14. MULTIEMPLOYER, SINGLE EMPLOYER, AND JOINT EMPLOYER UNITS

177-1642 et seq.

420-9000

As we have seen, Section 9(b) of the Act confers on the Board the duty to determine in each instance whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit craft unit, plant unit, or subdivision thereof." From an early date, the Board has construed "employer unit" to include multiemployer units, and joint-employer units. In some respects the tests for determining multiemployer and joint-employer status overlap although there are distinctions. Generally, a multiemployer situation is said to exist when two or more employers band together for purposes of bargaining with the union for what would otherwise be separate units of the employees of each of the Employers. A "single employer" question presents different considerations and is posed when "two nominally-separated entities are actually part of a single integrated enterprise." *Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). In contrast, the term "joint employer" is usually applied to a situation where two or more employers share labor relations control over a group of what would otherwise be one of the employer's employees. This sharing is not necessarily for bargaining purposes. In fact, joint-employer issues arise often in unfair labor practice cases.

This chapter deals primarily with multiemployer bargaining units. The subjects of single- and joint-employer relationships and applicable unit principles are covered briefly.

14-100 Multiemployer Units

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The practice of multiemployer bargaining was known to Congress when it enacted the Taft-Hartley amendments. The construction was given formal approval by the Supreme Court in *NLRB v. Teamsters Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957), when it stated that Congress "intended to leave to the Board's specialized judgment the inevitable questions concerning multiemployer bargaining bound to arise in the future.''

The question of the appropriateness of a bargaining unit comprising employees of more than one employer generally arises where employers in an industry have conducted collective-bargaining negotiations jointly as members of an association or are asserted to have delegated the power to bind themselves in collective bargaining to a joint agent. Consideration is given to the history of collective bargaining, intent of the parties, the nature and character of the joint bargaining, the contract executed by the parties, whether effective withdrawal from multiemployer bargaining had occurred, and other factors relevant to this determination. See *Maramount Corp.*, 310 NLRB 508 (1993), where the long history of collective bargaining was balanced against the employees' Section 7 rights as evidenced by a series of petitions for single units.

Basically, in addressing itself to this standard to be applied in assessing the existence of a multiemployer bargaining, the Board looks for a sufficient indication from the history of the bargaining relationship between the employers and the union of "intent to be governed by joint action." *Rock Springs Retail Merchants Assn*., 188 NLRB 261 (1971).

Determinations normally are made within the framework of a unit functioning either via an association or under an informal understanding between otherwise unrelated employers. See *Weyerhaeuser Co*., 166 NLRB 299, 300 (1967); and *Van Eerden Co*., 154 NLRB 496 (1965).

In *Weyerhaeuser*, the Board adverted to the fact that it had in the past found a multiemployer unit even though the employers had never formalized themselves into an employer association, "a requirement the Board has never demanded," and added that "substance rather than legalistic form is all the Board has ever required in multiemployer bargaining." Thus, the emphasis is on intent to be bound by joint action as evidenced by objective, as distinguished from subjective, facts. Compare *Accetta Millwork*, 274 NLRB 141 (1985), where the Board found no intent to be bound by group action.

14-200 The General Rule

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The general rule is that a single-employer unit is presumptively appropriate. Thus, to establish a contested claim for a broader unit, a controlling history of collective bargaining on a multiemployer basis must be shown. *Central Transport, Inc*., 328 NLRB 407 (1999); *Chicago Metropolitan Home Builders Assn*., 119 NLRB 1184 (1958); *Cab Operating Corp*., 153 NLRB 878, 879–880 (1965); and *Bennett Stone Co*., 139 NLRB 1422, 1424 (1962). See also *Sands Point Nursing Home*, 319 NLRB 390 (1995), and *St. Luke's Hospital*, 234 NLRB 130 (1978), where the Board found that the history of multiemployer bargaining governed the scope of the unit.

