23. VOTING ELIGIBILITY

Questions affecting the eligibility of employees to vote in a Board election arise either at the initial hearing, if one is held, or in the context of an election agreement, or, in any event, by way of challenges at the polling place at the time of the election.

We shall treat here voting eligibility in general. The rules governing eligibility are spelled out and illustrations are given of special formulas used in industries and situations that are not susceptible to the application of these rules. The subject of eligibility lists, including the *Norris-Thermador* rule (*Norris-Thermador Corp.,* 119 NLRB 1301 (1958)), is also discussed. Other eligibility questions are treated in the chapter on Categories Governed by Board Policy, because these pertain basically to unit inclusion or exclusion issues, and there is therefore no reason for repeating this subject matter here.

23-100 Eligibility in General

23-110 The General Rule

362-3312

362-6706

362-6772-6700

362-6766

Voters must be employees within the meaning of the Act. Applicants are considered employees (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)), but unpaid volunteers are not. *Seattle Opera Assn.,* 331 NLRB1072 (2000); and *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999). Aliens, whether legally or legally in the United States are eligible to vote. *Sure Tan v. NLRB*, 467 U.S. 883 (1984).

To be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date, which is normally during the the payroll period immediately preceding the date of the direction of election, or election agreement, *and* (2) in employee status on the date of the election. See, for example, *Plymouth Towing Co*., 178 NLRB 651 (1969); *Greenspan Engraving Corp.,* 137 NLRB 1308 (1962); *Gulf States Asphalt Co.,* 106 NLRB 1212 (1953); *Reade Mfg. Co.,* 100 NLRB 87 (1951); *Bill Heath, Inc.,* 89 NLRB 1555 (1949); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993). Individudals who were scheduled to become supervisors after the date of the election were eligible to vote because they were employees during the eligibility period. *Nichols House Nursing Home*, 332 NLRB 1428 (2000).

As a general rule, the Board does not determine eligibility based on events occurring after an election. *Dean & Deluca New York, Inc.,* 338 NLRB 1046 (2003); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 820 fn. 15 (2003).

The employee must be employed and working on the established eligibility date, unless absent for reasons specified in the direction of election. See, for example, *Roy N. Lotspeich Publishing Co*., 204 NLRB 517 (1973). Those reasons are illness, vacation, temporary layoff status, and military service. See also *NLRB v. Dalton Sheet Metal Co*., 472 F.2d 257 (5th Cir. 1973); *Agar Supply Co.*, 337 NLRB 1267 (2002) (transfer to light duty work did not remove eligibility); *Amoco Oil Corp*., 289 NLRB 280 (1988); *Schick, Inc*., 114 NLRB 931 (1956); *Barry Controls*, 113 NLRB 26 (1955). In *Jam Productions,* 338 NLRB 1117 (2003), the Board overruled challenges to voters based on loss of business after the elibility date. The Board rejected the employers' contention that the employees become casual and thus ineligible.

The general rule is qualified by exceptions applicable to certain classes or groups of employees and to special circumstances. These are treated under separate headings.

23-111 Newly Hired or Transferred Employees

362-6766-6000

In order to be eligible to vote, an employee must be "hired and working." Thus, employees who are hired on the eligibility date but do not report for work until a later date are ineligible to vote. *Roy N. Lotspeich Publishing Co.,* 204 NLRB 517 (1973); *Greenspan Engraving Corp*., 137 NLRB 1308, 1311 (1962). Similarly, employees who have been hired and are participating in "training, orientation, and other preliminaries" are not considered to be working and are ineligible. *NLRB v. Tom Wood Datsun*, 767 F.2d 350 (7th Cir. 1985); *Speedway Petroleum*, 269 NLRB 926 fn. 1 (1984); *F & M Importing Co*., 237 NLRB 628 (1978). But see *CWM, Inc.,* 306 NLRB 495 (1992). An employer who is transferred from nonunit work to unit work prior to the eligibility date is eligible to vote. *Meadow Valley Contractors*, 314 NLRB 217 (1994). But an employee transferred out of the unit before the election and who has no reasonable expectancy of returning to the unit is not eligible. *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997).

See *Dynacorp/Dynair Services*, 320 NLRB 120 (1995), for a recent summary of the cases on the eligibility of recently hired employees. See also *Pep Boys–Manny, Moe & Jack*, 339 NLRB 421 (2003).

An employee employed on the date of the election and otherwise meeting this test is eligible to vote despite an intention to quit after the election. *St. Elizabeth Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983); *NLRB v. Hillview Health Care Center*, 705 F.2d 1461, 1471 (7th Cir. 1983); *Harold M. Pitman Co*., 303 NLRB 655 (1991); *Personal Products Corp*., 114 NLRB 959 (1955); *Whiting Corp*., 99 NLRB 117 (1951), revd. on other grounds 200 F.2d 43 (7th Cir. 1952). Compare *Fairview Hospital*, 174 NLRB 924 (1969), enfd. 75 LRRM 2839 (7th Cir. 1970), in which the Board ruled ineligible an employee whose discharge was effected on the day of the election. See also *Nichols House Nursing Home*, supra at 23 (individual scheduled to be supervisor found eligible).

