12. APPROPRIATE UNIT: GENERAL PRINCIPLES

12-100 Introduction

401-2500 et seq.

420-0150

440-1720

Section 9(a) of the Act implements the general provisions contained in Section 7 of the Act, which grant employees the right to self-organization and to representation through agents of their own choosing. Section 9(a) goes further by providing that representatives selected for the purposes of collective bargaining shall be the "exclusive" representatives.

There are specific requirements in the statutory provision. The representative must be chosen by a majority of the employees. These employees must be in a unit appropriate for collective-bargaining purposes. Under Section 9(b) the Board is empowered to "decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." "The selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, if not final, is rarely to be disturbed." *So. Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976).

The distinction between issues involving the scope of the unit and those involving its composition should be kept in mind. The scope of the unit pertains to such questions as to whether it should be limited to one plant rather than employerwide or to one employer as distinguished from multiemployer. (Chs. 12–14.) Composition of a unit relates to such questions as the inclusion or exclusion of disputed employee categories or unit placement in general. (Chs. 16–20.) In *Boeing Co*., 337 NLRB 152, 153 (2001), the Board described its policy with respect to determining appropriate units:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g., *Overnite Transportation Co*., 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

It will be observed that there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co*., 334 NLRB 484 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp*., 157 NLRB 1130 (1966); *Parsons Investment Co.*, 152 NLRB 192 fn. 1 (1965); *Capital Bakers*, 168 NLRB 904, 905 (1968); *National Cash Register Co*., 166 NLRB 173 (1967); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986); and *Dezcon, Inc*., 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co*., supra.

Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example,

General Instrument Corp. v. NLRB, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); and *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). The Board will pass only on the appropriateness of units that have been argued for. *Acme Markets, Inc*., 328 NLRB 1208 (1999).

The presumption is that a single location unit is appropriate. *Hegins Corp*., 255 NLRB 1236 (1981); and *Penn Color, Inc.*, 249 NLRB 1117, 1119 (1980). *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); see also *Huckleberry Youth Programs*, 326 NLRB 1272 (1998).

A petitioner's desire as to unit is always a relevant consideration but cannot be dispositive. *Marks Oxygen Co.*, supra; and *Airco, Inc.*, 273 NLRB 348 (1984), and section 12-140, infra. Obviously, a proposed bargaining unit based on an arbitrary, heterogeneous, or artificial grouping of employees is inappropriate. *Moore Business Forms, Inc*., 204 NLRB 552 (1973); and *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Thus, when all maintenance and technical employees have similar working conditions, are under common supervision, and interchange jobs frequently, a unit including only part of them is inappropriate. *U.S. Steel Corp.*, 192 NLRB 58 (1971).

The discretion granted to the Board in Section 9(b) to determine the appropriate bargaining unit is reasonably broad, although it does require that there be record evidence on which a finding of appropriateness can be granted. *Allen Health Care Services*, 332 NLRB 1308 (2000). The only statutory limitations are those pertaining to professional employees (Sec. 9(b)(1)); craft representation (Sec. 9(b)(2)); plant guards (Sec. 9(b)(3)); and extent of organization (Sec. 9(c)(5)). These provisions are treated in summary manner here and at greater length under more specific headings in later chapters. By way of an introductory note to these statutory limitations, we summarize them here.

12-110 Professional Employees

355-2260

401-2575-1400

440-1760-4300

Section 9(b)(1) prohibits the Board from deciding that a unit including both professional and nonprofessional employees is appropriate, unless a majority of the professional employees vote for inclusion in such a mixed unit. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Vickers, Inc*., 124 NLRB 1051 (1959); *Pay Less Drug Stores*, 127 NLRB 160 (1960); *Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7 (2d Cir. 1971), cert. denied 404 U.S. 853 (1971); *A. O. Smith Corp.*, 166 NLRB 845 (1967); and *Lockheed Aircraft Corp*., 202 NLRB 1140 (1973). In *Russelton Medical Group*, 302 NLRB 718 (1991), an unfair labor practice case, the Board declined to order bargaining in a combined unit where there had never been a vote under Section 9(b)(1). See also *Utah Power & Light Co.*, 258 NLRB 1059 (1981), and section 18-100, infra.

12-120 Craft Units

440-1760-9100

Section 9(b)(2) prohibits the Board from deciding that a proposed craft unit is inappropriate because of the prior establishment by the Board of a broader unit unless a majority of the employees in the proposed craft unit vote against separate representation. For a full discussion of this provision and its interpretation, see chapter 16 on Craft and Traditional Departmental Units in general and *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967), in particular.

12-130 Plant Guards

339-7575-7500 et seq.

401-2575-2800

Section 9(b)(3) prohibits the Board from establishing units including both plant guards and other employees and from certifying a labor organization as representative of a guard unit, if the

labor organization admits to membership, or is affiliated, directly or indirectly, with an organization which admits nonguard employees. *American Building Maintenance Co.*, 126 NLRB 185 (1960); *Bonded Armored Carrier*, 195 NLRB 346 (1972); and *Wackenhut Corp*., 196 NLRB 278 (1972). See also *Elite Protective & Security Services*, 300 NLRB 832 (1990).

The Board has also held that the 9(b)(3) restriction precludes it from finding unlawful the withdrawal of recognition for a mixed guard union that had been voluntarily recognized for a guard unit. *Temple Security, Inc.*, 328 NLRB 663 (1999), and *Wells Fargo Corp.*, 270 NLRB 787 (1984)

See also section 18-200, infra.

12-140 Extent of Organization

401-2562

Section 9(c)(5) prohibits the Board from establishing a bargaining unit solely on the basis of extent of organization. *NLRB v. Morganton Hosiery Co.*, 241 F.2d 913 (4th Cir. 1957); *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965); and *Motts Shop Rite of Springfield*, 182 NLRB 172 (1970). See also *Overnite Transportation Co*., 322 NLRB 723 (1996) , and 325 NLRB 612 (1998), where the Board held that a finding of different units in the same factual setting does not mean that the decision is based on extent organization.

For a fuller discussion of this statutory limitation, see sections 12-300 and 13-1000.

12-200 General Principles

The Board has given full recognition to the significance of its discretionary determination of an appropriate bargaining unit. In *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962), it stated:

> Because the scope or the unit is basic to and permeates the whole of the collective-bargaining relationship, each determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. Accord: *Gustave Fischer, Inc.*, 256 NLRB 1069 (1981).

To obtain a better understanding of the factors which go into a unit finding, we shall first consider those which are relatively simple and therefore require little elaboration, and then, in more detail, those which need further explication.

12-210 Community of Interest

401-7500

420-2900

420-4000 et seq.

A major determinant in an appropriate unit finding is the community of duties and interests of the employees involved. When the interests of one group of employees are dissimilar from those of another group, a single unit is inappropriate. *Swift & Co.*, 129 NLRB 1391 (1961). See also *U.S. Steel Corp*, supra. But the fact that two or more groups of employees engage in different processes does not by itself render a combined unit inappropriate if there is a sufficient community of interest among all these employees. *Berea Publishing Co.*, 140 NLRB 516, 518 (1963).

