NLRB 287, 288 (1971).

The rule requiring a written contract assumption is inapplicable where changes in stock ownership or managerial hierarchy have no effect on the legal identity or responsibility of the corporate employer, the composition of the contract unit, or the operations of the company (*M.B. Farrin Lumber Co.,* 117 NLRB 575 (1957)), or when the employer becomes a wholly owned subsidiary of a larger corporation and its name is changed slightly, but no changes result in the nature of the operation, the management, the composition of the contract unit, or the stability of the bargaining relationship (*Grainger Bros. Co.,* 146 NLRB 609 (1964)). But see *MPE, Inc*., 226 NLRB 519 (1976); *Spencer Foods*, 268 NLRB 1483 (1984).

It should be noted that where the successor employer had no good-faith doubt that the union represented a majority of the employees in the unit and accordingly negotiated a new contract with the incumbent, the new agreement constituted a bar. Otherwise, said the Board, "we would be discouraging a successor Employer and incumbent Union from creating a new and stable bargaining relationship." *Ideal Chevrolet,* 198 NLRB 280 (1972).

See also section 10-500.

9-300 Duration of Contract

347-4010-2000

347-4040-5060

725-6733-8010

Whether the duration of a contract contravenes the policy assuring employees a free choice of representatives at reasonable intervals must be determined as part of contract-bar policy.

The lead decision is *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958), as modified in *General Cable Corp*., 139 NLRB 1123 (1962). In *General Cable*, the Board enlarged the period of the basic contract-bar rule from 2 to 3 years, but emphasized that "All other contract-bar rules, whether related or unrelated to the subject of contract term, remain unaltered; our new 3-year rule is to be read in harmony with them." Id. at 1125. Accord: *Dobbs International Services*, 323 NLRB 1159 (1997). See also *Crompton Co.*, 260 NLRB 417, 418 (1982), holding that agreements of less than 90 days do not bar a petition.

Since contracts of unreasonable duration are treated as if they were limited to a reasonable period (3 years), a petition is dismissed where it is not filed 60 days prior to the third anniversary date rather than the expiration date designated in the contract. *Union Carbide Corp*., 190 NLRB 191, 192 (1971).

9-310 Fixed-Term Contracts

347-4010-2000

4040-1760

347-4040-5060

A contract having a fixed term of more than 3 years operates as a bar for as much of its term as does not exceed 3 years. *General Cable Corp*., supra; *General Dynamics Corp*., 175 NLRB 1035 (1969). The 3-year period during which a contract is operative as a bar runs from its *effective date. Benjamin Franklin Paint Co*., 124 NLRB 54 (1959).

To achieve its contract-bar objectives, the Board looks to the contract's fixed term or duration, because it is this term on the face of the contract to which employees and outside unions look to determine the appropriate time to file a representation petition. The length of the term of the contract as well as its adequacy must therefore be ascertainable on its face, with no resort to parol evidence, for it to be a bar. *South Mountain Healthcare & Rehabilitation Center*, 344 NLRB No. 40 (2005); *Union Fish Co.,* 156 NLRB 187 (1966); and *Cind-R-Lite Co.*, 239 NLRB 1255 (1979). Cf. *Cooper Tire Co*., 181 NLRB 509 (1970).

However, a significant exception is made where the party challenging the contract is either the employer or the contracting union. In those circumstances, the contract continues as a bar for its *entire* term. *Montgomery Ward & Co*., 137 NLRB 346, 348–349 (1962). The petition in that case was filed by the employer in the third year of a current 5-year contract with a certified union. The contract-bar rules, the Board explained, should not be interpreted so as to permit the contracting parties to take advantage of whatever benefits may accrue from the contract "with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election."

In *Absorbent Cotton Co.,* 137 NLRB 908 (1962), the employer filed a petition in the third year of a 3-year contract. The incumbent union was uncertified. The Board saw no valid reason for according to such an employer rights which are different from those of an employer who has a current contract with a certified union and held that, whether or not the union is certified, an employer's petition is barred by a current contract to which it is a party for the entire term of the contract.

When, after the end of the first 3 years of a long-term contract, and before the filing of a petition, the parties execute a new agreement which embodies new terms and conditions, or incorporate by reference the terms and conditions of the long-term contract or a written amendment which *expressly* reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period, the new agreement or amendment is effective as a bar for as much of its term as does not exceed 3 years. *Southwestern Portland Cement Co.,* 126 NLRB 931 (1960); *Santa Fe Trail Transportation Co*., 139 NLRB 1513, 1514 fn. 2 (1962). See also *Shen-Valley Meat Packers*, 261 NLRB 958 (1982). *Shen-Valley*

was reaffirmed in *M.C.P. Foods*, 311 NLRB 1159 (1993), where the parties signed a 5-year contract and an amendment which reaffirmed the expiration date prior to the 3-year anniversary date of the initial agreement. The Board held this to be a "premature extension." For discussion of this doctrine, see section 9-580.

Where the employees, during the period of a long-term contract, vote in an election to redesignate the contracting union as their representative, the current contract between the parties is a bar to a subsequent petition for a new period of reasonable duration; i.e., up to 3 years, running from the date of the election. *Montgomery Ward & Co.,* 143 NLRB 587 (1963). The election date is used as the beginning of the new period instead of the date of recertification because the election
date is the critical date on which the employees manifested their decision to retain the incumbent as their representative. Id. at 588 fn. 3.

9-320 Contracts With no Fixed Term

A contract which has no fixed term does not bar an election for any period. *Pacific Coast Assn. of Pulp & Paper Mfrs*., supra, and *McLean County Roofing,* 290 NLRB 685 fn. 5 (1988). Contracts with no fixed duration include contracts of indefinite duration (9-321), contracts terminable at will (9-322), temporary agreements to be effective pending a final agreement(9-323), and extensions of expired agreements pending negotiations (9-324). They are defined as follows.

9-321 Indefinite Duration

347-4010-2042

A contract of indefinite duration is a contract without stated provisions for termination or which terminates on the occurrence of some event the date of which cannot be established with certainty before its occurrence. *W. Horace Williams Co.,* 130 NLRB 223 (1961); *Pacific Coast Assn. of Pulp & Paper Mfrs*., supra.

It should be noted that, when a contract is for a fixed term, an employer's notice of intention to close the plant does *not* demonstrate that the plant is operating under a contract of indefinite duration; the only indefiniteness is as to whether the plant will remain open for the duration of the contract period. *Swift & Co.*, 145 NLRB 756, 761 (1963).

9-322 Terminable at Will

347-4010-2056

A contract terminable at will is a contract which terminates immediately on, or a stated period after, notice, and such notice can be given at any time by either party. *Pacific Motor Trucking Co*., 132 NLRB 950 (1961).

9-323 Temporary Agreements

347-4010-2070

A temporary agreement, within the meaning of these rules, is one which is to be effective until a complete and final agreement can be negotiated. *Bridgeport Brass Co*., 110 NLRB 997 (1955).

9-324 Extensions

347-4040-1760-7500

347-4040-8384

An extension of an expired agreement, for the purpose of these rules, means an extension made pending the negotiation of a new agreement or the modification of the old agreement. *Union Bag Corp*., 110 NLRB 1831 (1955); *Frye & Smith, Ltd.,* 151 NLRB 49 (1956). See also *Crompton Co.,* supra. In *Madelaine Chocolate Novelties*, 333 NLRB 1312 (2001), the Board found that an alleged new contract was nothing more than an attempt to convert the fourth year of a prior agreement into the first year of a new contract.

In *Direct Press Modern Litho, Inc.,* 328 NLRB 860 (1999), the Board extended the duration of a contract bar where the employer had filed for Chapter 11 reorganization under the Bankruptcy Code. The

Bankruptcy Court ordered the collective-bargaining agreement extended beyond its original expiration date for an additional 6-1/2 months. The Board found the 6-1/2-month extension consistent with its policy of industrial stability between the employer and the union, and was an appropriate accommodation between the NLRA and the Bankruptcy Code. The Board said that the Bankruptcy Court's action was not prohibited by the Board's "premature extension" doctrine. Id. at 862.