23-112 Voluntary Quits

362-6706

362-6772

Employees who quit their employment, and stop working on a date prior to the date of the election, are not eligible to vote. *Dakota Fire Protection Inc.*, 337 NLRB 92 (2001); *Orange Blossom Manor*, 324 NLRB 846 (1997), and *Birmingham Cartage Co.,* 193 NLRB 1057 (1971). Compare *NLRB v. General Tube Co*., 331 F.2d 751 (6th Cir. 1964), in which employee eligibility was grounded on the employees actually having performed work on the day of the election. In *Roy N. Lotspeich Publishing Co*., 204 NLRB 517 (1973), an employee who did not work on election day was held ineligible to vote, even though he was paid for the day and was considered to be on the payroll and to be employed on election day. Where an employee terminated his employment in the middle of the payroll period of eligibility, but was rehired and working before the election date, the Board found him to be an eligible voter. But see *Apex Paper Box*, 302 NLRB 67 (1991). Payroll eligibility is conferred by some work during the payroll eligibility period. *Leather by Grant*, 206 NLRB 961 (1973).

23-113 Discharged Employees

362-6766-7000

362-6766-8000

In *Choc-Ola Bottlers*, 192 NLRB 1247 (1971), an employee had been discharged for cause on the day of the election. The Board, applying the general rule described at the beginning of this chapter, found the requirements of the rule satisfied and ruled that he was eligible to vote. The Seventh Circuit disagreed, holding that on the employee's removal for cause "he was no longer

sufficiently concerned with the terms and conditions of employment in the unit to warrant his participation in the representation election." *Choc-Ola Bottlers v. NLRB*, 478 F.2d 461 (7th Cir. 1973). See also *Plymouth Towing Co.,* 178 NLRB 651 (1969); compare *Ely & Walker*, 151 NLRB 636 (1965). See also *Walter Packing*, 241 NLRB 131 (1979), in which the Board applied the *Lotspeich* and *Choc-Ola* rules in a discharge case.

In *Community Action Commission,* 338 NLRB 664 (2003), the Board sustained the challenge to a ballot of an employee who was discharged after the eligibility date but before the election even though there was a "theoretical possibility" that the discharge might be reversed.

Employees allegedly discharged for discriminatory reasons in violation of Section 8(a)(3) who, pursuant to an informal settlement agreement, are placed on a preferential hiring list and can be said to have a reasonable prospect of recall during the next season are eligible to vote. *Koehring Co*., 193 NLRB 513 (1971). As a general rule, a discharge is presumed to be for cause unless a charge has been filed and is pending concerning the discharge. In such a case, the employee votes under challenge. *Dura Steel Co*., 111 NLRB 590 (1955). This same policy applies with respect to pending grievances, *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962), and other litigation where reinstatement is possible. *Machinists*, 159 NLRB 137 (1966). See also *Curtis Industries*, 310 NLRB 1212 (1993), applying this same principle in the case of strikers who the employer contends are permanently replaced but who are the subject of litigation. The Board noted in *Curtis* and reaffirmed in *Morgan Services, Inc.,* 339 NLRB 463 (2003); and *Mono-Trade Co*., 323 NLRB 298 (1997), that it would wait a reasonable period of time for completion of the litigation or arbitration.

See also section 23-300.

23-114 Employees on Sick Leave

362-6766-2000 et seq.

An employee who at the time of the election had the status of an employee on sick leave was regarded as sharing and retaining a substantial interest in the terms and conditions of employment, particularly since the employer considered him an employee by accepting his health insurance premiums and by not removing his name from the payroll records and seniority list. *Delta Pine Plywood Co*., 192 NLRB 1272 fn. 1 (1971). The general rule regarding employees on sick leave is that they are presumed to remain in that status until recovery, and a party seeking to overcome that presumption must make an affirmative showing that the employee has resigned or been discharged. *Edward Waters College*, 307 NLRB 1321 (1992); *Atlantic Dairies Cooperative*, 283 NLRB 327 (1987); *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Sylvania Electric Products*, 119 NLRB 824 (1958); *Wright Mfg. Co*., 106 NLRB 1234 (1953). Recently in a series of cases, a divided Board reaffirmed the general rule. *Agar Supply Co.,* 337 NLRB 1267 (2002); *Super Valu, Inc*., 328 NLRB 52 (1999); *Pepsi-Cola Co*., 315 NLRB 1322 (1995); *Associated Constructors*, 315 NLRB 1255 (1995); *Vanalco, Inc*., 315 NLRB 618 (1994); and *Thorn Americas, Inc.,* 314 NLRB 943 (1994). See also *A & J Cartage*, 309 NLRB 263 (1992), which requires that the employee have done unit work before going on sick leave.

23-115 Laid-Off Employees

The test applicable to the eligibility of laid-off employees is "whether there exists a reasonable expectancy of employment in the near future." *Higgins, Inc*., 111 NLRB 797 (1955); and *Madison Industries*, 311 NLRB 865 (1993). Thus, although an employee's termination notice stated that the layoff was temporary and the employee considered herself subject to recall, an absence of objective evidence in support of a finding of temporary layoff and the presence of countervailing evidence resulted in a finding that the employee had no reasonable expectancy of returning to work and was therefore ineligible to vote in the election. *Sierra Lingerie Co.,* 191 NLRB 844 (1971). In *Apex Paper Box*, 302 NLRB 67 (1991), supra, the Board sustained the challenges to ballots of three employees who were laid off prior to the payroll eligibility date and

were recalled after that date but prior to the election. Note that this case summarizes the case law on the laid-off issue. See also *MJM Studios of New York*, 338 NLRB 980 (2003); and *Dredge Operators*, 306 NLRB 924 (1992), where the temporary layoff rule was applied in the context of a mail ballot election.

