10. PRIOR DETERMINATIONS AND OTHER BARS TO AN ELECTION

The granting of a petition for an election is subject to certain limitations which are designed, like contract bar, to implement the statutory objective of achieving a balance between industrial stability and freedom of choice.

We have already considered contract bar. Treated here are other bars, one based on a statutory provision, Section 9(c)(3) of the Act, and the others on policy considerations.

10-100 Effect of Prior Election

347-2083

10-110 Board Elections

Section 9(c)(3) prohibits the holding of an election in any bargaining unit or subdivision in which a valid election was held during the preceding 12-month period.

An election may be valid and bar a new election even if the certification resulting from that election is revoked during the 12-month period, depending on the circumstances. *Weston Biscuit Co*., 117 NLRB 1206 (1955). The 12-month period runs from the date of balloting, not from the date of the certification. *Mallinckrodt Chemical Works,* 84 NLRB 291 (1949); and *Retail Store Employees Local 692 (Irvins, Inc.),* 134 NLRB 686 fn. 5 (1961). If the balloting takes more than 1 day, the election is not considered as held until it has been completed. *Alaska Salmon Industry,* 90 NLRB 168, 170 (1950).

Under Section 9(c)(3), the prior election must be a "valid" election. *Security Aluminum Co*., 149 NLRB 581 (1964). A considerable increase in the number of employees and the employer's inaccurate prediction at the prior hearing, concerning the number of employees it would shortly have at the plant, did not impair the validity of the prior election. *U. S. Steel Corp*., 156 NLRB 1216 (1966).

A withdrawal of a petition after an election during the consideration of determinative challenge ballots does not affect the 1-year election bar rule. *E Center, Yuba Sutter Head Start*, 337 NLRB 983 (2002).

The prohibition of Section 9(c)(3) does not preclude the processing of a petition filed within 60 days before the expiration of the statutory period so long as the election resulting from such petition is not held within the prohibited time. However, petitions filed more than 60 days before the end of the statutory period will be dismissed. *Vickers, Inc*., 124 NLRB 1051 (1959). Note the distinction between this rule and the 1-year certification rule, treated later, which precludes the processing of a petition filed before the end of the 1-year period. The *Vickers* rule does not apply to a situation when an untimely petition, dismissed by the Regional Director, is reinstated by the Board on appeal because of questions concerning the validity of the prior election. *Mason & Hanger-Silas Mason Co*., 142 NLRB 699 (1963).

Although a petition was filed more than 5 months before the end of the 12-month period described in Section 9(c)(3), an immediate election was directed where the petition had already been processed, a hearing was held, and 12 months had by this time actually elapsed, the Board noting that "To dismiss the petition at this time would subject the Board to an immediate repetition of the proceeding as a new petition could be timely filed as soon as a decision in this case issues." *Weston Biscuit Co.,* supra at 1208; see also *Mason & Hanger-Silas Mason Co*., supra. Compare *Randolph Metal Works,* 147 NLRB 973, 974 fn. 5 (1964).

A new election is barred only in a "unit or any subdivision" in which a previous election was held. Section 9(c)(3) applies to the unit, not the employer, so an election is barred in same unit in the case of a successor employer during the 12-month period. *Kraco Industries,* 39 LRRM 1236 (Feb. 20, 1957).

Section 9(c)(3) does not preclude for a 12-month period the holding of an election in a larger unit, such as a plantwide unit, where there has been a previous election in a smaller unit, such as a craft unit, because the subsequent election is not being conducted in a "unit or any subdivision" in which the earlier election was held. *Allegheny Pepsi-Cola Bottling Co.*, 222 NLRB 1298 (1976). *Thiokol Chemical Corp*., 123 NLRB 888 (1959); and *Allstate Insurance Co*., 176 NLRB 94 (1969). For a discussion of the converse of this situation, see *Vickers, Inc*., supra at 1052. Employees who voted in the first election may be included in the larger unit and vote in the new election. *Robertson Bros. Dept. Store*, 95 NLRB 271, 273 (1951). Similarly, an election is not barred for employees who are excluded from the unit in the prior election. *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994), and *Philadelphia Co*., 84 NLRB 115 (1949).

Section 9(c)(3) prohibits only the holding of more than one valid election within a 1-year period. It does not prevent the Board from imposing a bargaining obligation based on a card majority within 1 year of a valid election. *Comvac International*, 297 NLRB 853 (1991); and *Great Scott Supermarkets*, 156 NLRB 592 (1966).

There is also an election year bar rule for UD elections. See Section 9(e)(2). That bar, however, applies only to valid UD elections. It does not bar a UD election within 12 months of a valid representation election. *Monsanto Chemical Co*., 147 NLRB 49, 50 (1964). See also *Gilchrist Timber Co.*, 76 NLRB 1233, 1234 (1948), explaining the interplay of Section 9(c)(3) and (e)(2) [then Sec. 9(e)(3)].