Many considerations enter into a finding of community of interest. See, e.g., *NLRB v. Paper Mfrs. Co.*, 786 F.2d 163 (3d Cir. 1986). The factors affecting the ultimate unit determination may be found in the following sampling:

a. Degree of functional integration. *Casino Aztar,* 349 NLRB 603 (2007); *Publix Super Markets, Inc*., 343 NLRB 1023 (2004); *United Rentals, Inc.,* 341 NLRB 540 (2004); *United Operations, Inc*., 338 NLRB 123 (2002); *Seaboard Marine Ltd.,* 327 NLRB 556 (1999); *Atlanta Hilton & Towers,* 273 NLRB 87 (1984); *NCR Corp*., 236 NLRB 215 (1978); *Michigan Wisconsin Pipe Line Co.,* 194 NLRB 469 (1972); *Threads-Inc.,* 191 NLRB 667 (1971); *H. P. Hood & Sons*, 187 NLRB 404 (1971); *Monsanto Research Corp*., 185 NLRB 137 (1970); and *Transerv Systems*, 311 NLRB 766 (1993).

b. Common supervision. *United Rentals, Inc*., supra; *Bradley Steel, Inc*., 342 NLRB 215 (2004); *United Operations, Inc*., supra; *Associated Milk Producers*, 250 NLRB 1407 (1970); *Sears, Roebuck & Co*., 191 NLRB 398 (1971); *Donald Carroll Metals*, 185 NLRB 409 (1970); *Dean Witter & Co.*, 189 NLRB 785 (1971); *Harron Communications*, 308 NLRB 62 (1992); *Transerv Systems*, supra; and *Sears, Roebuck & Co*., 319 NLRB 607 (1995).

c. The nature of employee skills and functions. *United Operations, Inc*., supra; *Overnite Transportation Co*., 331 NLRB 662 (2000) (all unskilled employees at particular location); *Seaboard Marine Ltd*., supra; *J. C. Penney Co.,* 328 NLRB 766 (1999); *Harron Communications*, supra; *Hamilton Test Systems*, 265 NLRB 595 (1982); *R-N Market*, 190 NLRB 292 (1971); *Downingtown Paper Co*., 192 NLRB 310 (1971); and *Phoenician*, 308 NLRB 826 (1992).

d. Interchangeability and contact among employees. *Casino Aztar*, supra; *United Rentals*, supra*; J. C. Penney*, supra; *Associated Milk Producers*, supra; *Purity Supreme, Inc*., 197 NLRB 915 (1972); *Gray Drug Stores*, 197 NLRB 924 (1972); and *Michigan Bell Telephone Co.*, 192 NLRB 1212 (1971).

e. Work situs. *R-N Market*, supra; *Bank of America*, 196 NLRB 591 (1972); and *Kendall Co.,* 184 NLRB 847 (1970).

f. General working conditions. *United Rentals*, supra*; Allied Gear & Machine Co.,* 250 NLRB 679 (1980); *Sears, Roebuck & Co*., supra; and *Yale University*, 184 NLRB 860 (1970). See also *K.G. Knitting Mills*, 320 NLRB 374 (1995), where the Board held that the fact that employees receive a salary, do not punch timeclocks, receive different health insurance benefits from other unit employees, and are able to adjust their own hours was not an adequate basis for exclusion from the unit.

g. Fringe benefits. *Allied Gear & Machine Co*., supra; *Donald Carroll Metals*, supra; *Cheney Bigelow Wire Works*, 197 NLRB 1279 (1972). In *Publix Super Markets*, supra; *Bradley Steel, Inc*., supra; and *Los Angeles Water & Power Employees' Assn*., 340 NLRB 1232 (2003), the Board found community of interest where the only factor militating against inclusion was the higher rate of pay enjoyed by the contested employee.

"[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co*., 96 NLRB 295, 298 fn. 7 (1951). Accord: *Gustave Fischer, Inc*., supra at fn. 5.

This enumeration of factors relevant to a community-of-interest finding is intended to alert the reader to the ingredients to look for in arriving at a determination. It should be noted, however, that, in the normal situation, the unit question is resolved by weighing *all* the relevant factors against the major determinant of community of interest. See, e.g., *Publix Super Markets*, supra; *Bradley Steel, Inc*., supra; *Trumbull Memorial Hospital*, 338 NLRB 900 (2003); *United Operations, Inc*., supra; and *Hotel Services Group*, 328 NLRB 116 (1999).

A difference in the situs of employment does not in itself require establishment of separate bargaining units, especially when there is evidence of a community of interest in their employment joining both groups. *NLRB v. Carson Cable TV*, supra. *McCann Steel Co*., 179 NLRB 635, 636 (1969); and *Peerless Products Co*., 114 NLRB 1586 (1956). Conversely,

employees stationed away from the plant are excluded from a production and maintenance unit where they do not have sufficient interests in common with the in-plant employees. *Sealite, Inc*., 125 NLRB 619 (1959); and *Sheffield Corp.*, 123 NLRB 1454 (1959). As a consequence, homeworkers are generally excluded from a unit of in-plant employees. *Valley Forge Flag Co*., 152 NLRB 1550 (1965); and *Terri Lee, Inc*., 103 NLRB 995 (1953). However, employees who spend most of their time away from the plant may be included in a plantwide unit if the petitioner is willing to represent such a unit and no other union seeks to represent them separately. *Marks Oxygen Co*., supra. Difference in supervision is not a per se basis for excluding employees from an appropriate unit. *Texas Empire Pipe Line Co*., 88 NLRB 631 (1950). The important consideration is still the overall community of interest among the several employees.

For a typical analysis of the operative factors leading to or away from a community-of-interest finding, see *U.S. Steel Corp*., supra, and *Brand Precision Services*, 313 NLRB 657 (1994). See also *Aerospace Corp*., 331 NLRB 561 (2000) (community-of-interest test used in research and development industry).

In *Winsett-Simmonds Engineers, Inc.*, 164 NLRB 611 (1967), the Board found sufficient community of interest to include work release prisoners in a bargaining unit in the circumstances there. Compare *Speedrack Products Group, Ltd.*, 321 NLRB No. 143 (1996) (not reported in Board volumes), enf. denied 114 F.3d 1276 (D.C. Cir. 1997). On remand the Board included the work release prisoners. *Speedrack Products Group Limited*, 325 NLRB 609 (1998).

12-220 History of Collective Bargaining

420-1200 et seq.

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective bargaining which is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Canal Carting, Inc.*, 339 NLRB 969 (2003); *Ready Mix USA, Inc.*, 340 NLRB 946 (2003); *Red Coats, Inc.*, 328 NLRB 205 (1999); and *Washington Post Co*., 254 NLRB 168 (1981). *Fraser & Johnston Co*., 189 NLRB 142, 151 fn. 50 (1971); *Lone Star Gas Co*., 194 NLRB 761 (1972); *West Virginia Pulp & Paper Co*., 120 NLRB 1281, 1284 (1958); and *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965). The rationale for this policy is based on the statutory objective of stability in industrial relations. See also *Hi-Way Billboards*, 191 NLRB 244 (1971).