For examples of cases in which the Board found a bargaining history on a multiemployer basis, see *Milwaukee Meat Packers Assn*., 223 NLRB 922, 924 (1976); *John Corbett Press Corp*., 172 NLRB 1124 (1968); *B. Brody Seating Co*., 167 NLRB 830 (1967); *United Metal Trades Assn*., 172 NLRB 410 (1968); and *Tom's Monarch Laundry & Cleaning Co*., 168 NLRB 217 (1968). Compare with *Santa Barbara Distributing Co*., 172 NLRB 1665 (1968), in which the Board found a manifest failure of intention to participate in a multiemployer unit. Similarly, in *Walt's Broiler*, 270 NLRB 556 (1984), the employers timely withdrew from multiemployer bargaining. The fact that they later used the same representative was not inconsistent with that withdrawal.

As multiemployer bargaining is a voluntary agreement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes, the "ultimate question . . . is the actual intent of the parties.'' *Van Eerden Co*., supra. Intent to be bound by joint bargaining is found where employers participate in meaningful multiemployer bargaining for a substantial period of time and there is a uniform adoption of the agreement resulting therefrom. *Architectural Contractors Trade Assn.*, 343 NLRB 259 (2004); *Arbor Construction Personnel, Inc.*, 343 NLRB 259 (2004); *Krist Gradis*, 121 NLRB 601 (1958); and *Hi-Way Billboards*, 191 NLRB 244 (1971).

The intention of the parties to be bound in their collective bargaining by group rather than individual action must be unequivocal. *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005); *Hunts Point Recycling Corp*., 301 NLRB 751 (1991); *Kroger Co*., 148 NLRB 569 (1964); *Morgan Linen Service*, 131 NLRB 420 (1961); and *Artcraft Displays*, 262 NLRB 1233 (1982). "The mere adoption of an areawide contract, which includes a 'one unit' clause" is not sufficient. See *Architectural Contractors*, supra, and *Arbor Construction*, supra.

Intent to become part of a multiemployer unit cannot be based solely on the adoption by an employer of a contract negotiated by a multiemployer association of which the employer was not a member. There must also be evidence that the employer had authorized the association to negotiate on its behalf. *Etna Equipment & Supply Co*., 236 NLRB 1578 (1978). *Moveable*

Partitions, 175 NLRB 915 (1969); and *Photographers of the Motion Picture Industries*, 197 NLRB 1187 (1972). In the latter, the evidence indicated that the so-called independent employers did not in fact comprise a part of a single unit for bargaining. It was admitted that these employers had the option to negotiate separately if they so desired; they could refuse to be bound by any agreement negotiated by any multiemployer group simply by not signing the resulting contract; it was not until they received the proposed agreement and discussed it that each individually decided whether to become a party to the agreement; and the association had not been authorized to negotiate on behalf of any of these. On this evidence, they were found *not* to be part of a multiemployer unit. Compare *Custom Color Contractors*, 226 NLRB 851 (1976).

Intent is inferred from the conduct of the parties, not subjectively. Thus, when employers have banded together informally to bargain, without expressly documenting their relationship to each other or to the unions, the presence of the requisite intention is inferred from the facts. In these cases, a steady refrain runs through Board rationales: meaningful joint bargaining, a substantial period of time, and adoption of uniform contracts resulting from the joint bargaining. *American Publishing Corp.*, 121 NLRB 115 (1958). In the language of the Board, in *Van Eerden Co*., supra at 499:

> The ultimate question in these cases, however, is the *actual* intent of the parties, since multiemployer bargaining is a voluntary arrangement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes. And where there is specific evidence, beyond the mere circumstances of joint negotiations and uniformity of contracts, indicating that the parties did not intend to accept the obligations and benefits of multiemployer bargaining, that evidence must be equally considered in determining the basic issue.

Thus, in *American Publishing Corp*., supra, the presentation of a joint position in bargaining and the signing of the resulting contract as a single document by all participating employers was regarded as a manifestation of the intent to be bound. But in *Texas Cartage Co*., 122 NLRB 999 (1959), mere adoption of an areawide agreement by an employer who never participated in group negotiations and never authorized any agent to negotiate on his behalf did not make the employer part of the multiemployer unit. See also *Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543 (1959), and *Ruan Transport Corp*., 234 NLRB 241 (1978).