10-120 Comity to State Elections

347-2033

347-2040

In applying the statutory limitations in Section 9(c)(3), representation elections conducted by State authorities are given the same effect as the Board's own election, provided that the election itself is valid under State law and not affected by any irregularities under the Board's standards. *We Transport, Inc*., 198 NLRB 949 (1972); *Olin Mathieson Chemical Corp*., 115 NLRB 1501 (1956); and *T-H Products Co.*, 113 NLRB 1246 (1955). In *Summer's Living Center*, 332 NLRB 275 (2000), the Board set out the standards for comity:

(1) the state-conducted elections reflect the true desires of the affected employees;
(2) there was no showing of election irregularities; and
(3) there was no substantial deviation from due process requirements.

Where in a State-conducted election supervisors within the meaning of the National Labor Relations Act were included in the unit found appropriate, the Board deemed such an election not a valid election and declined to accord to it the same effect as it would have given to one of its own elections. *Southern Minnesota Supply Co.*, 116 NLRB 968, 969 (1957). See also *Health Center of Boulder County*, 222 NLRB 901 (1976), in which the Board did not give effect to an election in a mixed unit of professionals and nonprofessionals.

The Board did give effect to an election held under the law of the Virgin Islands, although that Territory's challenge procedures did not conform to the Board's, since the parties voluntarily participated in the election and the election was conducted "without substantial deviation" from the due-process requirements. *West Indian Co.*, 129 NLRB 1203 (1961). The results of a second election held by a State agency within 1 year of the first election were honored where the State law did not prohibit such an election. *Western Meat Packers*, 148 NLRB 444, 449–450 (1964). In *Albertson's/Max Food Warehouse*, 329 NLRB 410 (1999), the Board reversed its prior holding in *City Markets, Inc*., 266 NLRB 1020 (1983), and ruled that the timeliness of a UD petition is to be determined under the NLRB, not State law.

A distinction is made between an election conducted by a Government agency and one privately conducted. *Interboro Chevrolet Co.*, 111 NLRB 783, 784 (1955).

10-200 The 1-Year Certification Rule

347-2017-2500

530-4020

It is the Board's policy to treat a certification under Section 9 of the Act as identifying the statutory bargaining representative with certainty and finality for a period of 1 year.

This rule was upheld by the U. S. Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), in which the Court stated that "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence." In *Americare-Lexington Health Care Center*, 316 NLRB 1226 (1995), the Board reaffirmed the certification year rule and a panel majority applied the rule to the year after employees voted for continued representation in a decertification election. Accord: *Beverly Manor Health Care Center*, 322 NLRB 881 (1997).

In *Virginia Mason Medical Center,* 350 NLRB No. 73 (2007), bargaining began 4 months after a court order affirming the Board's order in a test of certification case. The Board found that there was no unwarranted delay in the 4-month period and therefore set the certification year as beginning with the bargaining.

To effectuate the policy of affording the employer and the union full opportunity of arriving at an agreement within the certification year, the Board has developed the rule that petitions, whether these be representation, employer, or decertification, will be dismissed if filed before the end of the certification year. The Board explained that "the mere retention on file of such petitions, although unprocessed, cannot but detract from the full import of a Board certification, which should be permitted to run its complete 1-year course before any question of the representative status of the certified union is given formal cognizance by the Board." This rule was enunciated in *Centr-O-Cast Engineering Co.,* 100 NLRB 1507, 1508 (1951), and is applied strictly. *United Supermarkets*, 287 NLRB 119 (1987). And in *Chelsea Industries*, 331 NLRB 1648 (2000), an unfair labor practice case, the Board held that an employer cannot withdraw recognition after the certification year expires based on evidence of employee dissatisfaction that was obtained during the certification year. Compare *LTD Ceramics, Inc.*, 341 NLRB 86 (2004) (signatures obtained on last day of certification year permitted).

In *Kirkhill Rubber Co.*, 306 NLRB 559 (1992), the Board decided that the certification year rule did not bar the processing of a UC petition. Compare *Firestone Tire Co*., 185 NLRB 63 (1970), distinguished by the Board in *Kirkhill*.

Care should be taken to distinguish between the 1-year certification rule promulgated by the Board and the 1-year limitation on elections provided by Section 9(c)(3) of the Act. The first requires the dismissal of any representation petition filed within 1 year after *certification*. The second prohibits the holding of an election in the 12-month period following a valid *election*.

A petition filed before the expiration of the 12-month period following an incumbent union's certification will, with certain exceptions discussed below, be dismissed, even if it is filed only a few days before that date.