9-400 Representative Status of Contracting Union

347-4030

During the term of a contract, questions may arise concerning the representative status of the contracting party. Unlike other subjects of contract-bar policy, these involve the status of the contracting union rather than the nature or content of the collective-bargaining agreement. Generally, the issue is raised in the context of (a) an alleged schism in the bargaining representative, or (b) a claim that the bargaining representative is defunct. The lead case is *Hershey Chocolate Corp*., 121 NLRB 901 (1958). Although the Court of Appeals for the Third Circuit denied enforcement in the unfair labor practice case which grew out of the representation case (*NLRB v. Hershey Chocolate Corp*., 297 F.2d 286 (3d Cir. 1981)), the court's decision, which was based on a disagreement with the Board in the interpretation of the facts, apparently has not impaired the validity of the schism doctrine as such. See *Dorado Beach Hotel*, 144 NLRB 712, 714 fn. 6 (1963).

9-410 Schism

347-2017-7533-6700

347-4030-5000

A contract does not bar an election if there has been a schism in the contracting representative which is coextensive in scope with the existing unit. To make a schism finding, all three of the following conditions, spelled out by the Board in *Hershey Chocolate Corp*., supra, must exist.

9-411 Basic Intraunion Split

177-3987

347-2017-7533-6700

347-4030-5000

The first element is a basic intraunion conflict affecting the contracting representative. A basic intraunion conflict is defined as a conflict over policy at the highest level of an international union, whether it is affiliated with a federation, or within a federation, which results in a disruption of existing intraunion relationships. See *Clayton & Lambert Mfg. Co.*, 128 NLRB 209, 210 (1960); cf. *Saginaw Furniture Shops*, 97 NLRB 1488 (1951).

As illustrations of the type of disruption envisaged, the Board in *Hershey* cited the disaffiliation or expulsion of an international from a federation, coupled with the creation by the federation of a rival; a split in an international combined with the transfer of affiliation of some officials to an existing rival or a new union; any realignment which has substantially the same effect on the stability of bargaining relationships.

In *B & B Beer Distributing Co.*, 124 NLRB 1420, 1422 (1960), the Board reemphasized the requirement that in order to warrant a schism finding the conflict have a substantial disruptive effect on the industrial stability normally flowing from the existence of a collective-bargaining contract. The rationale for the requirement is explained in *Allied Chemical Corp.,* 196 NLRB 483, 484 (1972), where the Board notes that one of its concerns, in *Hershey* was to preclude an otherwise untimely election "when the alleged schism was in fact no more than a raid or an effort by dissident elements to repudiate their representative's bargain."

A distinction thus exists between schism and "mere individual dissatisfaction with the collective bargaining apparatus." *Southwestern Portland Cement Co*., 126 NLRB 931, 934 (1960). A mere disaffiliation movement within a local, born out of a policy conflict between the local and its international, does not alone satisfy the Board's requirements for a schism. *Swift & Co.,* supra at 763. And the Board rejected the assertion of schism when it found merely competition between two individuals with conflicting

sympathies for control of the existing unit to which both continued to belong. *Allied Chemical Corp*., supra. See also *Georgia Kaolin Co.,* 287 NLRB 485 (1987), where the Board found no conflict at the highest level and therefore did not reach the question of whether the other conditions existed for a schism.

9-412 Opportunity at a Meeting

347-2017-7533-6700

370-9500

The second element: the employees in the unit seek to change their representatives for reasons related to the basic intraunion conflict and have had an opportunity to exercise their judgment on the merits of the controversy at an open meeting, called with due notice to the members in the unit for the purpose of taking disaffiliation action for reasons related to the basic intraunion conflict.

Thus, where several meetings were held but no advance notice was given of their purpose, the requirement that employees have an opportunity to express their views was not satisfied, and a schism finding was not warranted. *Wm. Wolf Bakery*, 122 NLRB 1163, 1164 (1959).

9-413 Reasonable Time

177-3987

347-2017-7533-6700

347-4010-4033-5040

The third element is that the action of the employees in the unit seeking to change their representatives took place within a reasonable time after the occurrence of the basic intraunion conflict. A year and a half was regarded as a reasonable period of time in light of all the circumstances. *Great Atlantic & Pacific Tea Co.,* 126 NLRB 580, 583 (1960); *Oregon Macaroni Co.,* 124 NLRB 1001, 1004 (1959). But in *Standard Brands,* 214 NLRB 72 (1974), a 3-month delay between a special convention and a disaffiliation vote was deemed unreasonable where the possible merger discussed at the special convention had been well known and long publicized.

9-414 Other Schism Issues

Apart from the above basic elements comprising the definition of "schism," additional rules spelled out in *Hershey* relate to filing, intervention, and a place on the ballot in the election, and also concern the effect on the existing contract. These are:

In the processing of cases involving a schism finding, any labor organization having an adequate showing of interest and otherwise entitled to participate in the election may file a petition or intervene in the proceeding. The ballot, as in all elections other than craft severance elections, provides for a "no union" or "neither" vote. Furthermore, the winning union, if any, is *not* required to assume the existing contract. *Hershey Chocolate Corp*., supra at 909–910.

In a situation involving joint representation by two or more local unions, disaffiliation action by members of one or more of the locals concerned a substantial number of employees in the contract unit, and was therefore regarded as sufficient to cause the kind of confusion which unstabilizes the bargaining relationship and justifies a schism finding. *St. Louis Bakery Labor Council*, 121 NLRB 1548, 1550–1551 (1958). The same result was reached where a disaffiliation action by one of three joint representatives occurred affecting four plants of a seven-plant single employer contract unit. *Purity Baking Co.,* 121 NLRB 75 (1958).

With specific reference to the expulsion of the Teamsters from the AFL–CIO, the Board found no evidence that such expulsion "has resulted either in the creation of a new rivalry or the aggravation of an existing rivalry, based on policy conflict." It therefore concluded that the expulsion, standing alone, was "insufficient to establish the existence of the basic intraunion conflict which is a necessary prerequisite to a schism finding." *B & B Beer Distributing Co*., supra.

In *Polar Ware Co.,* 139 NLRB 1006 (1962), the Board rejected a claim that a basic intraunion conflict had arisen over the issue of Communist domination of the international union. On three occasions

subsequent to the expulsion of the international from the CIO, the employees had reaffirmed their affiliation with the expelled union and not until the latest contract was negotiated by that union did they vote to disaffiliate. Some employees supported the disaffiliation movement for reasons unrelated to the Communist issue. In these circumstances, the employees' disaffiliation action did not meet the standards established for a schism finding.

In *Packerland Packing Co*., 181 NLRB 284 (1970), the Board found no schism creating confusion as to the identity of the bargaining representative under the existing contract. In that case, an ambiguously worded ballot in an internal union poll did not conclusively indicate whether the majority of the unit had voted against continued representation by the intervenor or merely against management's most recent contract proposal. Subsequent to the election, the intervenor had continued to negotiate new contracts, process grievances, and receive checked-off dues despite the advent of a rival faction claiming to be the intervenor's successor.

In *Kimco Auto Products,* 183 NLRB 993 (1970), the Board dealt with a situation where no new organization resulted from the disaffiliation action of the contracting local and no "assignment" of the existing agreement was effected, so that the local, which alone had executed the agreement, remained the same after the disaffiliation action and continued to administer the agreement. As there was no open split at the highest level of the international union and within the certified local, "followed by intensive campaigning to secure the allegiance of the local union members on the basis of the policy differences which were initially responsible for the basic conflict," the disaffiliation action did not create such confusion in the bargaining relationship as to remove the contract as a bar to an election. See also *Bluff City Transfer Co.,* 184 NLRB 604 (1970); *Buckeye Cellulose Corp*., 184 NLRB 606 (1970).

The Board has long held that the mere change in designation or affiliation of the contractual representative does not of itself warrant a finding that an otherwise valid preexisting contract is no longer a bar. This is true whether there is a specific assignment of the contract (see, for example*, Louisville Railway Co*., 90 NLRB 678 (1950)). However, this Board holding was not applied to "a true schismatic situation" as defined in *Hershey* but rather to agreements with respect to the transfer among all interested unions, or, at most, a disaffiliation based on a disagreement between an international and an individual local which did not result in the confusion and instability inherent in a true schismatic situation (see, for example, *Prudential Insurance Co.,* 106 NLRB 237 (1953)).

"[A]pplication of this principle to a true schism," said the Board in *Hershey*, supra at 911, "would tend to place resolution of the representation issue in the hands of the local officers who may or may not reflect the employees' wishes."

9-420 Defunctness and Disclaimer

347-2017-7533-5000

347-4030-2500 et seq.

347-4030-6700

(a) *Defunctness*

The rules as to defunctness, also enunciated in *Hershey Chocolate Corp*., 121 NLRB 901 (1958), are:

A contract does not bar an election if the contracting representative is defunct. *Hershey Chocolate Corp*., supra at 911; *International Harvester Co*., 111 NLRB 276 (1955).