An effective bargaining history or pattern, even though based on an informal organization of employers, may be sufficient to establish an appropriate multiemployer unit (*Detroit News*, 119 NLRB 345, 347–348 (1958)), but the fact that the union voluntarily entered into initial negotiations with a new employer association, with no prior bargaining history and no existing multiemployer unit, and continued negotiations over a period of some months without reaching agreement was insufficient to establish a multiemployer unit binding upon the union. *Operating Engineers Local 701 (Cascade Employer)*, 132 NLRB 648 (1961).

An employer group may be found to have engaged in joint bargaining even though the members of that group had no formal organization and even in the absence of an advance agreement to be bound by the negotiations. *Belleville Employing Printers*, 122 NLRB 350 (1959). Similarly, the retention by participating employers of the right to approve or disapprove the agreement reached does not necessarily preclude a finding that a multiemployer unit is appropriate. *Quality Limestone Products*, 143 NLRB 589 (1963). Compare *Rock Springs Retail Merchants Assn*., supra.

A multiemployer unit may be appropriate even though the employer has not specifically delegated to an employer group the authority to represent it in collective bargaining or given the group the power to execute final and binding agreements on its behalf. What is essential is that the employer member has indicated from the outset an intention to be bound in collective bargaining by group rather than by individual action. *Kroger Co*., supra. See also *Bennett Stone Co*., supra.

Fluctuating membership in a multiemployer group does not necessarily render the multiemployer unit inappropriate. *Quality Limestone Products*, supra at 591.

The fact that an employer group includes employers who are members of an existing formal association, as well as employers who are not, is not relevant to the determination. *American Publishing Corp*., supra. Similarly, a multiemployer unit may be appropriate even though some of the contracts have not been signed by all members of the employer group. *Kroger Co*., supra.

A finding that an effective multiemployer bargaining history exists is not precluded by the fact that joint negotiations are followed by the signing of individual uniform contracts, rather than by the execution of a single document. *Krist Gradis*, supra; see also *Belleville Employing Printers*, supra. It is immaterial that the members of the employer group sign a joint agreement separately rather than delegate authority to sign to a joint representative. *American Publishing Corp*., supra. Nor is it decisive that, in addition to the joint agreement, there are local agreements in strictly local matters or that each employer in the group handles his own grievances. *Evans Pipe Co*., 121 NLRB 15 (1958).

The exercise of a mutually recognized privilege to bargain individually on limited matters is not necessarily inconsistent with the concept of collective bargaining in a multiemployer unit. *Kroger Co*., supra. "Multiemployer bargaining does not altogether preclude demand for specialized treatment of special problems; what is required, if an employer or a union is unwilling to be bound by a general settlement, is that the particularized demand be made early, unequivocally and persistently." *Genesco Inc. v. Clothing & Textile Workers*, 341 F.2d 482, 489 (2d Cir. 1966).

Where the employer had bargained collectively with the union on a multiemployer basis for 17 years, but, during and after the latest negotiations, had insisted that it would not agree to a contract which included a pension plan, such a reservation was found to be "nothing more than an exercise of the Employer's privilege, acquiesced in by the Union, to insist upon limited separate negotiation, which privilege . . . is consistent with the concept of multiemployer bargaining." Nor did the fact that in past bargaining limited individual adjustments arose from apparently dozens of agreements, all of which were jointly negotiated, establish a future unequivocal intent not to be bound by group action generally. *Kroger Co*., supra at 574.

The existence of a multiemployer agreement which establishes an administrative organization to speak for the employers, in such matters as the management of trusts and health and welfare funds, should not be construed as committing an employer to a multiemployer bargaining relationship, absent a clear intention to be so bound. *Averill Plumbing Corp*., 153 NLRB 1595 (1965).

There is a distinction between an employer who is a member of a multiemployer bargaining unit and an employer who, while not a member of that unit, nonetheless agrees to sign the multiemployer agreement with the union. *HCL, Inc.*, 343 NLRB 981 (2004).