10-210 Application of the 1-Year Certification Rule

347-2017-7533-8300

The 1-year certification rule applies only to petitions involving the representation of employees *in the unit certified*. It was not applied to a petition seeking a small segment of the employees who were included in a unit certified less than 1 year prior to the new petition, when during that year those employees had been effectively separated for unit purposes from the other employees covered by the certification. *American Concrete Pipe of Hawaii*, 128 NLRB 720 (1960).

When a voting group in a self-determination election chooses to remain a part of the existing larger bargaining unit, the certification resulting from that election does not constitute the type which bars a petition for 1 year because it does not embrace a complete bargaining unit, but only amounts to a finding that the group of employees voting have indicated a desire to remain a part of the larger unit. *Westinghouse Electric Corp*., 115 NLRB 185, 186 (1956), and *Edward J. DeBartolo Corp.*, 315 NLRB 1170 (1994). See also chapter on "Self-Determination Elections," infra, section 21.

But an RM petition for a plantwide unit was dismissed when a union had been certified less than 1 year previously as bargaining representative for a unit which encompassed a part of the employees in the plant. *Casey-Metcalf Machinery Co.*, 114 NLRB 1520, 1525 (1956).

10-220 Exceptions to the Rule

347-2017-5000

347-2017-7567

625-6675

10-221 The *Mar-Jac* Exception

The certification year is extended in situations where the employer has failed to carry out his statutory duty to bargain in good faith. The extension equals the time of delay and commences on the resumption of negotiations. The aim is to insure "at least one year of actual bargaining." *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962), and *Lamar Hotel*, 137 NLRB 1271, 1273 (1962). See also *Bridgestone/Firestone, Inc.*, 337 NLRB 133 (2001); and *JASCO Industries*, 328 NLRB 201 (1999).

Thus, when the employer had bargained with the union for only 6 months and, largely through its refusal to bargain, took from the union a substantial part of the 1-year period, "when Unions are generally at their greatest strength," to permit an election on the employer's petition at that time in question "would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year." Id. See also *Midstate Telephone Co.*, 179 NLRB 85 (1969); *Burnett Construction Co.*, 149 NLRB 1419 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); and *Lower Bucks Cooling & Heating*, 316 NLRB 16 (1995).

When there was not "a single minute of bargaining uncompromised by . . . unlawful conduct," the Board extended for a full year. *Metta Electric*, 349 NLRB 1088 (2007). Compare *American Medical Response*, 346 NLRB 1004 (2007) (3-month extension).

In *Dominguez Valley Hospital*, 287 NLRB 149 (1987), the Board ruled that the *Mar-Jac* year began with the first bargaining session, not the date of court enforcement of the bargaining order and not the date in which the parties agreed to schedule a bargaining session. The Board has held that an employer offers to bargain conditional on litigation in the Supreme Court did not in any way afford the unions their *Mar-Jac* year. *Chicago Health Clubs*, 251 NLRB 140 (1980). See also *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), and *JASCO Industries*, supra.

In *Paramount Metal & Finishing Co.*, 223 NLRB 1337 (1976), the Board rejected an employer defense to *Mar-Jac* application where the union did not request immediate bargaining after the election and where the employer had an appeal pending in a related bargaining case.

On the other hand, the "equities of the case" were found not to warrant the *Mar-Jac* exception where the lapse in negotiations was occasioned solely by the employer's cessation of operations for a period of 4 months; the settlement of unfair labor practices related to the employer's refusal to bargain as to such cessation; and the union had the benefit of more than a year under its certification (9 months prior to the plant shutdown and more than 5 months subsequent to the settlement agreement) in which to negotiate. *Southern Mfg. Co.*, 144 NLRB 784 (1963).

The *Mar-Jac* case involved a settlement agreement, as did *Southern Mfg*. The *Mar-Jac* rule was also applied to a situation when an employer belatedly furnished requested information

resulting in the union's withdrawal of the charge. This was held "tantamount" to a settlement of the unfair labor practice proceeding, less formal but essentially not different from the written settlement agreement which the Board in *Mar-Jac* considered a sufficient foundation for extending the period following a certification during which no valid petition may be filed. *Gebhardt-Vogel Tanning Co.*, 154 NLRB 913, 915 (1965).

In this line of cases, violations occurred during the certification year and directly served to deprive the union of the fruits of the certification. When, however, all the employer's violations occurred before the beginning of the certification year and it did not appear that any further violations were committed between the date of the certification and that of the request to bargain, there was no warrant for concluding that meaningful bargaining could not have taken place during the certification year. *Dixie Gas, Inc*., 151 NLRB 1257, 1259–1260 (1965).

Similarly, the *Mar-Jac* rule is not necessarily applicable in any 8(a)(5) situation; there must be a showing of a general refusal to bargain. *Cortland Transit*, 324 NLRB 372 (1997).