Eligibility is assessed based on the facts existing on or before the eligibility date, not on the date of the election. Thus, employees who had been recalled before the election were considered ineligible because as of the eligibility date, the Board found that they did not have a reasonable expectancy of recall. *Osram Sylvania, Inc.,* 325 NLRB 758 (1998).

A mere assertion of permanent layoff, in the absence of any supporting evidence or a specific offer of proof, and especially in the face of subsequent recall, may be insufficient to rebut the presumption that layoffs are temporary. *Intercontinental Mfg. Co*., 192 NLRB 590 (1971).

See *Nordam, Inc.,* 173 NLRB 1153 (1969), for a factual analysis of evidence in determining whether at the time of layoff the employees in question "had a reasonable expectancy of reemployment in the near future." See also *D. H. Farms Co*., 206 NLRB 111 (1973); and *Tomadur, Inc*., 196 NLRB 706 (1972).

23-116 Retirees/Social Security Annuitants

Retired employees are not employees within the meaning of the Act. See *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), and *Mississippi Power Co*., 332 NLRB 530 (2000). However employees who are collecting a Social Security annuity and limit their working term so as not to decrease that annuity are not, solely for that reason, ineligible to vote in an election. *Holiday Inns of America*, 176 NLRB 939 (1969).

23-120 Economic Strikers, Locked Out Employees, and Replacements

362-6766-4500

362-6778-6700

362-6780

362-6784-6700

Section 2(3) of the Act provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he or she has not obtained regular and substantially equivalent employment. That cessation must be in concert with other employees. *Lin Rogers Electrical Contractors*, 323 NLRB 988 (1997). The status of economic strikers as eligible voters was dealt with in the 1959 amendments to the Act by adding the following provision to Section 9(c)(3):

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

The effect of this amendment was to eliminate the former voting disability of economic strikers and, at the same time, to preserve the concurrent eligibility of permanent replacements for such strikers. *W. W. Wilton Wood, Inc.,* 127 NLRB 1675 (1960); *Kingsport Press*, 146 NLRB 1111 (1964); see also 105 Cong. Rec. 6396 (1959). The Board may expedite the processing of the petition in order to conduct the election within the 12 months. *Kingsport Press*, supra; *Northshore Fabricators & Erectors*, 230 NLRB 346 (1977.

The rules with respect to the voting rights of economic strikers may be summarized as follows:

a. Strikers are presumed to be "economic strikers" unless they are found by the Board to be on strike because of unfair labor practices on the part of the employer. *Bright Foods*, 126 NLRB 553 (1960); see also *Times Square Stores Corp.,* 79 NLRB 361 (1948).

b. Economic strikers are presumed to continue in that status and thus are eligible to vote under Section 9(c)(3). To rebut the presumption of eligibility, the party challenging must affirmatively show by objective evidence that the economic strikers have abandoned their interest in their struck jobs. *Pacific Tile & Porcelain Co.,* 137 NLRB 1358 (1962). The nature of the evidence which might rebut the presumption, said the Board in that case, would he determined on a case-by-case basis, but it cautioned that "acceptance of other employment, even without informing the new employer that only temporary employment is sought, would not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote." See also *National Gypsum Co.,* 133 NLRB 1492 (1961). See also *Omahaline Hydraulics Co*., 340 NLRB No. 104 (2003) (employer bears burden of establishing that jobs have been eliminated and did not do so here).

In *Globe Molded Plastics Co*., 200 NLRB 377 (1972), economic strikers had been engaged in their strike for 3 months before the election. Notwithstanding an alleged depressed condition in the plastics industry, there was no contention or evidence that their work had been permanently abolished or that they had abandoned interest in their jobs. The fact that the employer had lost certain work or that obtaining new customers was difficult, possibly because of the effectiveness of the strike, was not the type of permanent abolition or elimination of jobs for economic reasons which warranted disenfranchising strikers otherwise eligible to vote. Compare *Lamb-Grays Harbor Co*., 295 NLRB 355 (1989), in which the elimination of jobs was predicated on valid substantial nonstrike-related economic reasons. In these circumstances the affected strikers were found ineligible. See also *St. Joe Minerals Corp*., 295 NLRB 517 (1989).

In *Roylyn, Inc*., 178 NLRB 197 (1969), the issue was whether the action of certain employees in signing a quit slip in order to obtain vacation pay was sufficient to show that economic strikers abandoned their interest in their struck jobs and thus lost their status of economic strikers for purposes of eligibility. The Board found on the facts in the case that the strikers did not abandon their employee status and did not sign the quit slips with that intent, and the presumption that an economic striker remains in that status had therefore not been rebutted. See also *P.B.R. Co*., 216 NLRB 602 (1975); and *Virginia Concrete Co.,* 316 NLRB 261 (1995).

Mere acceptance of a job with better benefits does not establish that a striker has forfeited his eligibility. *Akron Engraving Co.*, 170 NLRB 232 (1968); *Pacific Tile & Porcelain Co*., 137 NLRB 1358 (1962), supra at 1362–1363.