Bargaining history under 8(f) agreements is relevant to a unit determination under Section 9 but not conclusive. *Barron Heating & Air Conditioning, Inc.*, 343 NLRB 450 (2004).

A party challenging a historical unit as no longer inappropriate has a heavy evidentiary burden. *Trident Seafoods, Inc.*, 318 NLRB 738 (1995); *Canal Carting*, supra*;* and *Ready Mix USA*, supra.

As in many areas of substantive law, exceptions are made to the general rule. These are:

12-221 Consent-Election Stipulation

393-6054-6750

401-5000

420-7312

The Board does not consider itself bound by a collective-bargaining history resulting from a consent election conducted pursuant to a unit stipulated by the parties rather than one determined by the Board. *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004); *Mid-West Abrasive Co.*, 145 NLRB 1665 (1964); and *Macy's San Francisco*, 120 NLRB 69, 71 (1958). Likewise, the Board does not consider itself bound by a history of bargaining resulting from a Board certification or stipulation of the parties at the hearing. *Coca-Cola Bottling Co. of Baltimore*, 156 NLRB 450, 452 (1966); and *Westinghouse Electric Corp.*, 118 NLRB 1043

(1957). This policy is not applicable to instances in which the Board is making unit placement determinations in a stipulated unit. In such cases, the intent of the parties is paramount. *Tribune Co*., 190 NLRB 398 (1971); and *Lear Siegler, Inc*., 287 NLRB 372 (1987). Where that intent is unclear, a community-of-interest test is applied. *Space Mark, Inc.,* 325 NLRB 1140 fn. 1 (1998).

For additional discussion of stipulations in representation cases, see sections 23-500, -520, and -530 and *Pacific Lincoln-Mercury*, 312 NLRB 901 (1993).

12-222 Bargaining History Contrary to Board Policy

420-1787

Bargaining history, conducted on a basis contrary to established Board representation policy, carries little or no weight in a determination of appropriate unit. *Mfg. Woodworkers Assn*., 194 NLRB 1122 (1972) (bargaining history on a "members only" basis); *Land Title Guarantee & Trust Co.,* 194 NLRB 148 (1972) (bargaining history based solely on the sex of the employees); *Crown Zellerbach Corp*., 246 NLRB 202 (1980), and *A. L. Mechling Barge Lines*, 192 NLRB 1118, 1120 (1971) (inclusion of employees by agreement despite lack of community of interest); *Liggett & Meyers Tobacco Co.*, 91 NLRB 1145, 1146 fn. 3 (1950) (bargaining history on a "members only" basis); and *New Deal Cab Co.*, 159 NLRB 1838, 1841 (1966) (bargaining history based solely on race). But simply because the historical unit would not be appropriate under Board standards if being organized for the first time, does not make it inappropriate. *Ready Mix USA, Inc.*, supra.

12-223 Ineffective Bargaining History

420-1708

420-1775

A brief or ineffective history of collective bargaining is not accorded determinative weight. Generally, a bargaining history of less than a year in duration is regarded as too brief to be deemed a significant factor. See *Jos. Schlitz Brewing Co*., 206 NLRB 928 (1973); *Duke Power Co*., 191 NLRB 308 (1971); *Heublein, Inc.*, 119 NLRB 1337, 1339 (1958); and *Chrysler Corp*., 119 NLRB 1312, 1314 (1958).

12-224 Oral Contract

420-1725

A bargaining history which is based on an oral contract is not controlling. *Inyo Lumber Co*., 92 NLRB 1267 fn. 3 (1951).

12-225 Bargaining History of Other Employees

420-1254

420-1263

420-1281

The bargaining history of a group of organized employees in a plant does not control the unit determination for every other group of unorganized employees in that plant. *North American Rockwell Corp.,* 193 NLRB 985 (1971); *Piggly Wiggly California Co.*, 144 NLRB 708 (1963); *Arcata Plywood Corp*., 120 NLRB 1648, 1651 (1958); and *Joseph E. Seagram & Sons, Inc*., 101 NLRB 101 (1953). Compare *Transcontinental Bus System*, 178 NLRB 712 (1969).

For similar reasons, the bargaining pattern at other plants of the same employer or in the particular industry will not be considered controlling in relation to the bargaining unit of a particular plant, *Big Y Foods*, 238 NLRB 855 (1978); *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1953), although it may be a factor in unit determination; and *Spartan Department Stores*, 140 NLRB 608 (1963).

12-226 Significant Changes

420-2300

Notwithstanding a long history of bargaining on a multiplant basis, where significant changes occur after the prior certification, the bargaining history on the former basis no longer has a controlling effect. *Plymouth Shoe Co.*, 185 NLRB 732 (1970); *General Electric Co.*, 185 NLRB 13 (1970); and *General Electric Co.*, 100 NLRB 1489 (1951). Thus, the bargaining history lost its impact where, as a result of a reorganization, integrated plants became decentralized. See also *General Electric Co.*, 123 NLRB 1193 (1959); and *Westinghouse Electric Corp*., 144 NLRB 455 (1963). Compare *Crown Zellerbach Corp*., supra, where the Board found the changes insubstantial but nonetheless directed an election in a single-plant unit which had historically been part of a multiplant unit. In *Rinker Materials Corp.*, 294 NLRB 738 (1989), the Board found that the changes were not sufficient "to destroy the historical separation of two groups of employees." See also *Ready Mix USA, Inc.*, 340 NLRB 946 (2003), changes made by successor found insubstantial.

12-227 Checkered Bargaining History

420-1209

Where there is a varied bargaining history, sometimes described as a "checkered bargaining history" (*Western Electric Co*., 98 NLRB 1018, 1036 (1951)), the most recent bargaining history normally controls. *Weston Paper & Mfg. Co*., 100 NLRB 276 (1951). A "checkered bargaining history" is one in which no fixed pattern of bargaining has been established either among all employees or among groupings of employees in a plant. See *Western Electric Co*., supra, for an illustration of such a bargaining history.

12-228 Deviation From Prior Unit Determination

420-1766

420-9000

Bargaining on a basis which deviates substantially from a prior unit determination is not controlling in a subsequent proceeding in which a redetermination of the unit is sought. Thus, for example, where all the parties have abandoned joint bargaining, as where a multiemployer association released its members and the members in turn resigned, revoked the association's authority, and entered into separate agreements with the former common employee representatives, the former bargaining history has no controlling effect on current unit determination. *Pennsylvania Garment Mfrs. Assn.*, 125 NLRB 185 (1959).

12-229 Other Exceptions

339-7550

420-1227

420-1758

420-1787

An employer's dealings with a shop committee established by it, which did not conduct any bargaining with the employer or handle any grievance, is not regarded as evidence of a bargaining history. *Mid-West Abrasive Co*., 145 NLRB 1665 (1964). Although in the determination of the scope of the appropriate unit weight is given to bargaining history and to the prior agreement of the parties, such factors are not determinative of the status of disputed employee categories whose exclusion may be required because of the statute or for policy reasons. *Firemen & Oilers*, 145 NLRB 1521, 1525 fn. 10 (1964). Where a multiplant bargaining history began prior to the expiration of a single-plant contract, and resulted in the execution of a multiplant contract found to be a premature extension of the single-plant contract, the bargaining history was not given

controlling weight in determining the appropriate unit. *Continental Can Co.*, 145 NLRB 1427, 1429 (1964)). See also *Firestone Synthetic Fibers Co*., 171 NLRB 1121 (1968), wherein the employees involved were found to be accretions to an existing unit.