The Board has specifically rejected the application of *Mar-Jac* to the voting group in a self-determination election. *Edward J. DeBartolo Corp*., supra, and *White Cap Inc*., 323 NLRB 477 (1997).

10-222 The *Ludlow* Exception

347-2017-7533-1700

When the parties execute a contract within 12 months of the contracting union's certification, the certification year merges with that of the contract and the latter controls the timeliness of the filing of a rival petition. In such circumstances, there is no need to protect the certification further. Thus, a petition which is filed timely in relation to such a contract will be processed even though it is filed before the end of the certification year. *Ludlow Typograph Co*., 108 NLRB 1463 (1954).

The *Ludlow* exception applies only when the union negotiates a new contract, and *not* when the union, after certification, assumes an existing contract pursuant to a preelection agreement. *Great Atlantic & Pacific Tea Co*., 123 NLRB 1005 (1959). In other words, it does not apply in a situation where an agreement to continue an existing contract in effect after certification is executed prior to the certification year. *John Vilicich*, 133 NLRB 238 (1961); and *Westinghouse Electric Corp*., 114 NLRB 1515 (1956). In the latter, an existing national agreement was applied to the plant.

10-300 Settlement Agreement as a Bar

347-6020-5067

Following a settlement agreement containing a provision requiring bargaining, a reasonable period of time must be afforded the parties in which to reach a contract. *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). *Poole* was recently reaffirmed in *Caterair International*, 322 NLRB 64 (1996).

Effectuation of the policies of the Act requires that the employer honor the bargaining obligation provided for in a settlement agreement for a reasonable period of time and no question concerning representation may be raised while the effects of the employer's unfair labor practices are being remedied by the employer's compliance with the terms of a settlement agreement. *Freedom WLNE-TV*, 295 NLRB 634 (1989). *Interstate Brick Co.*, 167 NLRB 831 (1967); *Frank Becker Towing Co.*, 151 NLRB 466, 467 (1965); and *Dick Bros., Inc.*, 110 NLRB 451 (1955).

In *Lexus of Concord, Inc*., 343 NLRB 851 (2004), the Board rejected an administrative law judge's holding that an employer's letter stating that it would resume negotiations met the standards for settlement bar such as to bar a question concerning representation raised by a majority of employees expressing disaffection from the union.

For a discussion of "reasonable period," see 10-1000.

In *Trusev Corp.*, 349 NLRB 227 (2007), the Board reversed a series of cases dealing with the processing of decertification petitions in the face of settlements of concurrent unfair labor practice charges. The Board summarized its decision as follows:

> Based on all of the above, we overrule *Douglas-Randall* and its progeny and return to the Board's prior holdings for handling decertification petitions when the parties have resolved concurrent unfair labor practice allegations by entering into either a settlement agreement or collective-bargaining agreement. Thus, an employer's agreement to resolve outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union, or by entering into a collective-bargaining agreement, will not be treated as an admission of wrongdoing unless it expressly so provides, and will not require dismissal of a decertification petition challenging the union's majority status filed after the alleged unlawful conduct but prior to settlement. When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, continue to serve as a bar to newly filed petitions under the Board's contract-bar rules, but it will not bar a petition filed prior to the agreement.

This decision reverses *Douglas Randall, Inc.*, 320 NLRB 431 (1995); *Liberty Fabrics*, 327 NLRB 38 (1998); and *Supershuttle of Orange County*, 330 NLRB 1016 (2000); and returned Board law to *Passavant Health Center*, 278 NLRB 483 (1986). It does not of course validate a decertification petition whose showing of interest is tainted by employer misconduct. In reinstating *Passavant*, the Board also reinstated *Jefferson Hotel*, 309 NLRB 705 (1992), which encourages participation of the RD petitioner in the settlement negotiations of the unfair labor practice case. See *Trusev*, supra at fn. 14.

For further discussion of related issues, see section 10-800.

In *BOC Group*, 323 NLRB 1100 (1997), the Board found that a settlement agreement did not require bargaining or involve the type of unfair labor practices that would preclude a question concerning representation. There were, however, other pending 8(a)(3) and (5) charges. In those circumstances, the Board dismissed the petition subject to reinstatement on request if it would be appropriate in light of the disposition of those charges.

10-400 Court Decree as a Bar

347-6040

817-5942-9000

When more than a year has elapsed since the entry by the court of a decree directing an employer to bargain with a union, and no contract has resulted, the court order will not act as a bar to a current determination of representatives. *Ellis-Klatcher & Co.*, 79 NLRB 183 (1948).