For thorough treatment of individual issues revolving around the question whether the presumption of eligibility has or has not been rebutted in the light of the principles here under discussion, see *Q-T Tool Co.*, 199 NLRB 500 (1972). See also *NLRB v. Woodview Calabasa Hospital*, 702 F.2d 184 (9th Cir. 1983).

c. Replaced strikers are not eligible to vote in an election held more than 12 months after the commencement of an economic strike. Conversely, if they have not been replaced they are eligible to vote. *Erman Corp.,* 330 NLRB 95 (1999). Similarly, where the election directed will be conducted more than a year from the commencement of the economic strike, only those replaced former economic strikers who are actually reinstated by the eligibility date of the election are entitled to vote. *Wahl Clipper Corp*., 195 NLRB 634 (1972); *Gulf States Paper Corp*., 219 NLRB 634 (1975). *Wahl Clipper* was reaffirmed by a divided Board in *Thoreson-McCosh*, *Inc*., 329 NLRB 630 (1999). But, if the election is a rerun, the replaced strikers may vote even if it is being conducted more than 12 months after the strike began. *Jeld-Wen of Everett, Inc.,* 285 NLRB 118 (1987).

In *Brooks Research & Mfg.,* 202 NLRB 634 (1973), the Board rejected a contention that economic strikers should be equated with laid-off employees. "The reinstatement rights of economic strikers under [*NLRB v.*] *Fleetwood Trailer* [*Co*., 389 U.S. 375 (1967)] and *Laidlaw* [*Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969)], are statutory as distinguished from the rights of laid-off employees. A layoff constitutes a discontinuance of work for an employer which does not rise to the level of a lawful economic strike, participation in which is

protected under Sections 7 and 13 of the Act." Distinguishing *Wahl Clipper*, supra, the Board pointed out that there it held only that economic strikers were not eligible to vote in a Board election after 1 year from the commencement of an economic strike and its decision was grounded on a "construction of specific language in Section 9(c)(3) concerning the voting eligibility of economic strikers." Making this distinction, the Board declined to place a time limit on the reinstatement rights of economic strikers.

In *Curtis Industries*, 310 NLRB 1212 (1993), the Board held that strikers who are permanently replaced but who are contesting that action in litigation, shall vote by challenge ballot. For a related discussion see section 23-113, supra.

d. The Board frequently does not resolve eligibility questions of this type unless the ballots are determinative. *Universal Mfg. Co*., 197 NLRB 618 (1972).

e. Replaced former economic strikers are eligible to vote in an election conducted within 12 months of the commencement of the strike whether or not the strike has terminated. *Tractor Supply Co*., 235 NLRB 269 (1978).

f. The Board presumes that replacements hired for strikers are temporary employees in all Board cases—representation and unfair labor practice. *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995). Employees hired subsequent to a strike and who are told by the employer when hired that his job is "permanent" are permanent replacements unless the presumption of permanence is rebutted. *Akron Engraving Co.,* 170 NLRB 232 (1968), supra; *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962), supra.

g. Permanent replacements are eligible to vote where a strike is called after the eligibility date and they are employed on the date of the election. *Macy's Missouri-Kansas Division*, 173 NLRB 1500 (1969).

In *St. Joe Minerals Corp*., 295 NLRB 517 (1989), the Board found that "cross overs" (former strikers who return to work) are considered permanent replacements if they are returned to positions other than those they held prior to the strike.

Note—Temporary replacements are not eligible to vote. See *Harter Equipment*, 293 NLRB 647 (1989), involving replacements for locked out employees.

Permanent replacements hired subsequent to the eligibility period to replace economic strikers who have gone on strike *after* the direction of the election are eligible to vote. *Tampa Sand & Material Co*., 129 NLRB 1273 (1961). However, permanent replacements who are hired subsequent to the eligibility period to replace economic strikers who have gone on strike *prior* to the direction of election are not eligible to vote. *Greenspan Engraving Corp*., 137 NLRB 1308 (1962). In both cases, the Board emphasized that the "timing of the strike" was the controlling factor in determining whether permanent replacements for economic strikers were entitled to vote in an election. See also *Famous Industries*, 220 NLRB 484 (1975).

h. Issues as to voting eligibility of strikers and replacements are normally deferred until the election for disposition by way of challenges. *Bright Foods*, 126 NLRB 553 (1960); *Pipe Machinery Co*., 76 NLRB 247 (1948).

i. In the unique situation where economic strikers and seasonal employees are involved the Board approved bifurcated election which assured that the strikers could vote before the 12-month period expired and the seasonal employees could vote later. *Diamond Walnut Growers*, 308 NLRB 933 (1992). Note also that the Board will bypass the blocking charge rule in order to hold an election within 12 months of the onset of an economic strike so as not to exclude strikers. *American Metal Products*, 139 NLRB 601 (1962).

j. The 12-month restriction also applies in union deauthorization (UD) elections. *Carol Cable Co. West*, 309 NLRB 326 (1992).

23-125 Prisoners and Work Release Inmates

Jailed prisoners on work release programs have been found to share a sufficient community of interest with employees in the bargaining unit to vote. *Winsett-Simmonds Engineers, Inc*., 164

NLRB 611 (1967). See also *Speedrack Products Group Limited*, 325 NLRB 609 (1998). See also section 12-210.