12-230 Specific Unit Rules

A number of rules have been formulated affecting a variety of unit contentions urging the determination of an appropriate unit on one or more of the grounds listed here. These include considerations such as size of unit, mode of payment, age, sex, race, union membership, territorial or work jurisdiction, and the desires of the employees involved.

12-231 Size of Unit

347-8040

As noted above 12-100, the Board generally selects the smallest appropriate unit that includes the petitioned-for employees. *Bartlett Collins Co.*, 334 NLRB 484 (2001).

It is**,** however**,** contrary to Board policy to certify a representative for bargaining purposes in a unit consisting of only one employee. *Roman Catholic Orphan Asylum*, 229 NLRB 251 (1977); *Sonoma-Marin Publishing Co*., 172 NLRB 625 (1968); and *Griffin Wheel Co*., 80 NLRB 1471 (1949); cf. discussion in *Louis Rosenberg, Inc*., 122 NLRB 1450, 1453 (1959); also *Foreign Car Center*, 129 NLRB 319 (1961)); and *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966). In the latter case, the Board held that, because it is not empowered to require bargaining or to certify a bargaining representative in a unit comprising only one employee, it does not direct elections in such units either under Section 9(c) or under Section 8(b)(7)(c). Consequently, a union claiming recognition is disabled through no fault of its own from invoking the Board's election processes for purposes of resolving the question concerning representation raised by picketing, and it would be inequitable and not within the congressional intent to condition the lawfulness of the recognitional picketing in the one-man unit on the union's filing of a petition. See also *Operating Engineers Local 181 (Steel Fab)*, 292 NLRB 354 (1989); and *Laborers Local 133 (Whitaker & Sons)*, 283 NLRB 918 (1987).

It should be noted that the appropriateness of a unit is not affected by the speculative possibility that the employee complement may be reduced to one employee. *National Licorice Co.*, 85 NLRB 140 (1949). It is the permanent size of the unit, not the number of actual incumbents employed at any given time that is controlling. *Copier Care Plus*, 324 NLRB 785 fn. 3 (1997).

12-232 Mode and/or Rate of Payment

420-2903 et seq.

The mode of payment itself is not determinative of the scope of an appropriate bargaining unit. *Palmer Mfg. Corp.*, 105 NLRB 812 (1953). Nor does a distinction in the rate of pay affect the unit determination. *Four Winds Services*, 325 NLRB 632 (1998) (some paid under Davis-Bacon and some not), and *Donald Carroll Metals*, 185 NLRB 409, 410 (1970). A mere difference in the method of payment does not warrant exclusion from an appropriate unit. *Armour & Co*., 119 NLRB 122 (1958); and *Century Electric Co*., 146 NLRB 232 (1964). Where a different method of payment arises out of historical or administrative reasons, rather than a functional distinction, no valid basis exists for distinguishing, for representation purposes, hourly paid workers from those paid by the week. *Swift & Co*., 101 NLRB 33 (1951). It is to the general interests, duties, nature of work, and working conditions of the employees that significance is given in the resolution of unit questions. *Kansas City Power & Light Co*., 75 NLRB 609 (1948). Mode of payment, if viable at all as a factor, is generally only one of a number of factors, all of which when considered together determine the unit finding. *Hotel Services Group*, 328 NLRB 116 (1999); *Liquid Transporters, Inc.*, 250 NLRB 1421, 1424 (1980); *Firestone Tire Co.*, 156

NLRB 454, 456 (1966); *"M" System*, 115 NLRB 1316 (1956); *Curcie Bros., Inc.*, 146 NLRB 380 (1964); and *Carter Camera Shops*, 130 NLRB 276 (1961).

12-233 Age

420-3460

Age is not a valid consideration for exclusion from a unit. Thus, a contention for exclusion from a unit on the ground that the employees were elderly was rejected. *Metal Textile Corp*., 88 NLRB 1326, 1329 (1950). Similarly, social security annuitants who limit their earnings so as not to decrease their annuity but who otherwise share community of interests with unit employees are included. *Holiday Inns of America*, 176 NLRB 939 (1969).

12-234 Sex

420-3440

In the absence of evidence of a substantial difference in skills between male and female employees, a petition for a unit based on sex is inappropriate. *Cuneo Eastern Press*, 106 NLRB 343 (1953); and *Land Title Guarantee & Trust Co*., 194 NLRB 148 (1972). For related reasons, severance of all female employees, although they performed similar duties and had interests in common with the other employees, was denied. No justification for severance had been advanced, leaving only the differentiation in sex, and that, Board policy makes clear, is by itself no basis for a separate unit. *Rexall Drug Co.*, 89 NLRB 683 (1950). Where the evidence established, and the parties admitted, that the sole basis for separate units and separate contracts was that one included all female production employees and the other included all male production employees, the Board directed an election in a unit of *all* production employees, rejecting a proposed unit based solely on sex. *U.S. Baking Co.*, 165 NLRB 951 (1967).

In the latter case, the Board admonished the parties that if the labor organization which had represented the separate units of male employees and female employees wins the election, and it should later be shown, in an appropriate proceeding, that equal representation had been denied to any employee in the unit, the Board would consider revoking its certification. See *U.S. Baking Co*., supra at fn. 6. See also *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 210 NLRB 943 (1974), separate locals and units based on sex held violative of Section 8(b)(1)(A) and (2).

12-235 Race

420-3420

The race of employees is not a valid determinant of the appropriateness of a unit. *Norfolk Southern Bus Corp.*, 76 NLRB 488 fn. 8 (1948); and *New Deal Cab Co.*, 159 NLRB 1838 (1966). See also *Andrews Industries*, 105 NLRB 946 (1953); *Pioneer Bus Co.*, 140 NLRB 54 (1963); and *Lindsay Newspapers*, 192 NLRB 478 (1971).

In *New Deal*, supra, the Board found that *New Deal Cab Co.*, and *Safety Cabs, Inc.*, 173 NLRB 17 (1969), constituted a single employer but had engaged in a bargaining pattern predicated on racial factors "which cannot be accepted as appropriate." The separation of bargaining units was rooted originally in representation by separate segregated locals, a situation fostered by the local government's issuance of separate permits to the separate enterprises based essentially on lines of racial segregation. That racial pattern continued to exist as of the time of the Board decision. "Throughout its entire history," said the Board, it "has refused to recognize race as a valid factor in determining the appropriateness of any unit for collective bargaining." See, for example, *American Tobacco Co.*, 9 NLRB 579 (1938); *Union Envelope Co.*, 10 NLRB 1147 (1939); *Aetna Iron & Steel Co*., 35 NLRB 136 (1941); *U.S. Bedding Co.*, 52 NLRB 382 (1943); *Norfolk Southern Bus Corp*.,);supra; *Andrews Industries*, supra; and *Pioneer Bus Co*., supra.