14-300 Exceptions to the General Rule

There are exceptions to the rule that controlling weight is accorded past bargaining history in determining the appropriateness of multiemployer units. These are:

14-310 Agreement of the Parties

420-7384

Where an employer association and a union agree to proposed multiemployer bargaining, and no party seeks a single-employer unit, bargaining history is not a prerequisite to a finding that a multiemployer unit is appropriate. *Broward County Launderers Assn*., 125 NLRB 256 (1960); and *Television Film Producers*, 126 NLRB 54 (1960). Compare *Maramount Corp*., 310 NLRB 508 (1993), where some employers had left the unit and the union filed petitions for separate units.

14-320 Tainted Bargaining History

420-1758

420-9630

A collective-bargaining history with a labor organization which has received illegal employer assistance is not given any weight. *Cavendish Record Mfg. Co*., 124 NLRB 1161, 1169 (1959).

14-330 Inconclusive Bargaining History

420-1209

420-1708 et seq.

Where there is a dispute as to the appropriateness of a multiemployer unit, the following circumstances will militate against a finding that such unit is appropriate, even though there has been some bargaining with respect to it: The bargaining was preceded by a long history of single-employer bargaining; it was of relatively brief duration; it did not result in a written contract of any substantial duration; and it was not based on a Board unit finding. *Chicago Home Builders Assn*., 119 NLRB 1184, 1186 (1958).

14-340 Employees in Different Category

420-1766

420-2966

A history of multiemployer bargaining for some employees does not preclude the establishment of a single unit of unrepresented employees in a different category. *Macy's San Francisco*, 120 NLRB 69 (1958). Compare *St. Luke's Hospital*, 234 NLRB 130 (1978).

14-350 The 8(f) Relationships-Construction Industry

In *Comtel Systems Technology*, 305 NLRB 287 (1991), the Board held that the merger of 9(a) and 8(f) bargaining units into a multiemployer unit does not convert the 8(f) relationship into a Section 9 relationship.

14-360 Nonbeneficial Bargaining History

Even a lengthy history of multiemployer bargaining may not be determinative if the Board concludes that the benefits and stability that have resulted from multiemployer bargaining have not been beneficial to the unit employees. *Maramount Corp*., 310 NLRB 508, 511 (1993), and *Burns Security Services*, 257 NLRB 387, 388 (1981).

14-370 Brief Duration of Multiemployer Bargaining

A brief history of multiemployer bargaining may be insufficient to rebut the presumption in favor of single employer units. *West Lawrence Care Center*, 305 NLRB 212, 217 (1991). See also section 9-560.

14-400 Employer Withdrawal From Multiemployer Bargaining

420-9016

440-5033-6080

530-5770

In the context of multiemployer units, a subject that regularly comes up for consideration is the question of withdrawals from multiemployer bargaining and its impact on unit policy.

The general rule, axiomatic by its very nature, is that employees are not included in a multiemployer bargaining unit if it is shown that their employer has effectively withdrawn from multiemployer bargaining.

The "specific ground rules" governing withdrawal are set out in *Retail Associates*, 120 NLRB 388, 394 (1958). The Board observed that:

> The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made.

See also *CTS, Inc.*, 340 NLRB 904 (2003).

To implement these principles, the Board, beginning with *Retail Associates,* has promulgated criteria. These follow under several headings below.

14-410 Adequate Timely Written Notice

420-9016 et seq.

530-5770

530-8023

Neither an employer nor a union may effectively withdraw from a duly established multiemployer bargaining unit except upon adequate written notice given prior to the date set by the contract for modification, or the agreed-upon date to begin the multiemployer negotiations. *Retail Associates*, supra at 395; *Milwaukee Meat Packers Assn*., 223 NLRB 922, 924 (1976).

14-420 Intent

420-9016 et seq.