In *Hershey*, the Board stated that a representative is deemed defunct if it "is unable or unwilling to represent the employees," but made it clear that "mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees." Id. at 911. The "relative inactivity of the union" is irrelevant to a defunctness determination. *Rocky Mountain Hospital,* 289 NLRB 1347 (1988); *Kent Corp.,* 272 NLRB 735 (1984). On the other hand, a clear and unequivocal disclaimer of interest, made in good faith, will remove the contract as a bar. *American Sunroof Corp.,* 243 NLRB 1128 (1979).

See also *Moore Drop Forging Co.,* 168 NLRB 984 (1967); *Aircraft Turbine Service,* 173 NLRB 709 (1969); *Nevada Club,* 178 NLRB 81 (1969); *Automated Business Systems,* 189 NLRB 124 (1971); *Road Materials,* 193 NLRB 990 (1971); and *Loree Footwear Corp.,* 197 NLRB 360 (1972). In *Apex Tankers Co.,* 257 NLRB 685 (1981), the Board treated as if it were defunct, a union that was dominated by supervisors. Although the union was not actually defunct, the disabling conflict of interest created by supervisory involvement prompted the Board to reject the contract as a bar.

A resolution purporting to "dissolve and disestablish" a union will not compel a finding of defunctness if the surrounding circumstances indicate that it is not *in* fact defunct. *News-Press Publishing Co*., 145 NLRB 803 (1964). The Board noted that the union remained a functioning organization with previous collective-bargaining experience, and could once again assume such a role if it wished or were required to do so; the meeting at which the resolution was voted was announced informally, with no statement of its purpose; fewer than half of the employees in the unit attended; the petitioner was instrumental in the efforts to terminate the allegedly defunct group's status as a labor organization; and, in voting to dissolve it, the members who attended the meeting seemed to have been motivated by a desire to rid themselves of the recently executed contract between the union and the employer. See *East Mfg. Corp.,* 242 NLRB 5 (1979). See also *Gate City Optical Co*., 173 NLRB 1709 (1969), in which a union that succeeded to the contracting union could not escape its contractual obligations by claiming its predecessor was defunct.

Defunctness was *not* found in *Polar Ware Co*., supra (the union continued to hold regular meetings and to meet with employer to settle grievances and emphatically claimed willingness to administer the contract); *Dorado Beach Hotel,* 144 NLRB 712 (1963) (the union experienced only temporary inability to function); *Swift & Co.,* 145 NLRB 756 fn. 6 (1963) (the union maintained a bank account, held membership meetings, and conferred with the employer to discuss plant shutdown); and *Gary Steel Supply Co*., 144 NLRB 470 fn. 3 (1963) (the union had elective officers and was in fact administering the contract); *Moore Drop Forging Co*., supra (the union's inactivity was due to its shop steward's erroneous legal conclusion that the posting of an election notice by the Board precluded the union from continuing to negotiate with the company); *Nevada Club*, supra (an attempted merger failed, and the original local was reactivated); *Wahiawa Transport System*, 183 NLRB 991 (1970) (the union was actively representing the employees at the time of an inadequately announced meeting at which a small percentage of the union's members voted to merge with the intervenor).

On the other hand, defunctness was found in *Bennett Stone Co*., 139 NLRB 1422 (1962) (the union's charter had been canceled; most of its members had joined the petitioner; all of its books and other property had been transferred to the petitioner; and no one appeared on its behalf at the hearing).

Although the Board found no defunctness in *Nevada Club*, supra, the contract involved did not serve as a bar because the Board's decision issued after the contract's expiration date. Similarly, in *Automated Business Systems*, 189 NLRB 124 (1971), the no-defunctness finding did not restore as a bar a contract which had been canceled by the officers and bargaining committee members who had signed it.

It should be added that action by an international union or intermediate body evidencing its willingness and ability to assume the representative functions of a local, which is no longer capable of performing such functions, will be deemed relevant to the issue of defunctness only if the international or intermediate body is a party signatory to the contract. *Hershey Chocolate Corp*., 121 NLRB 901, 911–912 (1958).

(b) *Disclaimer*

See section 8-100.

9-500 Effect of Contract on Rival Claims or Petitions

347-4020-6725

The issue of the timeliness of a rival petition as affecting contract bar arises often in representation cases. Because this has many potential complex ramifications, the Board has formulated a set of rules in an attempt to simplify the procedure. The lead case decision in this decisional area is *Deluxe Metal Furniture Co*., 121 NLRB 995 (1958).

9-510 Time of Filing of Petition

347-2067-3333

347-4020-6700

393-6007-1700

A contract does not bar an election if a petition is filed with the Board before the execution date of the contract (where it is effective immediately or retroactively), or if a petition is filed with the Board before the effective date of the contract (where it is effective at some time after its execution). *Deluxe Metal Furniture Co*., supra; *National Broadcasting Co.*, 104 NLRB 587 (1953); *Herdon Rock Products*, 97 NLRB 1250 (1951). See also *Aramark School Services, Inc.,* 337 NLRB 1063 (2002).

A contract executed on the same day that a petition is filed with the Board bars an election provided the contract is effective immediately or retroactively, and the employer did not have actual notice at the time of its execution that a petition had been filed. The "postmarking" rule—date of deposit in mail—governs the filing of petitions under this doctrine. See Rules Section 102.111(b). For an application of this rule, see *Santa Fe Trail Transportation Co*., 139 NLRB 1513, 1514 fn. 3 (1962). But the petition is regarded as received in the Regional Office even if the mechanical details of filing have not been completed by the affixing of the date and time stamp *Campbell Soup Co*., 175 NLRB 452 (1969). The petition, to be considered filed, need not be on an official Board form. *Duke Power Co*., 191 NLRB 308, 311 fn. 10 (1971). Also, the Board has found no prejudice to the employer where it received notice of the filing of the petition a few hours before the petition was actually received in the Regional Office. As long as the employer was informed prior to its signing of the contract, the notice requirement was held fulfilled. *Rappahannock Sportswear Co.,* 163 NLRB 703 (1967). Merely informing the employer of petitioner's representative interest, however, and not of the filing of the petition, does not meet the requirement. *Boise Cascade Corp.,* 178 NLRB 673 (1969).

In *Weather Vane Outerwear Corp.*, 233 NLRB 414 (1977), the Board held that when one petition filed under Section 9(e) is timely filed, and a second petition is filed during the pendency of the unresolved question concerning representation raised by the earlier one, the contract-bar doctrine is rendered inoperative as to the later petition.

See also *Hamilton Park Health Care Center*, 298 NLRB 608 (1990), where the Board held that knowledge of the rival union campaign is irrelevant to a contract-bar determination.

A contract may be deprived of its bar quality if it does not clearly reflect its expiration date*. Bob's Big Boy Family Restaurants*, 259 NLRB 153 (1981). But in *Suffolk Banana Co.,* 328 NLRB 1086 (1999), the limited confusion of two different expiration dates in the contract was not detrimental to the employees. Since they did not rely on either date in filing their petition, the contract was held to be a bar.

9-520 Amendment of Petition

347-4020-6750 et seq.

Where a petition is amended, and the employers and the operations or employees involved were contemplated under the original petition, and the amendment does not substantially enlarge the character or size of the unit or the number of employees covered, the filing date of the original petition is controlling. *Deluxe Metal Furniture Co*., supra, 1000 fn. 12. See also *Illinois Bell Telephone Co*., 77 NLRB 1073 (1948). When the Board itself finds a larger unit appropriate, an intervening contract will not be found a bar, *Brown Transport Corp*., 296 NLRB 1213 (1989). But see *Centennial Development Co.,* 218 NLRB 1284 (1975). The filing date of the original petition is also controlling when a favorable ruling is made on a petitioner's appeal from a Regional Director's dismissal of a petition or on a motion for reconsideration of a decision. Id. However, when the original petition sought a craft in a departmental unit and was amended to seek a production and maintenance unit, the date of the amended petition was deemed controlling. *Hyster Co*., 72 NLRB 937 (1947). Also, when the original petition misnamed the employer in a material manner, the Board used the date of the amended petition as the date of filing. *Allied Beverage Distributing Co.*, 143 NLRB 149 (1963); *Baldwin Co*., 81 NLRB 927 (1949).