23-200 Eligibility Dates

23-200

362-3312

As noted above, the general rule is that an employee must be employed both on the eligibility date and the date of the election. The eligibility date is usually described in terms of an employer's payroll period which ends on a date sometime prior to the election. In at least one case the Board has directed a second election where the eligibility date used was not the date previously established. The Board noted that the error resulted in an ineligible ballot being cast that could have affected the results. *Active Sportswear Co*., 104 NLRB 1057 (1953). In *Jam Productions, Ltd.,* 338 NLRB 1117 (2003), the Board indicated that the hearing officer in a postelection hearing on challenged ballots could consider a loss of business arising after the eligibility date in determining whether the challenged employees status had changed from part time to casual. The Board however overruled the challenge.

23-210 Initial Elections

362-3312

The eligibility period for an election being conducted pursuant to an election agreement should be for the payroll period ending before the date of approval of the election agreement or the Decision and Direction of Election. CHM sections 11086.3 and 11312.1

23-220 Runoff Elections

355-1167-2500

In a runoff election, eligibility is based on the same eligibility date as that used in the original election, but employee status is required on the date of the runoff. See Rules 102.70 and *Lane Aviation Corp*., 221 NLRB 898 (1975). Where, however, there has been a substantial increase in the employee complement since the original election was conducted, the current payroll is used for eligibility purposes. *Interlake Steamship Co*., 178 NLRB 128 (1969). Moreover, where there is a long passage of time after the payroll eligibility date used in a prior runoff election, the eligibility payroll period is the one immediately preceding the date of issuance of the latest notice of election. *Caribe General Electric*, 175 NLRB 773 (1969); *Interlake Steamship Co*., 174 NLRB 308 (1969).

The Board holds that it is an unfair labor practice for an incumbent union to continue to accept recognition between the initial election and a runoff election where it, the incumbent, did not garner enough votes to be on the runoff ballot. *Wayne County Legal Services*, 333 NLRB 146 (2001).

See also section 22-114, supra.

23-230 Rerun Elections

362-3362-5000

Where the Board sets aside a prior election and directs a repeat election, the eligibility period, in the absence of unusual circumstances, is the one immediately preceding the date of the repeat election and not the one established for the first election. *Wagner Electric Corp*., 127 NLRB 1082 (1960); *Great Atlantic & Pacific Tea Co*., 121 NLRB 38 (1958).

See also section 22-120, supra.

23-240 Seasonal Operations

362-3350-2000

370-0750-4900

Where the employer's operations are seasonal, the voting franchise is made available to the largest number of eligible voters by holding the election at or near the seasonal peak among the employees who are employed during the payroll period immediately preceding the issuance of the notice of election. *Kelly Bros. Nurseries*, 140 NLRB 82 (1962); *Toledo Marine Terminals*, 123 NLRB 583 (1959). See also *Dick Kelchner Excavating Co*., 236 NLRB 1414, 1416 (1978); and *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974). Where, however, an employer operates on a year-round basis, is not in a seasonal industry, and its business has several employment peaks, the Board weighs the advantage of an early election, the possibility that more employees may vote at a higher peak of employment, and the relative interest of those employed during the various peaks as determined by their rate of return. Accordingly, the election in such circumstances is held during "the next representative period." *Elsa Canning Co.*, 154 NLRB 1810, 1812–1813 (1965); cf. *Baugh Chemical Co*., 150 NLRB 1034 (1965). Seasonal employees must share a community of interest in order to be included in a unit of permanent employees and the mere happenstance of employment on the eligibility date is not sufficient to permit them to vote. *Seneca Foods Corp*., 248 NLRB 1119 (1980).

The Board has also deferred elections in cases involving universities and colleges until the commencement of fall classes where many unit employees would not be present on campus during the summer months. See, e.g., *Tusculum College*, 199 NLRB 28 (1972).

23-300 Alleged Discriminatees

362-6766-7000

Employees who are the subject of pending unfair labor practice proceedings alleging their unlawful discharge are permitted to vote subject to challenge. *Machinists*, 159 NLRB 137 (1966); *Tetrad Co*., 122 NLRB 203 (1959). See also *Curtis Industries*, 310 NLRB 1212 (1993), involving permanently replaced strikers who are litigating that action under another statute and sections 23-110 and 23-120, supra.

23-400 Special Formulas for Specific Industries

Some industries do not have the kind of steady employment that is characteristic of the mainstream of industrial enterprise. It is therefore necessary to devise an eligibility formula in those industries which will best be tailored to their special needs. Examples, by industry, of special formulas follow.

23-410 Longshore

362-3350-4000

A formula geared to the specific circumstances was evolved based not on the usual payroll period but rather on the basis of employees who worked a specific number of hours during a given year. The formula was predicated on eligibility requirements in connection with fringe benefits; i.e., entitlement to vacation pay and welfare benefits. *New York Shipping Assn*., 107 NLRB 364, 374 (1954); *E. W. Coslett & Sons*, 122 NLRB 961 (1959).

23-420 Construction

362-3350-6000

Eligibility to vote in the construction industry elections is determined by the use of the *Daniel* formula. This formula was announced in two *Daniel Construction Co*. cases, *Daniel Construction Co.,* 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). In 1991 the Board made additional changes in the construction industry formula.

In 1992, the Board reconsidered its *Whitty* decision (*S. K. Whitty & Co.,* 304 NLRB 776 (1991)) and, with slight modification, returned to its *Daniel* policy. See *Steiny & Co.,* 308 NLRB 1323 (1992). See also *Atlantic Industrial Constructors*, 324 NLRB 355 (1997); *Brown & Root, Inc*., 314 NLRB 19 (1994); *Delta Diversified Enterprises*, 314 NLRB 946 (1994); and *Johnson Controls, Inc*., 322 NLRB 669 (1996).