For a discussion of Board policy with respect to contention that a union should not be certified because it discriminates on racial grounds see *Handy Andy, Inc.*, 228 NLRB 447 (1977), discussed of section 6-130. See also *Memphis Furniture Mfg. Co.*, 259 NLRB 401 (1981).

12-236 Union Membership

420-7336 et seq.

The fact that a union does not admit certain employee categories to membership is not a valid ground for excluding such employees from a bargaining unit. *Rockwell Mfg. Co*., 89 NLRB 1434, 1436 fn. 8 (1950). Thus, the jurisdictional inability of a union to represent certain employees or job classifications in no way restricts the Board in the determination of the appropriate unit. *Davis Cafeteria*, 160 NLRB 1141 (1966); *Associated Grocers*, 142 NLRB 576 (1963); and *Central Coat, Apron & Linen Service*, 126 NLRB 958 (1960). Nor are the union's jurisdictional limitations, standing alone, a proper determinant of bargaining unit. *Pennsylvania Garment Mfrs. Assn.*, supra. Moreover, a jurisdictional agreement between two or more unions does not relieve the Board of its statutory duty to determine the appropriate bargaining unit. *J. A. Jones Construction Co*., 84 NLRB 88 (1949). This is true even where there has been a prior bargaining history along the lines of the jurisdictional agreement. *Utility Appliance Corp.*, 106 NLRB 398 (1953).

When, however, exclusion from membership is based on invidious or discriminatory reasons, see *Handy Andy, Inc.*, supra.

12-237 Territorial Jurisdiction

420-7342

420-8473

The union's territorial jurisdiction and limitations do not generally affect the determination of an appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968). See also *Building Construction Employers Assn.*, 147 NLRB 222 (1964); *John Sundwall & Co.*, 149 NLRB 1022 (1964); and *Paxton Wholesale Grocery Co*., 123 NLRB 316 (1959). But see *Dundee's Seafood, Inc*., 221 NLRB 1183 (1976), in which the Board considers the union's jurisdictional limitations as one factor in its unit determination. In doing so, the Board noted that its limitation was a factor in past bargaining. See also *P. J. Dick Contracting*, 290 NLRB 150 fn. 8 (1988).

12-238 Work Jurisdiction

420-7342

420-8400

560-7580-4000

Early in its history the Board stated that its function in a representation proceeding "is to ascertain and certify to the parties the name of the bargaining representative, if any, that has been designated by the employees in the appropriate unit; it is not our function to direct, instruct, or limit that representative as to the manner in which it is to exercise its bargaining agency." *Wilson Packing & Rubber Co*., 51 NLRB 910, 913 (1943). Thus, in describing a unit the Board does not make an award to employees in the unit found appropriate to perform exclusively all the duties required by their job classifications. *General Aniline Corp*., 89 NLRB 467 (1950). See also *Plumbing Contractors Assn*., 93 NLRB 1081, 1087 fn. 21 (1951); and *Gas Service Co*., 140 NLRB 445 (1963). As the Board has explained, certifications are not granted to unions on the basis of specific work tasks or types of machines operated, on union jurisdictional claim but in terms of employee classifications performing related work functions, under a community of interest analysis. *Ross-Meehan Foundries*, 147 NLRB 207 (1964). *Scrantonian Publishing Co*., 215 NLRB 296, 298 fn. 9 (1974).

12-239 Employees' Desires

420-7306

"While the desires of employees with respect to their inclusion in a bargaining unit [are] not controlling, it is a factor which the Board should take into consideration in reaching its ultimate decision. . . . Indeed, it may be the single factor that would 'tip the scales.'" *NLRB v. Ideal Laundry & Dry Cleaning Co*., 330 F.2d 712, 717 (10th Cir. 1964).

While in *Ideal Laundry*, the Board accepted the court's theory with respect to the employees' unit desires as the law of the case, it disagreed with the court's opinion to the extent that the court indicated that subjective testimony by employees as to their desires for inclusion in or exclusion from an appropriate unit is generally relevant in Board unit determinations. *Ideal Laundry & Dry Cleaning Co.*, 152 NLRB 1130, 1131 fn. 6 (1955). See also *Marriott In-Flite Services v. NLRB*, 652 F.2d 202 (1981).

See also Extent of Organization, section 12-300, infra.

12-300 Extent of Organization

401-2562

420-8400

We mentioned at the beginning of this chapter, in referring to statutory limitations, that one of these is the provision in Section 9(c)(5) against making "extent of organization" a controlling factor in bargaining unit determination. Amplification of this provision appears to be appropriate at this point. Although this requirement is essentially one of statutory origin, its application is nonetheless couched in terms of Board policy and therefore does not seem out of place in a synopsis of general unit principles.

The Board has effectuated the 9(c)(5) provision denying unit requests where the only apparent basis was the extent of the petitioner's organization of the employees. However, it has held that extent of organization may be taken into consideration as one of the factors in unit determination, together with other factors, provided, of course, that it is not the governing factor. *NLRB v. Quaker City Life Insurance Co.*, 319 F.2d 690 (4th Cir. 1963); *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965).

In conformity with this statutory limitation, it has been held that a unit based solely or essentially on extent of organization is inappropriate. *New England Power Co*., 120 NLRB 666 (1958); and *John Sundwall & Co*., supra. However, the fact that under Section 9(c)(5) the extent that employees have been organized may not be the controlling determinant of the appropriateness of a proposed bargaining unit does not, as we have said, preclude reliance on that factor in conjunction with other factors. *Metropolitan Life Insurance Co.*, 156 NLRB 1408 (1966); *Central Power & Light Co.*, 195 NLRB 743 (1972); *Mosler Safe Co*., 188 NLRB 650, 651 fn. 6 (1971); and *Overnite Transportation Co*., 141 NLRB 384 fn. 2 (1963).

In *Central Power & Light Co*., supra at 746, which involved the public utility industry, it was pointed out that "Before bargaining can occur on the basis of a systemwide unit, there must be systemwide organization of employees"; there is nothing in the Act or in Board policy which requires a petitioner to seek the optimum unit; and it "need only seek to represent an appropriate unit of employees." Consequently, the decision aimed at in that case comported with the statutory direction and did not preclude the eventual establishment of bargaining in the systemwide unit.

Even if a petitioning union's proposal is, in part, based on the extent of its organizational efforts, it does not follow that such a unit is necessarily defective or that in designating that unit as appropriate the Board is thereby giving any, much less controlling, weight to the union's extent of organization. *Dundee's Seafood, Inc*., supra; *Consolidated Papers*, 220 NLRB 1281 (1975); and *Bell Industries*, 139 NLRB 629, 631 fn. 7 (1962). Similarly, the fact that the petitioner's motive in seeking separate units is guided by the extent to which the union had organized is

immaterial so long as the Board, in its choice of appropriate unit, does not give controlling weight to that fact. *Stern's Paramus*, 150 NLRB 799, 807 (1965).

See earlier reference to this subject at sections 12-140 and 12-239, supra. See also section 13-1000, infra.