9-530 "Substantial Claim" Rule

347-4020-6725

530-8019

A contract between an employer and a rival union has been held not to bar an election if (1) when it was executed an incumbent union continued its claim to representative status, or (2) a nonincumbent union had refrained from filing a petition in reliance upon an employer's conduct which indicated that recognition had been granted or that a contract would be obtained without an election. This is known as the substantial claim rule. *Deluxe Metal Furniture Co*., supra at 998–999; see also *Acme Brewing Co*., 72 NLRB 1005 (1947); *Chicago Bridge Co*., 88 NLRB 402 (1950); *Southern Permanente Services*, 172 NLRB 1399 (1968); and *Riverdale Manor Home for Adults*, 189 NLRB 176 (1971). But see *RCA Del Carribe*, 262 NLRB 965 (1982), an unfair labor practice case.

Thus, when a petitioner, an incumbent union, asserted a substantial representative claim by (1) urging that the employer's notice of termination was untimely and that the contract remained in force for another year, (2) filing suit in the State court to vindicate this claim, and (3) filing a petition with the Board on the same date that the employer and the intervening union executed their contract, that contract did not serve as a bar to an election. *General Dynamics Corp.,* 144 NLRB 908, 909–910 (1963).

All other claims of majority status or demands for recognition (generally called "bare claims") have no effect on the determination of whether a contract is a bar to a rival petition. The "substantial claim" rule is applied in a situation when a petitioner is lulled into a false sense of security by an employer who led it to believe that recognition would not be granted, or any contract be entered into with any union, until after a Board election. *Greenpoint Sleep Products*, 128 NLRB 548 (1960).

9-540 The "Insulated Period"

347-4010-4067 et seq.

530-6083-2033

A significant element in contract-bar policy is the concept of an "insulated period." The parties to a contract which is approaching its expiration date are provided with a 60-day "insulation period" immediately preceding and including the expiration date to negotiate and execute a new contract.

Representation petitions filed timely under the "postmark rule" (Sec. 102.111(b)) will be processed even though received in the Regional Office during the insulated period. *John I. Hass, Inc.,* 301 NLRB 300 (1991); *Central Supply Co. of Virginia, Inc.,* 217 NLRB 642 (1975). See also *Cargill Nutrena, Inc.,* 344 NLRB No. 139 (2005).

The "insulated period" was adopted to afford the parties to an expiring contract an opportunity to negotiate and execute a new or amended agreement without the disrupting effect of rival petitions. See *Crompton Co*., 260 NLRB 417, 418 (1982), for a discussion of the policies involved and for holding that contracts for less then 90 days are not a bar because they do not stabilize the relationship and provide no "insulation period." The insulated period rule was, announced in *Deluxe Metal Furniture Co.*, supra at 1000, and holds petitions filed during the 60-day (or other applicable) period immediately preceding and including the expiration date of an existing contract are dismissed, regardless of whether the contract contains an automatic renewal clause and regardless of the length of the renewal period.

An "insulated period" applies to every kind of representation petition, including employer petitions (*Nelson Name Plate Co.,* 122 NLRB 467 (1959)), and regardless of the seasonal nature of the employer's business (*Cooperativa Azucarera Los Canos,* 122 NLRB 817 fn. 2 (1959)), but the period is different in health care institution cases. See section 9-550 infra.

It does *not* apply when the contract is not a bar for other reasons under the contract-bar rules. *National Brassiere Products Corp*., 122 NLRB 965 (1959); *Stewart-Warner Corp.,* 123 NLRB 447 (1959).

The net effect of the "insulated period" rule is to require all petitioners to have their petitions on file at least 61 days before the contract's termination date or undergo a risk that a contract executed during the 60-day insulated period will foreclose another petition for the new contract's term. Moreover, the rule prevents

"overhanging rivalry and uncertainty during the bargaining period, and will eliminate the possibility for employees to wait and see how bargaining is proceeding and use another union as a threat to force their current representative into unreasonable demands." *Deluxe Metal Furniture Co*., supra at 1001; *Electric Boat Division*, 158 NLRB 956 (1966); *National Cash Register Co.,* 201 NLRB 846 (1973).

The *Electric Boat* policy of granting an additional 60-day insulated period applies only when an untimely petition is processed under conditions denying the parties to an existing bargaining relationship an opportunity to execute a new contract within the original 60-day insulated period. Thus, when an untimely filed petition was administratively dismissed about 26 days before expiration of the insulated period and there was no showing that an additional insulated period could be justified on other grounds, a newly executed contract was held not to bar a petition filed before its execution. *Kroger Co*., 173 NLRB 397 (1969); *Royal Dean Coal Co*., 177 NLRB 700 (1969). In another context, when any prejudice to the parties, caused by the processing of the untimely filed petition, resulted from their own conduct in waiting 2 weeks to apprise the Regional Director of the existence of the contract, the request for an additional insulated period was denied. *Utilco Co*., 197 NLRB 664 (1972).

In *Vanity Fair Mills,* 256 NLRB 1104 (1981), the Board reinstated a petition that had been dismissed as untimely filed. In doing so, the Board noted that the petitioning employee relied on erroneous advice by an NLRB agent.

A Presidential wage-price freeze led to a special exception to the *Deluxe Metal* rule. In several cases, the Board dismissed as untimely petitions which would be considered timely under ordinary contract-bar rules because the freeze in effect during the parties' insulated period created an uncertainty which deprived the parties of a 60-day period in which to bargain intelligently. The parties were then granted a new 60-day insulated period. *West India Mfg. Co*., 195 NLRB 1135 (1972); *Hill & Sanders-Wheaton, Inc.*, 195 NLRB 1137 (1972); *Dennis Chemical Co*., 196 NLRB 226 (1972); and *Litton Business Systems*, 199 NLRB 354 (1972). This approach was also applied when agreement between the union and an employer association had been a firm precondition, acquiesced in by the employer, to an agreement between the union and the employer, and negotiations had been effectively suspended during the freeze. *California Parts & Equipment*, 196 NLRB 1108 (1972). However, a contract agreed on but not signed because of uncertainties created by phases I and II of the President's economic program was held not a bar when the union had ample time, prior to the filing of the petition and after sufficiently clear guidelines had been established by the Pay Board, to resume negotiations obstructed by the freeze. *Bowling Green Foods*, 196 NLRB 814 (1972).

9-550 The Period for Filing

347-4010-4000 et seq.

347-4010-8080

347-4020-6700

Except in the health care industry and seasonal operations to be timely with respect to an existing contract, the petition must be filed more than 60 days but less than 90 days before the expiration date of the contract. *Leonard Wholesale Meats,* 136 NLRB 1000 (1962) (which modified the *Deluxe Metal* decision in one respect; i.e., by changing the maximum limit from 150 days to 90 days). In health care cases, the petition must be filed not more than 120 days or less than 90 days before expiration. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

A petition filed untimely will be regarded as premature under this rule and may be dismissed unless (1) the contract would not be a bar under some other rule, or (2) a hearing is directed despite the prematurity of the petition in order to resolve doubts as to the effectiveness of the contract as a bar, and the decision issues on or after the 90th day preceding the expiration date of the contract. *Deluxe Metal Furniture Co*., 121 NLRB 995, 999 (1958), and *Mosler Safe Co*., 216 NLRB 9 (1975). See, for example, *Royal Crown Cola Bottling Co.*, 150 NLRB 1624 (1964); *General Time Corp*., 195 NLRB 1107 (1975); and *Maramount Corp.*, 310 NLRB 508 (1993).

When a substantial number of the employers comprising the appropriate unit are neither named in nor notified of a petition until the filing and service of an *amended* petition, the filing date of the amended petition is controlling and, if it was filed within the "insulated period," it is subject to dismissal. *Allied Beverage Distributing Co*., 143 NLRB 149 (1963). See also *Baldwin Co*., 81 NLRB 927 (1949), and in connection with the discussion of amended petitions on 33, ante.

An interim arrangement extending the expiration date of a contract pending the negotiation and execution of a new agreement cannot change the expiration date for purposes of the timely filing of a petition. *Metropolitan Life Insurance Co*., 172 NLRB 1257 (1968).

A petition filed after the execution of a supplemental agreement amending the original agreement so as to cover employees who, in effect, were an accretion to the unit is barred by the contract as amended, so long as the petition would be untimely with respect to the expiration date of the original contract. *California Offset Printers*, 181 NLRB 871 (1970). See also *Firestone Synthetic Fibers Co.,* 171 NLRB 1121 (1968).

When a unit was covered by two contracts which were jointly negotiated and administered but which expiration dates were 30 days apart, a petition filed 90-60 days before the later of the two expiration dates was held timely as to both contracts. *Midway Lincoln-Mercury, Inc*., 180 NLRB 58 (1969).