In *Ellis-Klatcher*, supra, more than 4 years had elapsed since the entry of the court decree. In *Mascot Stove Co.*, 75 NLRB 427 (1948), the union had been certified as the exclusive bargaining representative, negotiations between the employer and the union were commenced but no contract was executed, and the Sixth Circuit entered a bargaining decree pursuant to which negotiations were resumed but, again, no contract was executed. When more than a year elapsed from the date of the decree without the consummation of a collective-bargaining agreement, the Board held that the court's decree did not preclude a current determination of representatives.

10-500 Lawful Recognition as a Bar/Reasonable Period of Time

347-2067

Like situations involving certifications, Board orders, and settlement agreements, where the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining, lawful recognition of a union bars a petition for "a reasonable period of time." *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). For a discussion of "reasonable time" see

Royal Coach Lines, 282 NLRB 1037 (1987); *Tajon, Inc.*, 269 NLRB 327 (1984); and *Brennan's Cadillac*, 231 NLRB 225 (1977). See also *Ford Center for the Performing Arts*, 328 NLRB 1 (1998), where the Board noted the problems of first contract bargaining as a consideration in determining "reasonable time." See also *MGM Grand Hotel*, 329 NLRB 464 (1999) (11 months held reasonable in circumstances).

See also the discussion of "reasonable period"at 10-1000.

The Board now holds that in order to apply the recognition-bar doctrine, unit employees or a rival union must be given an opportunity to petition for an election. Thus, in *Dana Corp.*, 351 NLRB No. 28 (2007), the Board majority modified its prior holding in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Smith's Food & Drug Centers*, 320 NLRB 844 (1996); and *Seattle Mariners*, 335 NLRB 563 (2001). It now requires that the employer notify the unit employees of the recognition so that they, or a rival union, may seek an election from the Board. The notice to employees is obtained from the Regional Director and must be posted for 45 days. A petition filed during this period must be supported by a 30-percent showing of interest. If no petition is filed during the 45-day period, the recognition bar will apply.

In 2002, the Board reversed its "successor bar" doctrine and returned to its earlier policy of holding that recognition extended to "an incumbent union in a successorship situation is entitled to—and only to—a rebuttable presumption of continuing majority status." *MV Transportation*, 337 NLRB 770 (2002), reversing *St. Elizabeth Manor*, 329 NLRB 341 (1999). In reversing *St. Elizabeth Manor*, the Board majority in *MV Transportation* returned to the rule of *Southern Moldings*, 219 NLRB 119 (1975).

In a number of cases when one or more of the criteria set forth in *Sound Contractors* and *Josephine Furniture* were not affirmatively met, the informal agreement was held not to constitute a bar. *S. Abraham & Sons*, 193 NLRB 523 (1971); *Akron Cablevision*, 191 NLRB 4 (1971); *Display Sign Service*, 180 NLRB 49 (1970); *Pineville Kraft Corp.*, 173 NLRB 863 (1969); and *Allied Super Markets*, 167 NLRB 361 (1967).

Since the *John Deklewa & Sons* decision (282 NLRB 1375 (1987)), there have been no cases in which the Board has been presented with a recognition bar in the construction industry. However, the discussion of appropriate unit in *Casale Industries*, 311 NLRB 951 (1993), clearly indicates that the Board would apply the doctrine in this industry subject to a scrutiny of that recognition. (See also sec. 9-1000.)

10-600 Expanding Unit

316-6701-6700 et seq.

347-8020-2050 et seq.

Some of the factors commonly raised by employers contending that a petition should be dismissed as premature are that the plant is still under construction or not yet in full operation; an insufficient number of the contemplated job classifications are filled; and there is not a representative number of employees in a substantial number of the existing job classifications.

In *Endicott Johnson de Puerto Rico*, 172 NLRB 1676, 1677 fn. 3 (1968), the Board made it clear that the yardsticks enunciated in *General Extrusion Co.*, 121 NLRB 1165 (1958), are applicable only to contract-bar issues and were not intended to govern the propriety of granting an election in cases involving an expanding unit in an unorganized plant. The test in noncontract-bar cases is, rather, whether the present complement is substantial and representative; and there is no flat rule for making such a determination. In this particular case, the employer, at the time of the hearing, had a complement of approximately 200 employees in 115 assigned job classifications engaged in the production of six types of shoes. The employer's expansion plans included more employees, more job classifications, and more types of shoes in the original plant as well as in a second plant to be constructed. As the Board found that the numerous new job titles planned would not necessarily involve new job classifications in terms of skills, it found the

present complement representative and substantial for purposes of directing an immediate election. See also *General Cable Corp*., 173 NLRB 251 (1969); and *Yellowstone International Mailing*, 332 NLRB 386 (2000), and cases cited there. In general, the Board finds an existing complement of employees substantial and representative when at least 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Shares, Inc.*, 343 NLRB 455 fn. 2 (2004).