440-5033-6020

530-5784

530-8023-3700

The withdrawal from a multiemployer unit "must be shown as manifesting an unequivocal and timely intention of withdrawing therefrom on a permanent basis." *B. Brody Seating Co*., 167 NLRB 830 (1967). See also *Walt's Broiler,* 270 NLRB 556, 557 (1984). For an instance of union effective withdrawal from a multiemployer bargaining unit, see *Belleville News Democrat*, 185 NLRB 1000 (1970).

14-430 Where Actual Bargaining had Begun

530-5770-2550 et seq.

530-8023

Where actual bargaining negotiations based on the existing multiemployer unit have begun, the Board will not permit, except on mutual consent, an abandonment of the unit upon which each party has committed himself to the other, absent unusual circumstances. *Retail Associates*, supra at 395; *Kroger Co*., supra; *Sheridan Creations, Inc*., 148 NLRB 1503 (1964), enfd. 357 F.2d 245 (2d Cir. 1966); *Union Fish Co*., 156 NLRB 187 (1966); and *Los Angeles-Yuma Freight*, 172 NLRB 328 (1968); *Hi-Way Billboards*, 191 NLRB 244 (1971).

An example of "unusual circumstances" may be found in *U.S. Lingerie Corp*., 170 NLRB 750 (1968). In that case, the following evidence was presented: (a) the employer withdrew from the association in order to relocate away from the particular area; (b) it unsuccessfully sought help from the union in its effort to overcome the difficult economic straits it was in; (c) its status was that of "debtor in possession" under the bankruptcy laws; and (d) its intention to relocate the plant outside the area it was in raised issues "more inherently amenable to resolution through collective bargaining confined to the parties immediately involved in the dispute rather than

through collective bargaining on an associationwide basis." The withdrawal in this case came at a time after the commencement of the latest round of bargaining.

In *Chel LaCort*, 315 NLRB 1036 (1994), a Board majority rejected as an "unusual circumstances" exception situations where the multiemployers association fails, either deliberately or otherwise, to inform its employer-members of the start of negotiations. Accord: *D. A. Nolt, Inc.*, 340 NLRB 1279 (2004), finding no secrecy or collusion concerning bargaining that was directed at respondent or employer members. Compare *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347 (1995), where a Board majority found that furnishing a list of employers represented by the association was adequate notice of the withdrawal of other employers from the association. The *Chel LaCort* principle was approved by the D.C. Court of Appeals in *Resort Nursing Home v. NLRB*, 389 F.3d 1262 (D.C. Cir. 2004).

A fragmented bargaining association that undermined the integrity of the multiemployer unit has been found to be an unusual circumstance. *Universal Enterprises*, 291 NLRB 670 (1988).

The Board has consistently rejected impasse as an "unusual circumstance" which would prompt withdrawal from multiemployer bargaining. *Hi-Way Billboards*, 206 NLRB 22 (1973); and *Charles D. Bonnano Linen Service v. NLRB*, 454 U.S. 404 (1982). See also *El Cerrito Mill & Lumber Co*., 316 NLRB 1005 (1995).

Compare *Ice Cream Council*, 145 NLRB 865, 870 (1964), where the Board approved withdrawal where there had been a "breakdown in negotiations leading to an impasse and a resultant strike."

In *Atlas Transit Mix Corp.*, 323 NLRB 1144 (1997), the Board rejected as unsupported, the contention that unusual circumstances existed because the association did not represent the interests of the employer. The employer relied on criminal proceedings against certain union officials.

14-440 After Filing of Petition by Rival Union

530-5770-2500

530-8023-5000

An attempted withdrawal from a multiemployer unit will be regarded as untimely and ineffective where it takes place after the filing of a petition by a rival union. "What we are doing," the Board pointed out, "is fulfilling our statutory duty of determining what is an *appropriate* time for such withdrawal." *Dittler Bros., Inc*., 132 NLRB 444, 446 (1961).

In the *Dittler* case, the attempted withdrawal took place while the multiemployer association was negotiating a new multiemployer contract with the incumbent union. The *Dittler* rule does not apply where a multiemployer contract is still in effect and a substantial part of its duration still has to run. *Ward Baking Co*., 139 NLRB 1344 (1962).