Conflicting contracts offered as a bar create no bar since such a situation precludes a clear determination by a potential petitioner of the proper time for filing a new petition. *Cabrillo Lanes*, 202 NLRB 921 (1973). Similarly, when the contract distributed to employees showed different dates than the actual contract dates, a petition filed within the dates known to employees was considered timely. *Bob's Big Boy Restaurant,* 235 NLRB 1227 (1978).

With respect to seasonal industries, while the 60-day insulated period is applicable, the 90-day filing rule (formerly 150-day rule under *Deluxe*) is not. *Cooperativa Azucarera Los Canos*, 122 NLRB 817 fn. 2 (1959).

9-560 The Impact of Bargaining History on Rival Petitions

347-4060-5000

When there has been a prior bargaining history on a single-employer basis, a rival petition for a single-employer unit will prevail if timely filed before the insulated period of the last individual contract, even if the employer has adopted or joined in a multiemployer contract and whether that multiemployer contract would otherwise be a bar to a petition. *U.S. Pillow Corp.,* 137 NLRB 584 (1962). See also *West Lawrence Care Center,* 305 NLRB 212 (1991). Compare *Albertson's Inc.,* 307 NLRB 338 (1992). This rule has been held not to apply where there has been no single-employer bargaining history. *Thos. de la Rue, Inc*., 151 NLRB 234 (1965).

9-570 Automatic Renewal Provisions

347-4010-9000

347-4040-8300

These are provisions under which contracts automatically renew themselves unless either party notifies the other of its desire to modify or terminate the contract. The parties sometimes forestall automatic renewal by notice as provided in the contract. If they do not, the contract renews itself and constitutes a bar unless a timely petition is filed before the beginning of the insulated period. If automatic renewal is forestalled, the situation is precisely the same as if the contract had no automatic renewal clause.

The pertinent rules pertaining to automatic renewal are:

a. The question of whether or not automatic renewal of a contract has been forestalled should be considered only after the parties have failed to execute a new agreement during the 60-day "insulated period." *Deluxe Metal Furniture Co*., supra at 999, 1001.

b. Any notice of a desire to negotiate changes received by the other party immediately preceding the automatic renewal date provided in the contract will prevent its renewal for contract-bar purposes unless there is a provision or agreement for the continuation of the existing contract during

negotiations. *KCW Furniture Co.,* 247 NLRB 541 (1980). Compare *Bridgestone/Firestone, Inc.*, 331 NLRB 205 (2001).

c. A written agreement which reinstates the old automatically renewable contract is treated as a new contract.

d. A notice given shortly before the automatic renewal date is treated as one to forestall renewal, even if the contract contains separate modification and renewal clauses, except where the contract *specifically* provides that it will be renewed despite notice given pursuant to the modification provisions and the notice is in fact specifically given pursuant to these provisions. Id. at 1003; *Wagoner Transportation Co.*, 177 NLRB 452, 453 fn. 2 (1969).

e. A midterm modification provision, regardless of its scope, does not remove the contract as a bar unless the parties actually terminate the contract. *Deluxe Metal Furniture Co*., supra at 1003; *Ellison Bros. Oyster Co*., 124 NLRB 1225 (1959); *Penn-Keystone Realty Corp*., 191 NLRB 800 (1971); and *Providence Television*, 194 NLRB 759, 760 (1972).

f. If the contract specifies an automatic renewal period other than 60 days, the parties are deemed bound by their agreement for purposes of forestalling renewal, but the timeliness of the petition is "keyed" to the 60-day period. *Deluxe Metal Furniture Co*., supra at 1000.

g. When the administration of the contract has been abandoned, it cannot automatically renew. Id. at 1002 fn. 15.

h. The effectiveness of a timely notice to forestall automatic renewal is not changed by inaction of the parties after such notice, even though the contract required certain action within a specified period, or by rejection of the notice, or by its withdrawal. Id. at 1002 fn. 16.

i. The employer, by repeatedly negotiating with the union in the absence of timely notice, does not thereby waive the untimeliness of such notice. Therefore, in *Moore Drop Forging Co.,* 168 NLRB 984 (1967), automatic renewal was not forestalled and the contract was held a bar.

j. Automatic renewal is not forestalled by oral notice. *Appalachian Shale Products Co*., 121 NLRB 1160 fn. 6 (1958). For other cases dealing with automatic renewal, see *Carter Machine Co*., 133 NLRB 247 fn. 2 (1961); *New England Lead Burning Co*., 133 NLRB 863, 866 (1961); *Long-Lewis Hardware Co*., 134 NLRB 1554 (1962); *General Dynamics Corp.*, 144 NLRB 908, 909–910 (1963); *Stox Restaurant,* 172 NLRB 1474 (1968); and *Herlin Press*, 177 NLRB 940 (1969).

9-580 The "Premature Extension" Doctrine

347-4010-4033-5060 et seq.

347-4040-8384

If the parties, during the term of an existing contract, execute an amendment or a new contract containing a later termination date, the contract is deemed prematurely extended. *Deluxe Metal Furniture Co*., supra at 1001–1002; *Lord Baltimore Press*, 144 NLRB 1376 (1963); *New England Telephone Co*., 179 NLRB 53 (1969); *M.C.P. Foods*, 311 NLRB 1159 (1993); and *Shen-Valley Meat Packers*, 261 NLRB 958 (1982).

In *New England Telephone*, the Board, reiterating this doctrine, explained that a new contract for a longer period, signed during the term of a previously executed agreement at a time when that prior agreement would bar a petition, can itself prevent the processing of a rival petition only for the remainder of the period when the prior contract would have been such a bar. Thus, when such a "premature extension" occurs, the proper time for the filing of a rival petition is the 30-day period between the 90th and 60th day prior to the expiration date of the original contract of 3 years' duration or less. See also *Hertz Corp*., 265 NLRB 1127 (1982).

For an earlier application of the "premature extension" doctrine, see *Republic Aviation Corp*., 122 NLRB 998 (1959), noting, of course, that the period for filing the petition, under *Leonard Wholesale Meats*, supra, was changed from a maximum of 150 days to 90 days prior to the expiration of the initial 3-year period, and that a prematurely extended contract therefore does not bar an election if the petition is filed more than 60 days but less than 90 days before the terminal date of the original contract.

It should be noted, however, that a contract is *not* prematurely extended when executed (1) during the 60-day insulated period preceding the terminal date of the old contract; (2) after the terminal date of the contract if automatic renewal was forestalled or if the contract contained no renewal provision; and (3) at a time when the existing contract would not have barred an election because of other contract-bar rules. *Deluxe Metal Furniture Co*., 121 NLRB 995, 1001–1002 (1958). An illustration of the third exception is where the contract had been in effect for its reasonable term, such as in *Cushman's Sons, Inc*., 88 NLRB 121 (1950).

It is immaterial that the premature extension is embodied in an entirely new and separate agreement rather than in an amendment, supplement, or extension of an existing contract. *Stubnitz Greene Corp.,* 116 NLRB 965 (1957); *Auburn Rubber Co.*, 140 NLRB 919 (1963). Such a prematurely extended contract does not bar a petition even though (1) the employer gave notice to employees of an intent to negotiate a new contract, (2) the new contract was entered into in good faith, and (3) the new contract was ratified by members of the incumbent union. The vice the Board sought to avoid was that of requiring employees, who desire to change representatives, to accelerate organizational activities so that they would be ready to assert a claim of majority representation at any time the parties might elect to discuss modification of the existing contract. Id. at 921.

When an employer was not a party to the original contract between its predecessor owner and the incumbent union, but instead, following purchase of the plant, entered into new obligations, separately undertaken, by executing with the union a new contract containing different starting and termination dates, the contract was not deemed an extension of the contract executed by the employer's predecessor, even though it was labeled "Extension Agreement.'' Thus, the new contract barred a petition for 3 years from its execution. *Chrysler Corp*., 153 NLRB 578 (1965).

When a multiplant contract is found to constitute a premature extension of a single-plant contract and a petition is timely filed with respect to the single-plant contract, the multiplant contract does not bar the petition. *Continental Can Co*., 145 NLRB 1427 (1964). This situation is distinguishable from that in which the agreement in question is intended solely to implement a long considered determination by the employer and the union to join in multiemployer bargaining. Under these circumstances the premature extension doctrine is *not* applied. *Sefton Fibre Can Co*., 109 NLRB 360 (1954).