In making its determination, the Board generally considers one or more of the following four factors:

1. The size of the employee complement just prior to the date of issuance of the Board's decision. By such time the complement may be significantly more representative and substantial than it was at the time of the hearing. See *Celotex Corp*., 180 NLRB 62 (1970); *Bell Aerospace Co*., 190 NLRB 509 (1971); and *St. John of God Hospital*, 260 NLRB 905 (1982).

2. Whether the projected additional jobs merely involve distinct operations rather than separate and distinct job classifications in terms of types of skills required of the employees. If no significantly different functions are to be fulfilled or no significantly different skills are required, the Board will find the "substantial and representative complement" test satisfied. See *Frolic Footwear*, 180 NLRB 188 (1970); *Redman Industries*, 174 NLRB 1065 (1969); and *Revere Copper & Brass*, 172 NLRB 1126 (1968). Compare *Bekaert Steel Wire Corp.*, 189 NLRB 561 (1971), in which the Board directed an election although the employer contended that its plans to add a new facility and process made the petition premature. The Board found the existing facility (process) then in operation "representative and a separate appropriate unit." The Board stated that the continuing viability of any certification that may result from the election and the effect, if any, of such certification may be reviewed in a subsequent appropriate proceeding after the new operations have materialized. See also *Some Industries*, 204 NLRB 1142 (1973), wherein the Board, while agreeing that the employee complement was substantial, held that the addition of 10–15 new classifications to the 9 in existence rendered the present complement nonrepresentative. Compare *Witteman Steel Mills*, 253 NLRB 320 fn. 7 (1981).

3. The rate of expansion of the unit. The Board has found that an expansion anticipated for implementation almost 2 years after the current hearing was "too remote and speculative to form a basis for denying present employees an opportunity to select a bargaining representative." An expansion contemplated within the forthcoming year, however, was considered "a more realistic date for measuring the substantiality of the present force." *Gerlach Meat Co.*, 192 NLRB 559 (1971). See also *Bekaert Steel Wire Corp*., supra; *Key Research & Development Co.*, 176 NLRB 134 (1969).

A case involving the construction industry highlights the rationality of the Board's flexible ad hoc approach in the area of expanding units. This decision notes the Board's effort to balance two potentially conflicting policy objectives: insuring maximum employee participation in the selection of a bargaining agent, and permitting employees who wish to be represented as immediate representation as is possible. Since the construction industry, however, is characterized by activities of "a fluctuating nature and unpredictable duration," delaying an election until the employee complement was full or almost full "might well result in bargaining for only a very short duration, with the project completed before any meaningful results could ensue." Thus, in the construction industry the Board favors an early election. *Clement-Blythe Cos.*, 182 NLRB 502 (1970). For further discussion see *John Deklewa & Sons*, 282 NLRB 1375, 1386 fn. 45 (1987).

4. The Board will look at the employer's projected plans and will not dismiss where the plans are mere speculation or conjecture. See, e.g., *General Engineering*, 123 NLRB 586

(1959); *Meramec Mining Co.*, 134 NLRB 1675 (1962); and *Pullman, Inc*., 221 NLRB 954 (1975).

In *Toto Industries (Atlanta)*, 323 NLRB 645 (1997)), the Board affirmed on a Regional Director's decision finding representative complement and describing seven factors to be considered.

For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-700, and 15-130.

10-700 Contracting Units and Cessation of Operations

347-8020-6000 et seq.

The Board has extended its expanding unit guidelines to cases where the unit is contracting. *M. B. Kahn Construction Co*., 210 NLRB 1050 (1974); and *Douglas Motors Corp*., 128 NLRB 307 (1960). See also *NLRB v. Engineer Constructors*, 756 F.2d 464 (6th Cir. 1985). In *Fraser-Brace Engineering Co.*, 38 NLRB 1263 (1942), the Board dismissed a petition without prejudice where the construction work on a project was nearing completion and all or most employees would soon be laid off.

In *MGM Studios*, 336 NLRB 1255 (2001), the Board described its policy:

> To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be substantial and representative of the ultimate complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications.

A mere reduction in the number of employees is not sufficient to warrant dismissal of the petition. Rather, the Board will examine whether the reduction is a result of a fundamental change in the nature of the employer operations. *Plymouth Shoe Co*., 185 NLRB 732 (1970); and *Douglas Motors Corp*., supra at 308. See also *Wm. L. Hoge & Co*., 103 NLRB 20 (1953). See *Canterberry of Puerto Rico, Inc.*, 225 NLRB 309 (1976), and *Gibson Electric*, 226 NLRB 1063 (1976), requiring that mere speculation as to the uncertainty of future operations is not sufficient warrant for dismissing the petition. In *Pathology Institute*, 320 NLRB 1050 (1996) (an unfair labor practice case), the Board noted that a reduction in operations did not "destroy the continued appropriateness of the historic unit." Compare *Tracinda Investment Corp*., 235 NLRB 1167 (1978), and *Larson Plywood Co*., 223 NLRB 1161 (1976). See also *Cooper International, Inc*., 205 NLRB 1057 (1973), as to unit contraction as a result of plant relocation.