14-450 Consent of the Union

530-5770-3733

530-8023-7500

Withdrawal is permitted at an otherwise inappropriate time when the action has the consent, express or implied, of the union. *Atlas Sheet Metal Works*, 148 NLRB 27 (1964).

In the *Atlas* case, the union not only concluded that the employer had withdrawn from multiemployer bargaining, but also acquiesced in the withdrawal. Its acquiescence was reflected both by its consent to bargain with the employer on a single-employer basis even after the association and the union had reached an agreement and by conduct such as its willingness to bargain with other individual employers during an impasse and its failure to present the association contract to the employer for signature. *Atlas Sheet Metal Works*, supra at 29. See also *C & M Construction Co.*, 147 NLRB 843 (1964).

Separate negotiations while reflecting union acquiescence and "unusual circumstances" may nonetheless present an unfair labor practice issue if those negotiations amount to an untimely withdrawal from group bargaining over the objections of the group. *Olympia Auto Dealers Assn*., 243 NLRB 1086 (1979). The Board will, however, permit interim agreements provided those agreements contemplate that the parties will execute the final agreement between the group and the union. *Charles D. Bonnano Linen Service*, 243 NLRB 1093, 1096 (1979), affd. 454 U.S. 404, 414 (1982).

Whether the union has acquiesced in the withdrawal is a question of fact to be determined from an examination of its conduct in the light of all the circumstances. As the Board stated in *CTS, Inc.*, 340 NLRB 904, 907 (2003):

> Thus**,** a union may be found implicitly to have consented to or acquiesced in the attempted withdrawal, where the totality of the union's conduct toward that employer consists of a course of affirmative action that is clearly antithetical to any claim that the employer has *not* withdrawn from multiemployer bargaining. *I. C. Refrigeration Service*, 200 NLRB 687, 689 (1972). In determining whether the union has consented or acquiesced to the employer's withdrawal, a prime indicator is the union's willingness to engage in individual bargaining with the employer that is seeking to abandon multiemployer bargaining.

In *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493 (1965), the union apparently recognized "a break from any possible past multiemployer association" when it met with a representative of one individual employer on the day following group bargaining and with another some time thereafter. Therefore, even if these individual employers had been members of a multiemployer association, the employers' "timely requests for separate bargaining and the Union's compliance with these requests clearly establish that neither operation [employer] was a member of any multiemployer bargaining unit at the time the present petitions were filed."

14-460 Appropriate Unit After Withdrawal

440-3325

440-5033-6080

530-8020-6000

In one case, the Board found that, after withdrawal, the determination of the appropriate unit for the withdrawn employer's employees is made on the basis of traditional unit considerations and not in relation to the history of bargaining on multiemployer basis. *Albertson's Inc*., 270 NLRB 132 (1984). But this principle is applicable only when the grouping in the multiemployer unit would not otherwise be an appropriate multifacility unit. *Arrow Uniform Rental*, 300 NLRB 246 (1990).

In the construction industry an 8(f) relationship does not convert into a Section 9 relationship by virtue of merger into a matter employer unit. Accordingly, careful consideration must be given to the nature of the recognition in this industry. See *Comtel Systems Technology*, 305 NLRB 287 (1991).

14-500 Single Employer

177-1642

401-7550

420-2900

The term "single employer" applies to situations where apparently separate entities operate as an integrated enterprise in such a way that "for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d. Cir. 1982). Single-employer issues are not limited to representation questions. They may, for example, have primary/secondary implications in 8(b)(4) cases.

The principal factors which the Board considers in determining whether the integration is sufficient for single-employer status are the extent of:

(1) Interrelation of operations
(2) Centralized control of labor relations
(3) Common management
(4) Common ownership or financial control

See *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 (1976); *Mercy Hospital of Buffalo*, 336 NLRB 1282 (2001); *Grass Valley Grocery Outlet*, 332 NLRB 1449 (2000); *Mercy General Health Partners*, 331 NLRB 783 (2000); *Centurion Auto Transport*, 329 NLRB 394 (1999); *Denart Coal Co.*, 315 NLRB 850 (1994); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979); *Hydrolines, Inc.*, 305 NLRB 416 (1991); and *Alexander Bistrikzky*, 323 NLRB 524 (1997).