When the antecedent contract contains a discriminatory provision, it does not bar an election and therefore does not come within the premature extension rule. However, the Board does not admit extrinsic evidence in a representation proceeding to establish the unlawful nature of a contract provision. Thus, in *St. Louis Cordage Mills*, 168 NLRB 981 (1968), because the Board could not determine, in the absence of extrinsic evidence, that sex was not a bona fide qualification for the jobs covered by a seniority clause, the clause was not found unlawful on its face. Therefore, the contract was held a premature extension and, consequently, no bar to an election.

Where there may be a question of premature extension, but the department involved in the petition is a new and separate unit, prior contracts covering other units in the employer's operations can have no impact on the contract between the employer and the intervenor covering employees in the new unit, and this latter contract serves as a bar. *Michigan Bell Telephone Co*., 182 NLRB 632 (1970).

The Board's rule is not an absolute ban on premature extensions; rather, it applies to petitions not timely filed with respect to antecedent agreements. Since contracts of unreasonable duration are treated as if they were limited to a reasonable period (3 years), a petition is dismissed where it is not filed 60 days prior to the third anniversary date rather than the expiration date designated in the contract. *Union Carbide Corp*., 190 NLRB 191, 192 (1971). A prematurely extended contract also bars a petition filed *after* the date on which the original contract would have expired if the new contract had not been executed. *H. L. Klion, Inc.,* 148 NLRB 656 (1964). See also *Baldwin Auto Co*., 178 NLRB 88 (1969). As stated in *Klion*, supra, 660:

> The primary purpose of the premature-extension rule is to protect petitioners in general from being faced with prematurely executed contracts at a time when the Petitioner would normally be permitted to file a petition. However, the Board's rule is not an absolute ban on premature extensions, but only

subjects such extensions to the condition that if a petition is filed during the open period calculated from the expiration date of the old contract, the premature extension will not be a bar.

Thus, a premature extension cannot serve to deprive a petitioner of the open period under the original contract. *M.C.P. Foods*, 311 NLRB 1159 (1993).

For an interesting case on a related subject, see *Madelaine Chocolate Novelties,* 333 NLRB 1312 (2001), discussed at 9-130 and 9-324. See also discussion of this doctrine in a bankruptcy context. *Direct Press Modern Litho, Inc.,* 328 NLRB 860 (1999). Section. 9-24, supra.

9-600 Private Agreements

9-610 Agreements not to Represent Certain Employees

347-4070

Under the *Briggs Indiana* rule (63 NLRB 1270 (1945)), an agreement in which a union agrees not to seek representation of certain employees bars a petition by that union for the specified employees during the life of the agreement. The agreement does not have to be part of the collective-bargaining agreement. *Lexington House*, 328 NLRB 894 (1999).

This rule was restated, with certain qualifications in *Cessna Aircraft Co*., 123 NLRB 855 (1959). See also *Allis-Chalmers Mfg. Co*., 179 NLRB 1 (1969), and *United Broadcasting,* 223 NLRB 908 (1976). In *Northern Pacific Sealcoating*, 309 NLRB 759 (1992), the Board applied the *Briggs Indiana* rationale to bar petitions filed by employers to 8(f) agreements where the employer agreed not to file a petition.

When a union, which has agreed not to represent certain employees during the term of a contract, files a petition for those employees during the contract term, but explicitly states at the hearing that it does not wish to represent them until after the contract has expired, the *Briggs Indiana* rule does not apply. *Fullview Industries*, 149 NLRB 427 (1965). In such a situation, the Board noted, it is not expending its efforts to assist a union in breaching its agreement.

The revised rules are:

(1) Such a promise will not be implied from a mere unit exclusion. *Budd Co*., 154 NLRB 421 (1965); *Women & Infants' Hospital of Rhode Island*, 333 NLRB 479 (2001).

(2) The rule will not be implied on the basis of an alleged understanding of the parties during contract negotiations. *Cessna Aircraft Co*., supra at 857. However, it is not required that the agreement be included in the contract. *Lexington House*, supra.

(3) When an international union is a party to a contract containing a provision within the meaning of this rule, the rule will be applied to any locals of the international as well as to the international itself, and where a local is a party to such a contract, the rule will be applied to any other local of the same international union. *Cessna Aircraft,* supra at 857.

In *Allis-Chalmers Mfg. Co*., supra, a contract provision read: "The Union shall not, during the term of this agreement, solicit or accept into membership any person in the employ of the Company excluded from the coverage of the agreement under the provisions of paragraph 3 above [which expressly excluded seven specific categories]." The Board, construing the provision to apply to the petitioner (the international), which was a signatory to the contract, stated that it did not view this rule as an undue encroachment on rights guaranteed by Section 7 of the Act; employees excluded by such provisions are *not* disenfranchised; "rather, their options as to which unions are available to them are merely diminished by one"; and the Act does not declare unlawful a union's decision not to organize and represent certain employees. See also *Budd Co*., supra; *Montgomery Ward & Co.,* 137 NLRB 346 (1962); *Huron Portland Cement Co*., 115 NLRB 879 (1956).

(4) The rule is inapplicable to a contract by a certified union, which contains a provision not to represent certain of the employees in the certified unit. Id.

9-620 Neutrality Agreements

It is beyond the scope of this book to cover all aspects of neutrality agreements; a broad term that can cover agreements calling for a "gag order" on employer speech, agreements for card checks, or even agreements for arbitration of first contracts.

The Board has held that a provision for recognition of "after-acquired" facilities is a mandatory subject. *Pall Biomedical Products Corp*., 331 NLRB 1674 (2000). These clauses are often referred to as *Kroger* clauses. See *Houston Div. of the Kroger Co*., 219 NLRB 388 (1975). Compare *Raley's,* 336 NLRB 374 (2001).

Where the parties agree to such a clause, the Board will hold them to it and will dismiss a petition filed by the union party thereto even in circumstances where the union argues that the agreement will result in an arbitrator deciding unit placement and scope issues. *Verizon Information Services*, 335 NLRB 558 (2001). See also *Central Parking System*, 335 NLRB 390 (2001).

On December 8, 2004, the Board granted review in *Shaw's Supermarkets*, 343 NLRB No. 105 (2004). The Regional Director had dismissed the RM petition "finding that the Unions demand for recognition based on an alleged contractual" after-acquired clause does not entitle the Employer to demand an election under Section 9(c)(i)(B). The Board granted review on the following issues:

(1) Whether the Employer clearly and unmistakably waived the right to a Board election;

(2) If so, whether public policy reasons outweigh the Employer's private agreement not to have an election.

In granting review, the Board commented that the *Central Parking* decision is "contrary to the general rule that the Board does not defer representation case issues to arbitration [and that]by granting review here we keep open the possibility that the Board will abide by the general rule rather than *Central Parking*."

See also *Dana Corp.,* 341 NLRB No. 150 (2004), pending review on the issue of recognition bar. (Sec. 10-500, infra.)

See also section 7-131.

9-700 Unlawful Union-Security and Checkoff Provisions

Another type of contract infirmity which renders it incapable of barring a representation petition is an unlawful union-security provision.

The lead case for this area of contract-bar policy is *Paragon Products Corp*., 134 NLRB 662 (1962), which overruled in several material respects the initial lead case, *Keystone Coat Supply Co*., 121 NLRB 880 (1958). For more recent discussion of *Paragon*, see *Electrical Workers Local 444 (Paramax Systems)*, 311 NLRB 1031, 1035, and 1037 fn. 32 (1993).

For convenience, the effect on contract bar of certain types of contract checkoff provisions is also treated here.

9-710 Union-Security Provisions

347-4040-3367

347-4040-6725

A contract containing a union-security clause which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, does not bar an election. "A clearly unlawful union-security provision for this purpose is one which by its terms clearly and unequivocably goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation.'' *Paragon Products Corp*., supra at 666. This principle was reaffirmed in *Paramax,* supra at 1037 fn. 32. The clause itself and not extrinsic evidence must establish the illegality. *Jet-Pak Corp*., 231 NLRB 552 (1977) (stipulation of parties not admissible to remove bar).

Such unlawful provisions include those which (1) require the employer expressly and unambiguously to give preference to union members in hiring, laying off, seniority, wages, or other terms and conditions of employment; (2) specifically withhold from incumbent nonmembers and/or new employees the statutory 30-

day grace period; and (3) expressly require, as a condition of employment, the payment of sums of money other than the "periodic dues and initiation fees uniformly required.''