12-400 Residual Units

420-8400

440-1780-6000

Groups of employees omitted from established bargaining units constitute appropriate "residual" units, provided they include all the unrepresented employees of the type covered by the petition. *G.L. Milliken Plastering*, 340 NLRB 1169 (2003); *Carl Buddig & Co.*, 328 NLRB 929 (1999); and *Fleming Foods*, 313 NLRB 948 (1994). See also *Premier Plastering, Inc.*, 342 NLRB 1072 (2004).

For example, where a group of laboratory employees had been excluded from the production and maintenance unit and were therefore unrepresented, representation in a separate unit on a residual basis was held appropriate. *S. D. Warren Co.*, 114 NLRB 410, 411 (1956). When, however, a petitioner sought a unit of employees in the employer's shipping and warehouse office, and it appeared that the employer had many unrepresented clerical employees other than those petitioned for, the unit sought was found to be comprised of only a segment of all the unrepresented employees, and therefore did not meet the test of "residual unit," and was inappropriate as a bargaining unit. *American Radiator Corp.*, 114 NLRB 1151, 1154–1155 (1956). Where, however, the union is willing to proceed to an election in a larger unit, an election will be directed. *Carl Buddig*, supra, and *Folger Coffee Co.*, 250 NLRB 1 (1980).

In fashioning overall or larger units, the Board is reluctant to leave a residual unit where the employees could be included in the larger group. *Huckleberry Youth Programs*, 326 NLRB 1272 (1998) . See also *United Rentals, Inc.*, 341 NLRB 540 fn. 11 (2004) (only unrepresented employees at facility included in unit despite sparse record of community of interest) and section 19-440, infra.

Where the record was insufficient to establish whether the requested residual unit includes all unrepresented employees, the Board has remanded the matter to the Regional Director. *G.L. Milliken*, supra.

For other illustrations of groups found *appropriate* as "residual," see *Cities Service Oil Co.*, 200 NLRB 470 (1972) (in a multiplant situation); *Walter Kidde & Co.*, 191 NLRB 10 (1971) (plant clerical employees); *Water Tower Inn*, 139 NLRB 842, 848 (1962) (food service and kitchen employees); *Hot Shoppes, Inc.*, 143 NLRB 578 (1963) (food preparation employees and related categories); and *Rostone Corp.*, 196 NLRB 467 (1972) (so-called hot mold employees).

For illustrations of groups found inappropriate for a bargaining unit on a residual basis, see *Republican Co.*, 169 NLRB 1146, 1147 (1968) (part-time employees in mailing room alone); *Budd Co.*, 154 NLRB 421, 428 (1965) (separate residual units of engineers and accountants inappropriate in view of established units of technical and office clerical employees represented by the petitioner); *Armstrong Rubber Co.*, 144 NLRB 1115, 1119 fn. 11 (1963) (unit sought as "residual'' did not contain all of the unrepresented employees); and *Richmond Dry Goods Co.*, 93 NLRB 663, 666–667 (1951) (inappropriate because the larger unit as to which it was allegedly "residual" was inappropriate).

When the employer's only employees not presently represented by a labor organization are those classified in the category sought by the petitioning union, the petition is treated as a request for a residual unit of all unrepresented employees and an election is directed in that unit. *Building Construction Employers Assn.*, 147 NLRB 222 (1964); *Eastern Container Corp.*, 275 NLRB 1537 (1985).

The issue of appropriateness of a residual unit sometimes arises in a more complex context. For example, when, in the face of an existing multiemployer unit, separate residual units of all unrepresented employees of two hotels were sought, these units were found inappropriate for the reason that the employees sought comprised miscellaneous groupings lacking internal homogeneity or cohesiveness and could not alone constitute an appropriate unit. To be "residual," the group must be coextensive in scope with the existing multiemployer unit, and not merely coextensive with the particular employer's operations and thus only a segment of the residual group. *Los Angeles Statler Hilton Hotel*, 129 NLRB 1349 (1961). But where employees could have expressed their choice in a smaller clerical unit if included in a prior election (held on the basis of a stipulation which failed to include them), they were accorded the opportunity to vote on a residual basis "under the same condition afforded represented clericals." *Chrysler Corp*., 173 NLRB 1046, 1047 (1969).

12-410 Residual Units in the Health Care Industry

When it fashioned its rules for bargaining units in acute care hospitals, the Board specifically deferred resolving whether or not it would process a petition for a residual unit filed by a nonincumbent union in cases involving nonconforming units. See *Health Care Unit Rules*, 284 NLRB 1580, 1580–1597 (1989); and Rules 103.30. Later in *St. John's Hospital*, 307 NLRB 767 (1992), the Board held that it would process a petition for an incumbent union but that the unit would have to include all skilled maintenance employees residual to the existing unit and that the employees must be added to the existing unit by means of a self-determination election.

In *St. Mary's Duluth Clinic Health System*, 332 NLRB 1419 (2000), the Board held that a nonincumbent union may represent a separate residual unit of employees in an acute care hospital that is residual to an existing nonconforming unit. In doing so, the Board overruled its pre-Rule decision in *Levine Hospital of Hayward*, 219 NLRB 327 (1975). Thereafter, in *Kaiser Foundation Health Plan of Colorado*, 333 NLRB 557 (2001), the Board applied its new *St. Mary's* policy to a nonacute care health facility. See also section 15-170, infra.

For a more extensive discussion of the type of elections accorded residual groups, see chapter 21, infra.

12-500 Accretions to Existing Units

316-3301-5000

347-4050-1733

385-7533-4080

440-6701

In outlining general unit principles, and before turning to the broad specific areas each of which is treated in the separate chapters that follow, we turn our attention to "accretion." For additional discussion of "accretion" see chapter 21 and section 11-220. "The Board has defined an accretion as 'the addition of a relatively small group of employees to an existing unit where these additional employees share a community of interest with the unit employees and have no separate identity.'" *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992). See also *Progressive Service Die Co.*, 323 NLRB 1182 (1997).

In *Safeway Stores*, 256 NLRB 918 (1981), the Board described its test as requiring that the group to be accreted have "little or no separate group identity" and "have an overwhelming community of interest with the unit." Recently, the Fourth Circuit agreed with this rule but disagreed with how the Board applied it. *Baltimore Sun Co. v. NLRB*, 257 F.3d 419 (4th Cir. 2001). Accord: *E. I. Du Pont, Inc.*, 341 NLRB 607 (2004).

Accretions to an established bargaining unit are regarded as additions to the unit and therefore as part of it. *United Parcel Service*, 325 NLRB 37 (1997). An accretion issue may arise in three different contexts: contract bar, a petition for certification, or a petition for unit

clarification. "The Board has followed a restrictive policy in finding accretion because it foreclosed the employee's basic right to select their bargaining representative." *Towne Ford Sales*, 270 NLRB 311 (1984); and *Melbet Jewelry Co*., 180 NLRB 107 (1970). See also *Giant Eagle Markets*, 308 NLRB 206 (1992). Thus, the accretion doctrine is not applicable to situations in which the group sought to be accreted would constitute a separate appropriate bargaining unit. *Passavant Health Center*, 313 NLRB 1216 (1994), and *Beverly Manor-San Francisco*, 322 NLRB 968, 972 (1997). The issue may also arise in an unfair labor practice case where the General Counsel alleges that an employer unlawfully added employees to a unit where there is no accretion and the union did not represent a majority of those added. *Ryder Integrated Logistics, Inc*., 329 NLRB 1493 (1999).