The most critical of these factors is centralized control over labor relations. Common ownership, while normally necessary, is not determinative in a single-employer status in the absence of such a centralized policy. *AG Communication Systems Corp.*, 350 NLRB 168 (2007); *Grass Valley Grocery Outlet*, supra; *Mercy General Health Partners*, supra; *Western Union Corp*., 224 NLRB 274, 276 (1976); and *Alabama Metal Products*, 280 NLRB 1090, 1095 (1986). Compare *Dow Chemical Co*., 326 NLRB 288 (1998), rejecting single-employer status based on common ownership alone.

However, in *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007), the Board found single-employer status for four commonly-owned corporations—two American and two Mexican—notwithstanding the absence of evidence of centralized contral of labor relations. Noting that it usually "accords centralized control of labor relations substantial importance in the single-employer analysis," the Board found it "inappropriate" to do so in this case.

For other cases presenting single-employer issues, see *Soule Glass & Glazing Co*., 246 NLRB 792 (1980), enfd. 652 F.2d 1055 (1st. Cir. 1981); and *George V. Hamilton, Inc*., 289 NLRB 1335 (1988). See also *RBE Electronics of S.D.*, 320 NLRB 80 (1995); and *Francis Building Corp*., 327 NLRB 485 (1998).

A determination of single-employer status does not determine the appropriate bargaining unit. Thus, a single-employer analysis focuses on ownership, structure, and employer integrated control of separate corporations. Consideration of the scope of the unit examines employee community of interest. *Peter Kiewit Sons' Co*., 231 NLRB 76 (1977); and *Edenwal Construction Co*., 294 NLRB 297 (1989). See also *Lawson Mardon U.S.A.*, 332 NLRB 1282 (2000) (Board applies traditional presumption involving separate locations even in single-employer cases).

14-600 Joint Employer

177-1650

420-7330

530-4825-5000

The distinction between single and joint employer is often blurred. In an excellent opinion, the Third Circuit described the distinction between these two concepts. *NLRB v. Browning-Ferris Industries*, supra at 1122. Thus, the court stated:

> In contrast, the "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'' *Checker Cab Co. v. NLRB*, 367 F.2d 692, 698 (6th Cir. 1966).

The existence of a joint-employer relationship is essentially a factual issue that depends on the control that one employer exercises over the labor relations of another employer. *M. B. Sturgis, Inc*., 331 NLRB 1298 (2000); *M. K. Parker Transport*, 332 NLRB 547 (2000); *Boire v. Greyhound Corp*., 376 U.S. 473 (1964); *Frostco Super Save Stores*, 138 NLRB 125 (1962); *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984); *TLI, Inc*., 271 NLRB 798 (1984); *O'Sullivan, Muckle, Kron Mortuary*, 246 NLRB 164 (1980); and *Lee Hospital*, 300 NLRB 947 (1990). *Rawson Contractors*, 302 NLRB 782 (1991). See also *G. Wes Ltd. Co.*, 309 NLRB 225 (1992); *Capitol EMI Music*, 311 NLRB 997 (1993); *Flatbush Manor Care Center*, 313 NLRB 591 (1993); *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993); and *Executive Cleaning Services*, 315 NLRB 227 (1994).

In *AM Property Holding Corp.*, 350 NLRB No. 80 (2007), the Board found no joint-employer relationship. The case is interesting because while agreeing with the decision, one Member criticized the test for joint employer and suggested that more emphasis be given to the provision of capital made by one corporation to another rather than the extent of supervisory control of one over the other.