While a union owes a duty to advise its members of their *General Motors* (373 U.S. 734 (1963)), and *Beck* (487 U.S. 735 (1988)) rights, it does not breech its duty of fair representation by negotiating a union security clause that tracks that statutuory language of Section 8(a)(3), i.e., uses the term "Membership" without expressly explaining to the employees their *General Motors* and *Beck* right. Thus, the use of that language would not make such a union-security clause illegal on its face. *Assn. for Retarded Citizens* (*Opportunities Unlimited)*, 327 NLRB 463 (1999).

Contracts containing ambiguous though not clearly unlawful union-security provisions bar an election in the absence of a determination of illegality as to the provision involved by the Board or a Federal court pursuant to an unfair labor practice proceeding.

In this connection, the Board has had occasion to distinguish *Paragon Products Corp*., supra, and also *St. Louis Cordage Mills*, supra, from circumstances which involved an ambiguity existing "as to the extended coverage of the contract'' in *Post Houses,* 173 NLRB 1320 (1969). The Board held in *Post Houses* that the ambiguity "must be resolved by considering the intent and practice of the contracting parties,'' relying therefore on such evidence in arriving at a determination that a contract was not a "members only'' contract.

This approach, however, is *not* used in cases involving determination as to the validity of union-security provisions. As we have indicated at the outset of this discussion, contracts containing ambiguous union-security (though not clearly unlawful) provisions are *not* litigated in representation proceedings and do bar an election. A similar result is reached where the issue is whether a seniority provision renders a contract ineffective as a bar. This determination, too, "depends on whether the provision was unlawful on its face, as the Board will not admit extrinsic evidence in a representation proceeding to establish its unlawful nature.'' *St. Louis Cordage Mills*, supra at 982. The Board has stated that it would view the contract itself and that no testimony or evidence relevant only to the practice under the contract would be admissible in a representation proceeding. See discussion in *Peabody Coal Co.,* 197 NLRB 1231 (1972).

When one article of a contract requires certain employees to become and remain members of the union after 3 months' service, a clause stating that these employees will receive a pay increase after 3 months' service if they join the union is not clearly unlawful, and the fact that an ambiguity is present does not, consistent with *Paragon Products*, remove the contract as a bar. *H. L. Klion, Inc*., supra at 660.

It is clear, of course, that a contract containing an unambiguous closed-shop clause does not bar a petition. *Horizon House 1*, *Inc*., 151 NLRB 766 (1965). Similarly, when a contract shows on its face that it is retroactively effective and that its grace period is geared to that effective date, and thereby fails to accord nonmember incumbent employees the required 30-day grace period following the date of its execution, it is not a bar. *Standard Molding Corp*., 137 NLRB 1515, 1516 (1962). The Board, in arriving at its conclusion, stated it was therefore "a provision incapable of a lawful interpretation and does not bar the instant petition.'' But in *Federal Mogul Corp*., 176 NLRB 619 (1969), the Board found that it was clear "from the terms of the contract itself'' that it was not retroactively effective. Accordingly, *Standard Molding* was inapplicable and, as the union-security provision of the contract was "not clearly unlawful on its face,'' it operated as a bar to a petition which was untimely filed after its execution date.

Where a union-security contract is renegotiated during its term with a retroactive effective date, the new contract will operate as a bar to a petition. As the terms of the contracts overlap and coverage under lawful union-security clauses is continuous, it cannot be said that the current contract specifically withholds from incumbent nonmembers and/or new employees the statutory 30-day grace period. *Weyerhaeuser Co*., 142 NLRB 702 (1963). A union-security clause requiring employees, upon employment, to sign a union membership application to become effective 30 days after date of hiring is unlawful. It denies to employees the 30-day grace period during which they may consider the matter of joining the union. *Sentry Investigation Corp*., 198 NLRB 1074 (1972).

A contract clause requiring all employees to pay, in addition to initiation fees and dues, "assessments [not including fines and penalties]'' is unlawful, since "assessments'' are not included within the meaning of the term "periodic dues'' as used in Section 8(a)(3) of the Act. *Santa Fe Trail Transportation Co*., 139

NLRB 1513 (1962). Compare *Suffolk Banana Co.,* 328 NLRB 1086 (1999), bar status not lost because the contract did not require payment of assessments.

On the other hand, a contract requiring employees to become and remain union members in accordance with the union's constitution and bylaws is lawful as such a clause may be interpreted to require no more than the tender of periodic dues and initiation fees. *Stackhouse Oldsmobile*, 140 NLRB 1239 (1963).

A contract clause conditioning the relative seniority standing of supervisors returning to that unit upon the quantum of payment of the equivalent of union dues during a period when such employees were outside the unit is clearly unlawful and, therefore, renders the contract inoperable as a bar. *Steelworkers Local 1070*, 171 NLRB 945 (1968). The same finding was made in *Pine Transportation*, 197 NLRB 256 (1972), where the objectionable clause conditioned retention and further accumulation of seniority by employees in or promoted outside the bargaining unit upon maintenance of membership.

Although the Board has addressed the effect of a savings clause on the enforcement of a contract under unfair labor practice law (compare *South Alabama Plumbing*, 333 NLRB 16 (2001); *Joint Council of Teamsters Local 42,* 248 NLRB 808, 816 fn. 28 (1980)), it has not clearly stated what effect a savings clause would have on whether the contract is a bar in a representation case. See, e.g., *Four Seasons Solar Products Corp*., 332 NLRB 67, 69 fn. 8 (2000), where the Board found it unnecessary to reach this issue.

9-720 Checkoff Provisions

347-4040-6750

536-2554-2500

725-6733-8045

The lead case for the impact of checkoff provisions is *Gary Steel Supply Co*., 144 NLRB 470 (1963). In that case, the Board codified its rules in relation to contracts containing checkoff provisions.

Section 302 of the Act provides that an employer may deduct union membership dues from wages of employees only if "the employer has received from each employee, on whose account such deductions were made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.'' However, a contract will not lose its effectiveness as a bar to a representation proceeding simply because it contains a checkoff provision which fails to spell out the requirements of the proviso to Section 302 quoted above.

This rule does not apply to a checkoff provision, which is either (a) unlawful on its face, or (b) found to be illegal in an unfair labor practice proceeding or in a proceeding initiated by the Attorney General. *Gary Steel Supply Co*., supra at 472–473 fn. 10. The Board reiterated its holding in *Paragon Products Corp.*, supra, that no testimony or evidence will be admissible in a representation proceeding when the testimony or evidence is only relevant to the question of the practice under a contract urged as a bar to the proceeding.

In *American Beef Packers*, 169 NLRB 215 (1968), the following contract clause was the subject of a contract-bar issue:

> During the period of this agreement, the Company shall deduct, as to each employee who shall authorize it in writing in the appropriate form or whose valid and effective authorization is now on file with the Company, and for so long as such authorization shall remain valid or effective, from the first pay payable to each member each month, the regular monthly union dues and the initiation fee of the Union and promptly remit the same to Arthur L. Morgan.

It was contended that this provision for employer payments to an individual representative of his employees was a misdemeanor under Section 302 of the Landrum-Griffin Act of 1959, and the checkoff clause therefore rendered the contract no bar. Applying *Gary Steel*, the Board held that the checkoff provision was not unlawful under the standards of that case and that the contract operated as a bar. "Such a contract,'' said the Board in the language of *Gary Steel*, "will be considered effective as a bar to a representation proceeding, even though it contains a checkoff provision which fails to spell out the requirements of the proviso to Section 302(c) (4) of the Act, unless the checkoff provision is either unlawful

on its face or has been otherwise determined to be illegal in an unfair labor practice proceeding or in a proceeding initiated by the Attorney General.'' See also *General Electric Co.*, 173 NLRB 511 (1969).

9-800 Racial Discrimination in Contracts

347-4040-3333-3367

Contracts which discriminate between groups of employees on racial lines do not constitute a bar to an election. *Pioneer Bus Co*., 140 NLRB 54 (1963).

Consistent with decisions by the courts in other contexts condemning governmental sanction of racially separate grouping as inherently discriminatory (see, for example, *Brown v. Board of Education*, 349 U.S. 294 (1955)), the Board does not permit its contract-bar rules to be utilized to shield such contracts from otherwise appropriate election petitions. Thus, when the bargaining representative of employees in an appropriate unit executes separate contracts, or for that matter a single contract which discriminates between groups of employees on the basis of race, such contracts do not operate as a bar.