As the Board noted in *Steiny*, the *Daniel* formula does not affect core employees who would be eligible to vote under traditional standards nor does it preclude the parties from a stipulation not to use the *Daniel* formula (fn. 16). *Ellis Electric*, 315 NLRB 1187 (1994). Nor is the formula used for showing-of-interest purposes. *Pike Co*., 314 NLRB 691 (1994). See also section 5-210, supra. But the formula is used in all construction industry elections unless the parties stipulate not to use it. *Signet Testing Laboratories*, 330 NLRB 1 (1999).

In *Wilson & Dean Construction Co*., 295 NLRB 484 (1989), the Board applied the *Daniel Construction* formula in the face of a contention that former employees would not be given preference for jobs under the employer's decision to no longer use the union hiring hall.

Although the Board has utilized special eligibility formulas in the construction industry, the usual requirements are used where the parties do not raise any eligibility issues and the record is insufficient concerning the work history of the employees. However, in this type of situation, former employees who do not qualify under these eligibility requirements may be permitted to vote by challenged ballots. *Queen City Railroad Construction,* 150 NLRB 1679 fn. 3 (1965).

In one unusual case the Board set aside the election because the Region had set out an incomplete *Steiny* formula prompting the employer to provide an erroneous *Excelsior* list and resulting in two eligible employees, not voting. *Atlantic Industrial Constructors,* 324 NLRB 355 (1997).

23-430 Oil Drilling

362-3350-8000

In the oil drilling industry, a voting eligibility formula of 10 days or more work a year had formerly been used. See *Sprecher Drilling Corp.*, 139 NLRB 1009 (1962); *Trade Winds Drilling Co.*, 139 NLRB 1012 (1962); *Fitzpatrick Drilling Co.*, 139 NLRB 1013 (1962). But in *Hondo Drilling Co.*, 164 NLRB 416, 418 (1967), eligibility was limited to all "roughnecks" who had been employed by the employer for a minimum of 10 working days during the 90-calendar-day period preceding the issuance of the direction of election. See also *Loffland Bros. Co.*, 235 NLRB 154 (1978); and *Carl B. King Drilling Co*., 164 NLRB 419, 421 (1967); *NLRB v. Rod-Ric Corp.,* 428 F.2d 948 (5th Cir. 1970).

23-440 Taxicabs

Part-time taxicab drivers who worked at least 2 or more days a week were deemed to have sufficiently substantial interests in the general working conditions of all drivers to justify their eligibility to vote in an election, but part-time drivers who worked 1 day a week or less were held essentially casual and therefore ineligible to vote. *Cab Operating Corp*., 153 NLRB 878, 883–884 (1965). Compare *Jat Transportation Corp*., 128 NLRB 780 (1960).

23-450 On-Call Employees

362-6734

On-call employees—those with no regular schedule of work—are generally considered eligible to vote if they regularly average 4 or more hours of work per week for the last quarter prior to the eligibility date. See *Davison-Paxon Co*., 185 NLRB 21 (1970); and *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994). See also *Trump Taj Mahal Casino*, 306 NLRB 86 (1992), which summarizes the case law as to on-call employees.

For a discussion of appropriate formulae for on-call nurses, see *Sisters of Mercy Health Corp*., 298 NLRB 483 (1990); and *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994).

For a related discussion of on-call employees, see section 20-120.

23-460 Entertainment Industry

362-6734

Stagehands are on-call employees and the irregular pattern of their employment in the entertainment industry prompted the Board to fashion a specific formula for those who have a reasonable expectancy of further employment with the employer. Thus, in *Medion, Inc*., 200 NLRB 1013 (1972), employees who were employed on at least two productions for a minimum of 5 working days in the year preceding the decision were deemed eligible to vote. See also *Julliard School*, 208 NLRB 153 (1974). In *American Zoetrope Productions*, 207 NLRB 621 (1973), the Board eliminated the 5-day requirement on a showing that at that employer most unit jobs lasted only 1 or 2 days. Compare the differing approach to on-call formula to two employers in the entertainment industry─*Julliard School*, supra, an educational institution that conducts performances and *Steppenwolf Theatre Co*, 342 NLRB No. 7 (2004), a professional theater company.The Board has a flexible approach to developing formulas suited to the conditions in different areas of the entertainment industry. See *DIC Entertainment, L.P*., 328 NLRB 660 (1999) (storyboard supervisors in television animation industry).

23-470 On-Call Teachers

362-3350-7000

362-6734

In *Berlitz School of Languages*, 231 NLRB 766 (1977), the Board devised a formula for eligibility of teachers who are called occasionally to teach foreign languages. Drawing on its experience with stagehands, the Board set the standard as being at least 2 days' work during the preceding year.

The above examples are, of course, illustrative only, and by no means exhaustive. They are given to indicate how eligibility formulas are tailored. Different enterprises, even in the same general industry, may be the subject of different formulas. Moreover, there are special formulas for industries not mentioned here which are adapted to the special needs of those operations.

23-500 Eligibility Lists and Stipulations

23-510 Voting List (Excelsior)

362-6708

393-6081-6075-5000

The list of employees who are considered eligible to vote in the election is called the *Excelsior* list. This list is prepared by the employer and is given to the Regional Director within 7 days after the approval of an election agreement or issuance of a decision and direction of election. *Excelsior Underwear*, 156 NLRB 1236 (1966); and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). This list is in turn provided to all parties to the election. (CHM section 11312.2.) The list must include the full first and last names of the employees as well as their addresses. *North Macon Health Care Facility*, 315 NLRB 359 (1994); and *Weyerhaeuser Co*., 315 NLRB 963 (1994).