In *Servicios Correccionales De Puerto Rico*, 338 NLRB 452 (2002), the Board, having been advised that the unit had ceased to exist because of cancellation of a management service contract, issued an order to Show Cause why the petition should not be dismissed.

For an analysis of Board policy in construction cases compare *Fish Engineering & Construction*, 308 NLRB 836 (1992); and *Davey McKee Corp.*, 308 NLRB 839 (1992).

For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-600, and 15-130.

10-800 Blocking Charges (CHM sec. 11730)

347-6020-5033

393-6061

578-8075-6028 et seq.

The Board has a longstanding policy of refusing to process representation petitions when there is a pending unfair labor practice case. *U. S. Coal Co*., 3 NLRB 398 (1937); and *Big Three Industries*, 201 NLRB 197 (1973). This policy is known as the blocking charge policy and it is set forth in detail in CHM section 11730. In practice the policy has two different applications.

(1) Election petitions will not be processed when the alleged unfair labor practice conduct would have a tendency to interfere with employees' free choice. *Mark Burnett Productions*, 349 NLRB 706 (2007). This aspect of the policy requires that the charges be filed by a party to the representation case. The processing of the petition is deferred until the unfair labor practice case is resolved, absent a request to proceed (CHM sec. 11731.1). See also *Overnite Transportation Co.*, 337 NLRB 131 (2001) (national posting blocked petition at facility where no unfair labor practices had occurred). In *Bally's Atlantic City*, 338 NLRB 443 (2002), a divided panel declined a suggestion by one Board member that impounded ballots be counted where the petitioner had filed unfair labor practice charges instead of objections.

(2) If the charges allege incidents that challenge the circumstances surrounding the petition or the showing of interest or violations of Section 8(a)(2), (5), (b)(3), or (b)(7), the petition will be dismissed if the charge is deemed to have merit because the remedies for such cases may preclude a question concerning representation (CHM sec. 11730.3). *American Medical Response*, 346 NLRB 1004 (2006). This second application of the policy does not require that the charge be filed by a party to the representation case. The petitioner may upon final disposition of the unfair labor practice case seek reinstatement of the petition and is, for this purpose, kept informed of the status of that case by being granted party in interest status in the unfair labor practice case (CHM sec. 11733.2(b)). See, e.g., *Brannon Sand & Gravel*, 308 NLRB 922 (1992).

The blocking charge policy is not a per se rule. Thus, there are four major exceptions to the policy:

(1) *Where a request to proceed is filed by the party filing the charge*. (CHM sec. 11731.1) Such a request must be in writing and will usually be honored except in cases where the charges would, if proven, preclude the existence of a question concerning representation (Sec. 8(a)(2), (5), (b)(7), or (3)). A request to proceed in an 8(a)(2) case may be honored if the parties execute a *Carlson* waiver. *Carlson Furniture Industries*, 157 NLB 581 (1966), and CHM section 11731.1(c)(1). See also *Mistletoe Express Service*, 268 NLRB 1245 (1984), where the Board rejected such a waiver in the absence of an 8(a)(2) order and *Town & Country*, 194 NLRB 1135 (1972). Cf. *Pullman Industries*, 159 NLRB 580 (1966), where a waiver was approved in the absence of a Board order because the alleged assisted union was not a party to the representation case.

(2) *Where a fair election can be conducted notwithstanding meritorious charges*. This exception is available where the nature of the unfair labor practices would not interfere with employee free choice. CHM section 11731.2 describes the considerations which go into the application of this exception.

(3) *Where significant common issues will be resolved by processing the representation case*. See CHM section 11731.3 for further information. See also discussion of *A. J. Schneider & Associates*, 227 NLRB 1305 (1977), in Chapter 11 under "Clarification of Certification (UC)."

(4) *Where the charge is filed too late to permit investigation before the hearing or the election*. (CHM secs. 11731.4 and 11731.5.) In this situation the Regional Director has the discretion to postpone the hearing or election; conduct the hearing or election and impound the ballots; or conduct the election, issue a tally and determine the validity of the election if objections are filed.

(5) A fifth less known exception involves strikers. The Board will waive the blocking charge rule in order to hold an election within 12 months of the beginning of an economic strike so as not to exclude strikers. *American Metal Products*, 139 NLRB 601 (1962). See also section 23-120, infra.