In *Pioneer Bus*, the employer met separately with representatives of a group composed exclusively of white employees and another group consisting entirely of black employees—both groups covering the same classifications—and executed separate contracts with each. While the contracts were executed on the same dates and generally contained identical terms and conditions of employment, separate seniority lists were maintained within each unit. On these facts, since the two contracts divided the employees into two separate bargaining units solely on considerations of race, they were removed as a bar.

In *Safety Cabs*, 173 NLRB 17 (1969), separate collective-bargaining agreements, entered into by a single employer on separate dates and with different terms for black drivers at one company and for white drivers at another, were found to constitute separate bargaining units essentially based on race. This was the type of bargaining history "established and continued on a racial basis, the validity of which the Board could not accept as a factor in determining the scope of an appropriate bargaining unit.'' For this reason, the Board in an earlier case involving the same companies (*New Deal Cab Co*., 159 NLRB 1838 (1966)) declined to accord any weight to the extensive bargaining history of separate units "essentially based on race'' in unit determination. In *Safety Cabs* the Board concluded that contracts thereafter executed which separated employees on racial lines could not bar a petition for a combined unit of both companies.

Significantly, the Board rejected the contention, inter alia, that segregation was inherent in and a reflection of the history of the community in which the parties functioned as a justification for separate units and for upholding the separate contracts as a bar. "The fact that the parties may not have caused the racial segregation,'' observed the Board, "does not make its perpetuation less invidious.''

Although it did not deal with contract bar issues, the Board's decision in *Glass Bottle Blowers, Local 106 (Owens-Illinois)*, 210 NLRB 943 (1974), would suggest the same result where there is gender discrimination.

9-900 Contracts Proscribed by Section 8(e)

347-4040-6775

Section 8(e) makes it an unfair labor practice for any labor organization and any "employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.'' The contract proscribed is commonly known as a hot cargo assessment.

A proviso to Section 8(e) specifically states that nothing in the above subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating "to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

In *Food Haulers*, 136 NLRB 394, 395–396 (1962), a contract asserted as a bar contained the following provision:

> It shall not be the duty of any employee nor shall any employee at any time be required to cross a picket line and refusal of any employee at any time to cross a picket line shall not constitute insubordination nor cause for discharge or disciplinary action.

It was contended that this contract clause was unlawful under Section 8(e) of the Act and that the contract was therefore no bar. The Board rejected this contention, holding that a hot cargo clause, although unlawful, "does not in any sense act as a restraint upon an employee's choice of a bargaining representative,'' and, accordingly, does not remove the contract as a bar. In arriving at this result the Board reasoned as follows:

> Thus, Section 8(e) provides that any contract or agreement containing an unlawful "hot cargo'' provision "shall be to such extent unenforceable and void.'' In an unfair labor practice proceeding, if the Board found after litigation that a disputed clause violated Section 8(e), it would not and could not set aside the entire contract but only the unlawful clause. Yet . . . in a representation proceeding where the issue of legality of an alleged "hot cargo'' clause is collateral at best, the entire contract would in effect be set aside [if found no bar] on a finding that the contract contained a "hot cargo'' provision. We can perceive no rational basis for a sanction so much more drastic in a representation than in an unfair labor practice proceeding, even assuming that the Board has to power so to do. In fact, such a drastic remedy seems to be inconsistent . . . with the stated purport of Section 8(e).

The Board distinguished *C. Hager & Sons Mfg. Co*., 80 NLRB 163 (1949), in which it held that it would not find a contract a bar which contained an unlawful union-security clause because the "existence of such a provision acts as a restraint upon those desiring to refrain from union activities within the meaning of Section 7 of the Act.'' A "hot cargo'' clause, it stated in *Food Haulers*, "although unlawful, does not in any sense act as a restraint upon an employee's choice of a bargaining representative.'' See also *Four Seasons Solar Products Corp.,* 332 NLRB 67 (2000).

9-1000 Special Statutory Provisions as to Prehire Agreements

347-4040-5080

90-7550 et seq.

Section 8(f)(1), added by the 1959 amendments to the Act, provides that it shall not be an unfair labor practice for an employer engaged primarily in the construction industry to make an agreement with a union covering construction employees, even though the union's majority status has not been established prior to the making of the agreement.

However, a proviso to Section 8(f) states that, when the majority status of the contracting union has not been established pursuant to Section 9, an agreement lawful under Section 8(f) will not serve as a bar to a petition filed pursuant to Section 9(c) or Section 9(e). Accordingly, a prehire contract made lawful by Section 8(f) does not constitute a bar to a petition. *John Deklewa & Sons*, 282 NLRB 1375 (1987), and *S. S. Burford, Inc*., 130 NLRB 1641, 1642 (1961).

Section 8(f)(1) does not mean that a union may acquire representative status only by certification; voluntary recognition is an equally suitable method for determining whether the proviso to Section 8(f) applies. Thus, a contract executed pursuant to voluntary recognition, when a union demonstrates its majority "in a manner recognized as valid under Section 9(a),'' remains bar despite the proviso to Section 8(f). *Island Construction Co*., 135 NLRB 13 (1962). *John Deklewa & Sons*, supra at 1384. The Board explained that a union obtains exclusive representative status by establishing that a majority of the employees in an appropriate unit have selected it as their representative, either in a Board-conducted election pursuant to Section 9(c), or by other voluntary designation pursuant to Section 9(a). A union selected under either Section 9(c) or Section 9 (a) is entitled to recognition. Accordingly, the Board, saw no justification to limit Section 8(f)(1) as meaning that the union's representative status may only be acquired by certification, or that recognition accorded under Section 9(a) is not an equally suitable method for determining whether the proviso to Section 8(f) applies. And where the relationship does convert from 8(f) to 9(a), the contract will become a bar to a rival petition. *VFL Technology Corp*., 329 NLRB 458 (1999).

For a discussion of these principles in an 8(a)(5) proceeding, see *Goodless Electric Co.*, 321 NLRB 64 (1996).

In *Central Illinois Construction*, 335 NLRB 717 (2001), the Board took the "occasion" to explain how an 8(f) representative can become a 9(a) representative through an agreement with the employer. Specifically the Board stated that written contract language must unequivocally show:

(1) that the union requested recognition as the majority representative of the unit employees.
(2) that the employer granted such recognition; and
(3) that the employee's recognition was based on the union showing, or offer to show, substantiation of its majority support.

On the other hand, strict requirements for the showing of majority status apply. *J & R Tile*, 291 NLRB 1034 (1988); *American Thoro-Clean Ltd.*, 283 NLRB 1107 (1987); and *Golden West Electric*, 307 NLRB 1494 (1992). And in *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000), a divided Board remanded an RD petition to the Regional Director to take evidence as to whether or not the union represented a majority when the cmployer extended 9(a) recognition. Compare *Oklahoma Installation Co*., 325 NLRB 741 (1998), where the Board found that a letter of assent that states that the union has submitted and the employer is satisfied that the union represents a majority of the unit employees.

The mere fact that a construction industry bargaining relationship was in existence prior to the enactment of Section 8(f) does not support an inference that the parties must have initiated their relationship under Section 9(a). *Brannan Sand & Gravel*, 289 NLRB 977 (1988). Compare *Casale Industries*, 311 NLRB 951 (1993), where the Board held that it would not permit a challenge to 9(a) status where that status is granted and more than 6 months passed without a charge or petition. At footnote 18 of *Casale*, the Board harmonized this decision with its decisions in *J & R Tile* and *Brannan Sand*, supra. Compare *H.Y. Floors,* supra, where the petition was filed less than 6 months after the purported 9(a) recognition. See also *Saylor's, Inc.,* 338 NLRB 330 (2002); *Reichenbach Ceiling & Partition Co.*, 337 NLRB 125 (2001); *Verkler, Inc.,* 337 NLRB 128 (2001); *Pontiac Ceiling & Partition Co.,* 337 NLRB 120 (2001)**.**

The decision in *Island Construction* is distinguishable from the Board's holding in *S. S. Burford, Inc*., supra. In the latter, the contract was held not to be a bar since it had been entered into as a prehire contract; i.e., at a time when the contracting unions had not and could not have demonstrated their majority status under Section 9 of the Act.

In one case the Board has suggested that it would not permit a carryover of 9(a) status where the units were substantially altered and expanded by subsequent agreements. *James Julian, Inc.*, 310 NLRB 1247 fn. 1 (1993).

For discussions of other prehire-8(f) issues, see sections 5-210 (Showing of Interest), 9-211 (Contract Bar), 10-500 (Lawful Recognition), 10-600 (Expanding Unit), 14-350 (Multiemployer, Single Employer, and Joint Employer Units), and 15-130 (Construction Units).