The procedures for the production and handling of the *Excelsior* list are contained in the CHM section 11312. Failure to comply with the *Excelsior* rule is grounds for setting aside the election when proper objections are filed. A summary of the case law dealing with *Excelsior* objections is contained in section 24-324.

Lists of eligible voters, normally the same lists as constitute the *Excelsior* list, are made available to the parties for inspection and possible challenges. These do not purport to be a final list of all eligibles; challenge procedures guarantee the right of every possible voter to cast a ballot. In these circumstances, the inadvertent omission of a small number of employees from the

eligibility list is not a sufficient basis for invalidating an election. *Jat Transportation Corp.,* 131 NLRB 122 (1961). The burden of checking the accuracy of the list rests with the participating union. *Kennecott Copper Corp*., 122 NLRB 370 (1959). The mere preparation and checking of such a list does not constitute an agreement that precludes the possibility of challenges at the election, either as to names appearing on, or names omitted from, such list. It is regarded as "a guide or a tool the use of which is to facilitate the election procedure." *O. E. Szekely & Associates*, 117 NLRB 42, 44–45 (1957). See also *Cavanaugh Lakeview Farm,* 302 NLRB 921 (1991).

See also section 24-324.

23-520 Stipulated Eligibility Lists (*Norris Thermador*)

362-6703

370-3533-4000

737-7078-5000

To codify its policy, the Board, in *Norris-Thermador*, adopted the policy that parties to a representation proceeding should be permitted definitively to resolve as between themselves issues of eligibility prior to the election if they clearly evidence their intention to do so in writing. Therefore, where parties enter into a written and signed agreement which expressly provides that issues of eligibility resolved therein shall be final and binding upon the parties, "such an agreement, and only such an agreement," is considered a final determination of the eligibility issues "unless it is, in part or in whole, contrary to the Act or established Board policy." This is known as the *Norris-Thermador* rule since it was adopted in *Norris-Thermador Corp.,* 119 NLRB 1301 (1958). A list is sufficient even if the stipulation does not include an on actual unit description. *Riveredge Hospital*, 251 NLRB 196 (1980).

Thus, where the parties incorporated an eligibility list in an election agreement which met the *Norris-Thermador* requirements, the Board found that the parties intended the list as prepared to be final and binding, and it deemed irrelevant the fact that an employee had been excluded from the list through "inadvertence and not as a result of discussion and agreement on his eligibility." *Pyper Construction Co.,* 177 NLRB 707 (1969).

The *Norris-Thermador* rule has been strictly applied and the Board has only permitted one "narrow exception" to it. Thus, in *Banner Bedding*, 214 NLRB 1013 (1974), the Board announced that it will accept an oral agreement only where both parties agree to its contents. See discussion of this exception in *NLRB v. Westinghouse Broadcasting & Cable*, 849 F.2d 15 (1st Cir. 1988). Compare *Giummarra Electric*, 291 NLRB 37 (1988), in which one party to the alleged agreement denied its existence. In *St. Peters Manor Care Center,* 261 NLRB 1161 (1982), the Board rejected an oral stipulation where it came just prior to the election and was inconsistent with the election agreement.

Where, however, there was nothing in the stipulation for certification which indicated that there was an agreed-upon addition stipulated to be final and binding on the parties, the document, as it stood, did not sufficiently reveal an intent on the part of the parties to be bound within the meaning of the *Norris-Thermador* rule. *Cooper Mattress Mfg. Co*., 225 NLRB 200 (1976).

The Board does not honor stipulations, whether under *Banner Bedding* or *Norris-Thermador* as to statutory exclusions. *Rosehill Cemetery Assn.,* 262 NLRB 1289 (1982); *Judd Valve Co*., 248 NLRB 112 fn. 3 (1980). Thus, as clearly enunciated in the statement of the *Norris-Thermador* rule itself, the election agreement is final and binding unless it is contrary to the Act or established Board policy. Where ballots were challenged on the ground of supervisory status and consequent statutory exclusion, the party was not, under *Norris-Thermador*, precluded from raising the issue as to their eligibility. It would have contravened the statutory policy "if by agreement of the parties supervisors were irrevocably rendered eligible to vote." *Fisher-New Center Co*., 184 NLRB 809 (1970).

A distinction has been drawn between the rule just stated and the one set out in *Cruis Along Boats*, 128 NLRB 1019 (1960). The policy applied in *Cruis Along* "was intended to apply to stipulations as to unit placement made at representation hearings and was not intended to modify the policy applicable to agreements as to eligibility made in consent election cases." *Lake Huron Broadcasting Corp*., 130 NLRB 908, 909–910 (1961). See also *Laymon Candy Co*., 199 NLRB 547 (1972), and in particular footnote 2 which addresses itself to the *Cruis Along* distinction and also raises a question concerning the nature of the stipulation.

Nor will the Board permit the *Norris-Thermador* agreement to permit an ex-employee to vote. In *Inacomp America, Inc.,* 281 NLRB 271 (1986), an employee whose name was included on a *Norris-Thermador* list but who resigned and left the employer before the election, was not permitted to vote. Compare *Trilco City Lumber Co*., 226 NLRB 289 (1976), in which an employee was permitted to vote who was included on the list but had not yet begun active work.