As noted earlier, joint-employer issues are usually presented in unfair labor practice cases. Where they do arise in a representation matter, i.e., who is the employer of the bargaining unit employees, the Board previously held that there must be a showing of employer consent, implied or actual, to the inclusion of employees other than its own in the unit. See *Lee Hospital*, supra, and *Greenhoot, Inc*., 205 NLRB 250 (1973); Compare *Quantum Resources Corp*., 305 NLRB 759 (1991), in which the Board found joint employers in a representation case without a discussion of consent and *Alexander Bistrikzky*, supra, where the Board found the *Lee/Greenhoot* consent requirement inapposite because all the employees in the petitioned-for unit are employed by a single employer.

In *M. B. Sturgis, Inc*., supra, the Board overruled *Lee Hospital* and clarified its *Greenhoot* holding. Specifically, the Board held that joint-employer consent is not required for a unit combining solely employed user employees and jointly employed user/supplier employees. In *Oakwood Care Center*, 343 NLRB 659 (2004), the Board overruled *Sturgis* finding that such units are multiemployer units and require consent of the employer involved.

There is a series of cases decided under *M. B. Sturgis, Inc*., supra, whose viability will have to be decided by the Board in future decisions. See *Holiday Inn City*, 332 NLRB 1246 (2000)*; Professional Facilities Management*, 332 NLRB 345 (2000); and *Engineered Storage*, 334 NLRB 1063 (2001).

In *Airborne Express*, 338 NLRB 597 (2002), a Board majority rejected the suggestion of the dissenting Member when she advocated that the Board revisit its joint-employer test because "business trends driven by accelerating competition . . . may no longer fit economic realities."

14-700 Alter Ego

Alter ego is primarily an unfair labor practice concept that applies to situations in which the Board finds that what purports to be two separate employers are in fact and law one employer and that the employer is not honoring its bargaining obligation. Two enterprises will be found to be alter egos where they "have substantially identical management, business purpose, operation, equipment, customers and supervision as well as ownership." *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982); and *Advance Electric*, 268 NLRB 1001, 1002 (1984). As the Board noted in each of these cases, it is also relevant to consider whether the alleged alter ego was created for the purpose of evading bargaining responsibilities. See also *Crawford Door Sales Co*., 226 NLRB 1144 (1976). *Fallon-Williams, Inc*., 336 NLRB 602 (2001) (motive relevant but not required for finding of alter ego); *APF Carting, Inc*., 336 NLRB 73 (2001); *Dupont Dow Elastomers LLC*, 332 NLRB 1071 (2001); and *NYP Acquisition Corp*., 332 NLRB 1041 (2001). The Board will also consider alter ego allegations in representation proceedings. *Elec-Comm, Inc*., 298 NLRB 705 (1990). Accord: *All County Electric Co*., 332 NLRB 863 (2000) (also noting that 10(b)

statute of limitations is not applicable to representation cases). Note also that the Board divided on the issue of whether alter ego can appropriately be decided in an "R" case.

In *D & B Contracting Co*., 305 NLRB 765 (1991), the Board declined to apply an alter ego bargaining order to a unit that had been the subject of a Board election. Noting that the "employees freely decided in a fair election that they did not want to be represented by the Union," the Board concluded that it would give "controlling weight to their rejection of representation" and dismissed the unfair labor practice complaint.

In one interesting case, the Board, as a consequence of court action, withdrew an earlier comment in *Gartner-Harf Co*., 308 NLRB 531 (1992), that alter ego is a subset of single employer. In doing so, the Board noted that the two concepts are related, but separate. *Johnstown Corp*., 322 NLRB 818 (1997).

In 2007, the Board decided two cases in which it rejected an alter ego contention because of the absence of common ownership. In *Summit Express, Inc.*, 350 NLRB No. 51 (2007), there was no common ownership although one Member found evidence of substantial control. In the second case, *US Reinforcing, Inc.*, 350 NLRB No. 41 (2007), the Board rejected a contention that the two corporations satisfied the common ownership test because of a close familial relationship. The Board majority accepted the general rule that close familial relationship where the owner exercises control over the alter ego business can amount to common ownership, but refused to find alter ego in this case notwithstanding that the owners cohabited and were a "committed couple."