Where employees are found to be an accretion to an existing unit, a current contract covering that unit bars the petition. *Firestone Synthetic Fibers Co*., 171 NLRB 1121 (1968); and *Public Service Co*., 190 NLRB 350 (1971).

Employees accreted to an existing unit are not accorded a self-determination election. *Borg-Warner Corp.,* 113 NLRB 152, 154 (1955); and *Goodyear Tire Co*., 147 NLRB 1233 fn. 6. (1964). Compare *Massachusetts Electric Co.*, 248 NLRB 155 (1980), where a self-determination election was directed where the meter readers could have been in either of two units. See also *Carr-Gottstein Foods Co*., 307 NLRB 1318 (1992), and *Photype, Inc*., 145 NLRB 1268 (1964), for discussion of self-determination elections. For a complete discussion of self-determination elections see chapter 21, infra.

Finally, a new classification that is performing the same work the unit classification had historically performed is viewed as part of the unit, not as an accretion. *Premcor, Inc.,* 333 NLRB 1365 (2001); and *Developmental Disabilities Institute,* 334 NLRB 1166 (2001).

A petition for certification of a group found to be an accretion is, of course, dismissed. *Granite City Steel Co.*, 137 NLRB 209 (1962); and *Radio Corp. of America*, 141 NLRB 1134 (1963). However, a petition for clarification is granted if the disputed employees are an accretion to the unit. *Printing Industry of Seattle*, 202 NLRB 558 (1973).

Accretion issue resolution can depend on a number of factors and as in the case of most areas depending on a resolution of factors, it is a combination of factors rather than one single factor which affects the determination whether the employees in question constitute an accretion to an existing bargaining unit. The touchstone is community of interest. See *Boeing Co.*, 349 NLRB 957 (2007). For example, the production and maintenance electrical workers and steamfitters at employer's newly established can manufacturing plant were held not an accretion to the employer's brewery plant in view of the absence of employee interchange, separate management and administrative control, and differences in working conditions. *Jos. Schlitz Brewing Co*., 192 NLRB 553 (1971). Similarly, shared factors such as geographic proximity, working conditions and wages were outweighed by other factors. *E. I. Du Pont, Inc.,* supra. By way of contrast, accretion was found where the employer's second plant provided the same service as the original unit; the employer was the sole owner of both companies; and the companies had interlocking officers and directors and similar operating functions, job classifications, and working conditions. *Baton Rouge Water Works Co*., 170 NLRB 1183 (1968). See also *Earthgrains Co.,* 334 NLRB 1131 (2001).

The factors commonly used to determine whether the group of employees in question constitutes an accretion include the following:

12-510 Interchange

Absence or infrequency of interchange among the new employees and those in the existing unit. *Dennison Mfg. Co.*, 296 NLRB 1034 (1989); *Plumbing Distributors*, 248 NLRB 413 (1980); *Brooklyn Union Gas Co.*, 129 NLRB 361 (1961); and *Combustion Engineering*, 195 NLRB 909, 912 (1972).

As pointed out by the administrative law judge in the last case, "The absence, or infrequency, of interchange of employees is probably the one factor most commonly relied upon by the Board in finding no accretion." It has not deemed it material that interchange was feasible. Thus, in finding no accretion, the Board noted that, although the jobs at the two operations involved were virtually interchangeable, there was in fact no interchange. *Essex Wire Corp*., 130 NLRB 450 (1961). See also *Towne Ford Sales*, 270 NLRB 311 (1984); *Super Value Stores*, 283 NLRB 134 (1987); and *Judge & Dolph, Ltd*., 333 NLRB 175 (2001).

12-520 Supervision and Conditions of Employment

420-2900

Common supervision and similar terms and conditions of employment. *Western Cartridge Co.*, 134 NLRB 67 (1962); and *Western Wirebound Box Co*., 191 NLRB 748 (1971).

In *Western Cartridge Co*., supra, the Board issued a decision in which it clarified an existing certification, including in the description of the appropriate unit a grouping of employees. It relied in part on the fact that these employees had "the same supervisors, duties, and conditions of employment." Compare *Town Ford Sales*, supra; and *Plumbing Distributors*, supra. See also *Safety Carrier, Inc.,* 306 NLRB 960, 969 (1992), and *Judge & Dolph, Ltd.*, supra.

12-530 Job Classification

385-7533-2000

Substantially similar job classifications. *Gillette Motor Transport*, 137 NLRB 471 (1962); and *Printing Industry of Seattle*, supra; *Plough, Inc*., 203 NLRB 818 (1973).

In *Printing Industry of Seattle*, supra, a certification was clarified to include personnel as an accretion because of the identical work being performed by them. But where a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as "remaining in the unit rather than being added to the unit by accretion." *Premcor, Inc.*, 333 NLRB 1365 (2001). See also *Developmental Disabilities Institute*, 334 NLRB 1166, 1168 (2001).

12-540 Integration of Units

420-4600

The physical, functional, and administrative integration of units. *Granite City Steel Co.*, supra; *Combustion Engineering*, supra.

"Although both groups may occasionally utilize similar work measurement techniques, this fact alone is insufficient to warrant the accretion of the new group to the existing unit, where, as here, the functions performed by the two groups are in no way integrated or related and there is no common supervision." *General Electric Co*., 204 NLRB 576 (1973).

The Board will find an accretion of a separate unit of employees into an existing unit where the reasons for the exclusion have been eliminated. *U.S. West Communications*, 310 NLRB 854 (1993).

An employer cannot have employees clarified out of a unit merely by transferring them to a new location, when they are doing the same work under the same supervision. *Montgomery Ward & Co*., 195 NLRB 1031 (1972). Similarly, in the case of an intracorporation reorganization, employees who continue to perform the same type of functions under the same supervision should remain in the unit. *Swedish Medical Center*, 325 NLRB 683 (1998); *McDonnell Douglas Astronautics Co*., 194 NLRB 689 (1972); and *S. D. Warren Co*., 164 NLRB 489 (1967). However, when a merger eliminates the "rational basis" for a separate unit, such unit will be found inappropriate and its members will be clarified into the larger, more comprehensive unit. *Joseph Cory Warehouse*, 184 NLRB 627 (1970). And when a change in the method of operation eliminates the historical justification for including certain employees in a unit, they may be

clarified out of the unit. *Cal-Central Press*, 179 NLRB 162 (1969); and *Libby, McNeill & Libby*, 159 NLRB 677, 681 (1966).