23-530 Construing Stipulations of the Parties in Representation Cases

393-6054-6750

401-5000

420-7312

737-7078-5000

The Board will accept stipulations of parties unless they are contrary to record evidence, the Act, or Board policy. *Carl's Jr.*, 285 NLRB 975 (1987). Compare *Hollywood Medical Center*, 275 NLRB 307 (1985), in which rejection of the stipulation would have resulted in a postelection challenge as to agreed-upon professional employees, and *Cabrillo Lanes*, 202 NLRB 921, 923 fn. 12 (1973), in which a stipulation that would have excluded regular part-time employees was rejected prior to the election.

In *Caesar's Tahoe*, 337 NLRB 1096 (2002), the Board formally adopted the three-prong test for analyzing stipulations articulated in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999). Under this test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. See *McFarling Foods, Inc.,* 336 NLRB 1140 (2001); *South Coast Hospice*, 333 NLRB 198 (2000); and *Royal Laundry*, 277 NLRB 820, 821 (1985). A classification will be deemed to be excluded if it is not mentioned in the inclusions and "all other employees"are specifically excluded. *Bell Convalescent Hospital,* 337 NLRB 191 (2001).

If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

For a description of the Board's approach to ascertaining the parties' intent, see *Viacom Television*, 268 NLRB 633 (1984). See also *Southwest Gas Corp.,* 305 NLRB 542 (1991); *Business Records Corp*., 300 NLRB 708 (1990) and *S & I Transportation*, 306 NLRB 97 (1992). An employer who stipulates to the inclusion of a classification is later barred from raising the inclusion as a defense in a refusal-to-bargain case. *Premier Living Center*, 331 NLRB 123 (2000). In *Red Lion*, 301 NLRB 33 (1991), the Board was confronted with a hearing officer's rejection of a stipulation that had no factual basis. In light of the due-process problems surrounding the hearing officer's initial acceptance of the stipulation, the Board permitted the parties to proffer supplemental evidence.

For a discussion of policies concerning the effect of Stipulated Election Agreements, see *T & L Leasing,* 318 NLRB 324 (1995) (Regional Director cannot vary terms of agreement absent special circumstances); *Grant's Home Furnishings*, 229 NLRB 1305 (1977) (alleged breach of agreement by Regional Director because of Board agent tardiness); *Sunnyvale Medical Clinic*,

241 NLRB 1156 (1979); and *Dynair Services*, 314 NLRB 161 (1994) (changed circumstances caused by intervening labor organization); and *Consolidated Print Works*, 260 NLRB 978 (1982) (consequences of failing to object to changed circumstances).

Where the intent of the parties is unclear or ambiguous, the Board will apply a community of interest test. *Laneco Construction Systems*, 339 NLRB 1048 (2003); and *Kalustyans*, 332 NLRB 843 (2000). If the stipulation is clear and unambiguous, the Board will not examine the intent of the parties. *South Coast Hospice*, and *Kalustyans,* supra. *Space Mark, Inc*., 325 NLRB 1140 (1998). But a stipulation cannot override a mandate of the statute. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999) (stipulation to include medical technologists cannot override mandate that Board conduct *Sonotone* elections).

In a recent series of cases, the Board reaffirmed its longstanding practice to follow the objective intent of stipulating parties where the stipulation does not violate Board law. *Caesars Tahoe,* supra; *G & K Services, Inc.,* 340 NLRB No. 103 (2003); *Peirce-Phelps, Inc.,* 341 NLRB No. 78 (2004); and *Bell Convalescent Hospital*, 337 NLRB 191 (2001); *Northwest Community Hospital*, 331 NLRB 307 (2000); *Cleveland Indians Baseball Co.,* 333 NLRB 579 (2001); *National Public Radio*, 328 NLRB 75 (1999); *Highlands Regional Medical Center*, 327 NLRB 1049 (1999); *Venture Industries*, 327 NLRB 918 (1999); *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997) (stipulated election agreement is a contract); *Pacific Lincoln-Mercury*, 312 NLRB 901 (1993); *Windham Community Memorial Hospital*, 312 NLRB 54 (1993); and *Gala Food Processing*, 310 NLRB 1193 (1993). See also *Dunham's Athleisure Corp.,* 311 NLRB 175 (1993), distinguishing *Vent Control, Inc*., 126 NLRB 1134 (1960).

Recently the Board in *Los Angeles Water & Power Employees' Assn.,* 340 NLRB No. 146 (2003), stated:

> In applying the first prong of the *Caesars Tahoe* analysis, the Board must determine whether the stipulated unit is ambiguous. In doing so, the Board compares the "express language of the stipulated unit with the disputed classifications." *Northwest Community Hospital*, 331 NLRB 307, 307 (2000) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find that the parties have "a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description." Id. Accord: *Bell Convalescent Home*, 337 NLRB 191 (2001).

Once a stipulation has been approved, a party may withdraw only by agreement or by showing unusual circumstances. *Hampton Inn & Suites*, 331 NLRB 238 (2000). Accord: *NLRB v. MEMC Electronic Materials, Inc.,* 363 F.3d 705 (8th Cir. 2004).

The Board does not consider itself bound by a bargaining history resulting from a stipulated unit in a consent election. See section 12-221, supra.