In the case of decertification petitions it may be alleged that unfair labor practices tainted the petition thus mandating dismissal thereof. In order to warrant dismissal, there must be a causal

connection between the unfair labor practices and the employee disaffection. *Lee Lumber & Building Material Corp*., 322 NLRB 175, 177 (1996); and *Overnite Transportation Co.*, 333 NLRB 1392 (2001). The Board has a four-factor test for determining causal connection:

(1) the length of time between the unfair labor practices and the filing of the petition;
(2) the nature of the alleged acts;
(3) any possible tendency to cause employee disaffection; and
(4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp*., 271 NLRB 78, 84 (1984). Compare *AT Systems West, Inc.*, 341 NLRB 7 (2004) (conduct tainted the petitions); and *LTD Ceramics, Inc.*, 341 NLRB 86 (2004) (conduct did not taint); *Overnight Transportation Co.*, supra, and *Penn Tank Lines, Inc*., 336 NLRB 1066 (2001).

In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board directed the Regional Director to conduct a preelection hearing on an RD petition to determine whether there "was a causal relationship between [alleged unfair labor practice] conduct and the disaffection." In so doing the Board noted that the standards set out in *Master Slack*, 271 NLRB 78 (1984), should be applied and that "the *Master Slack* test is an objective one." Id. at fn. 2.

A petition that is not dismissed may be held in abeyance. Upon final disposition of the unfair labor practice charges, the petition that was held in *abeyance* will be activated and be processed in the normal manner. Where the unfair labor practices were found meritorious, no election will be conducted until the posting period has expired absent a written waiver. Preliminary processing of the petition is permitted (CHM sec. 11734). See also *Matson Terminals*, 321 NLRB 879 fn. 7 (1996).

As noted above, a petitioner may request that a *dismissed* petition be reinstated on final disposition of the unfair labor practice case. In *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), the Board ordered the employer to bargain for a reasonable period of time after entry of an 8(a)(5) order and would not permit a question concerning representation to be raised during that period. A previously dismissed petition will not be reinstated during this period and if, bargaining during that period results in a contract, that contract will bar processing of the petition. In *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001), the Board set a 6-month to 1-year period for bargaining before the union's status can be challenged.

For Board policy with respect to concurrent decertification pettions and unfair labor practice cases, see section 10-300, supra.

Petitions filed during the posting period of a settlement agreement will be dismissed. *Freedom WLNE-TV*, 295 NLRB 634 (1989); *Hertz Equipment Rental Corp.*, 328 NLRB 28 (1999).

For additional discussion, see sections 10-300 and 24-150.

10-900 Special Situations

There are times when special situations occur. In *Aerojet-General Corp*., 144 NLRB 368, 371 (1963), the Board stated:

> In the particular circumstances of this case, we do not believe it would be in the national interest to direct an election based on the present petition. Administration of the National Labor Relations Act, it must be remembered, is an important, but not the sole, instrument of our national labor policy. Although exclusive jurisdiction over representation matters has been committed to the Board, we do not regard this as a license to carry out our responsibilities with myopic disregard for other important considerations affecting the national interest and well-being.

In *Aerojet-General*, supra, the Board held that an election would be inappropriate, although it would normally have directed one, in view of the intervention of the President of the United States and the Secretary of Labor in the national interest and their setting up special procedures to resolve a contract dispute in order to avert serious damage to the Nation's vital defense program that a strike would have caused.

Along similar lines, in *Mine Workers*, 205 NLRB 509 (1973), a case in which a union was involved in its capacity as an employer, the Board found a special situation "in which extraordinary considerations compel a different result." Factually, a reorganization resulted from proceedings began by the Secretary of Labor and actions initiated by private parties enforcing rights granted under the Labor-Management Reporting and Disclosure Act, Section 2(a). To hold an election at the time in question, observed the Board, would be at cross-purposes with, and possibly impede, the Government-initiated procedures set in motion by those suits and might also interfere with possible voluntary resolutions of existing issues concerning some of the districts of the union acting as employer. In these circumstances, the representation petition was dismissed, without prejudice to refiling after stabilization of the situation.

10-1000 Reasonable Period of Time

A Board bargaining order pursuant to an order of the Board will bar any challenge to the union's status for "a reasonable period of time." In *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001), a case involving a withdrawal of recognition after an adjudicated violation of Section 8(a)(5), the Board set out the parameters of what constitutes a reasonable period, id.:

> [W]e have decided that when an employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable time for bargaining before the union's majority status can be challenged will be no less than 6 months, but no more than 1 year. Whether a "reasonable period of time" is only 6 months, or some longer period up to 1 year, will depend on a multifactor analysis. Under that analysis, we shall consider whether the parties are bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties are to agreement, and the presence or absence of a bargaining impasse.

See also sections 10-300 and 10-500.