12-550 Geographic Proximity

420-6700

Rollins-Purle, Inc., 194 NLRB 709, 711 (1972), in which the administrative law judge quoted from *Melbet Jewelry Co*., 180 NLRB 107 (1970): "We will not . . . under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." Geographic remoteness was among the factors militating against an accretion finding in *Rollins-Purle, Inc*.,)supra. See also *Granite City Steel Co*., supra. See also *Super Value Stores*, supra. In that case the Board found a 10–12-mile distance as not weighing in favor of accretion. See *Bryant Infant Wear*, 235 NLRB 1305 (1978), and *Judge & Dolph, Ltd.*, 333 NLRB 175 (2001) (70 miles). Compare *Arizona Public Service Co.*, 256 NLRB 400 (1981); and *White Front Stores*, 192 NLRB 240 (1971).

The Board does not automatically accrete employees at a new facility solely because the unit description covers all facilities in a geographical area. *Superior Protection Inc*., 341 NLRB 267 (2004).

12-560 Role of New Employees

The role of the new employees in the operations of the existing unit is a factor in accretion analysis. *Granite City Steel Co.*, supra. In that case, the Board commented, inter alia, on the "vital role in the operation" of new employees held to be an accretion. Compare *Premcor, Inc.*,)supra; *Developmental Disabilities Institute,*)supra, section 12-530.

12-570 Community of Interest

401-7550

As we have seen in other substantive areas, the element of community of interest is consistently a vital element in determining accretion. *Boeing Co.*, 349 NLRB 957 (2007); and *Dennison Mfg. Co*., supra. In *Firestone Synthetic Fibers Co*., supra at 1123, accretion was found where maintenance employees, recently acquired, shared a community of interest with the employer's other maintenance employees and with the production and maintenance employees generally. *Earthgrains Co*., 334 NLRB 1131 (2001). See also *U.S. Steel Corp*., 187 NLRB 522 (1971); and *CF&I Steel Corp*., 196 NLRB 470 (1972). Compare *Giant Eagle Markets*, 308 NLRB 206 (1992).

A UC petition was dismissed where petitioner did not seek to include other employees who performed similar functions and had a close community of interest with the employees sought. *Armstrong Rubber Co*., 180 NLRB 410 (1970). Compare *KMBZ/KMBR Radio*, 290 NLRB 459 (1988).

12-580 Bargaining History

420-1200

A long history of exclusion from the unit was relied on by the Board in rejecting an accretion contention. *Teamsters Local 89 (United Parcel Service),* 346 NLRB 484 (2006). *Aerojet-General Corp*., 185 NLRB 794, 798 (1970). See also *Manitowoc Shipbuilding*, 191 NLRB 786 (1971), noting a long history of inclusion of related employees in the unit which warranted finding of accretion. Compare *Safeway Stores*, 256 NLRB 918 (1981), where jurisdictional clause in a contract with another union precluded accretion. In *Massachusetts Electric Co.* , supra, the Board declined to accrete transferred employees who had been separately represented by another union.

See also *United Parcel Service*, 303 NLRB 326 (1991); *Staten Island University Hospital*, 308 NLRB 58 (1992); and *ATS Acquisition Corp*., 321 NLRB 712 (1996).

As a general rule, the Board will not clarify a bargaining unit to interfere with or change a long-term collective-bargaining history. However, in *Rock-Tenn Co.*, 274 NLRB 772 (1985), the Board clarified a two-plant unit into separate units in which the two plants had been sold to separately incorporated operating divisions of *Rock-Tenn*. The Board found that the sale had resulted in significant organizational changes which offset what community of interest had existed among the employees of the two plants. The Board's *Rock-Tenn* decision emphasized the particular facts of the case finding that they constituted "compelling circumstances" for disregarding the two-plant bargaining history. Later, in *Batesville Casket Co.*, 283 NLRB 795 (1987), the Board declined to clarify an existing two-company single unit into separate units where the single unit had been in existence without substantial changes for many years. In distinguishing *Rock-Tenn*), the Board emphasized that the changes there which had prompted clarification were "*recent* substantial changes." As there were not "recent substantial changes" in *Batesville*, the UC petition was dismissed. See also *Ameron, Inc.*, 288 NLRB 747 (1988), where the Board clarified a single unit into two units under *Rock-Tenn* principles and *Delta Mills*, 287 NLRB 366 (1987), where the Board in an RD proceeding rejected a contention that changed circumstances warranted splitting an existing unit into two units. Accord: *Lennox Industries*, 308 NLRB 1237 (1992), in which the Board clarified a single unit into two units rejecting the employer's request for six units. In *Mayfield Holiday Inn*, 335 NLRB 38 (2001), the Board allowed a historically single unit covering two locations to be divided into two separate units when the two facilities were sold to different employers.

As a "members only" contract does not afford the kind of representation nor establish the type of bargaining unit which the Act contemplates, the Board will not make its procedures available to clarify a unit covered by an agreement which has been applied, in effect, on a "members only" basis. *Ron Wiscombe Painting Co.*, 194 NLRB 907 (1972).

In *United Parcel Service*, 325 NLRB 37 (1997), the Board declined to clarify a nationwide bargaining unit to include a group of employees in one geographic area while continuing to exclude employees performing similar duties in the rest of the unit.

For an analysis of the effect of hiatus on accretion, compare *F & A Food Sales*, 325 NLRB 513 (1998) (position included in unit after 3-year hiatus); with *Coca-Cola Bottling Co. of Wisconsin*, 310 NLRB 844 (1993) (no accretion due to 12-year hiatus).

12-590 Skills and Education

420-2963

Despite an apparent similarity of function, employees found to be basically "computer programmers," who had to meet special educational requirements, were held, for this reason among others, not to have accreted to the unit. *Dennison Mfg. Co.*, supra; and *Aerojet-General Corp*., supra at 797. Accord: *E. I. Du Pont, Inc*., 341 NLRB 607 (2004).

12-600 Relocations, Spinoffs, and Accretions

530-8018-2500

530-8090-4000 et seq.

The Board has been confronted with the problem presented by the transfers of bargaining unit work members. In *Coca-Cola Bottling Co. of Buffalo*, 299 NLRB 989 (1990), the Board termed a transfer of what has been traditionally unit work to a new facility using unit members as a "spinoff." In *Gitano Distribution Center*, 308 NLRB 1172 (1992), the Board overruled *Coca-Cola* and announced a new test for determining the bargaining obligation in such situations. Under this test, the Board will presume that the new operation is a separate appropriate unit. If this presumption is not rebutted, the Board then applies "a simple fact-based majority test'' to

determine the bargaining obligation. See also *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000); *Mercy Health Services North*, 311 NLRB 367 (1993); and *ATS Acquisition Corp*., supra. The Board remanded *Coca-Cola* for further consideration in light of *Gitano* and later found that the presumption of a separate unit had been rebutted. *Coca-Cola Bottling Co. of Buffalo*, 325 NLRB 312 (1998). See also *Rock Bottom Stores*, 312 NLRB 400 (1993), an unfair labor practice case involving when it is appropriate to require application of an existing contract at the new facility.

In *Armco Steel Co*., 312 NLRB 257 (1993), the Board held that UC proceedings could be utilized to resolve the full panoply of issues presented in a *Gitano* analysis. Thus, the Board found the UC proceeding is a more expeditious method of resolving the unit scope and the majority status issues that are part of a *Gitano* consideration.