IV. SUBSTANTIVE ISSUES

A. Jurisdiction

The Board's statutory jurisdiction extends to all conduct that may constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. (For examples of constitutional problems, see the discussion of Religious Schools in Section 13 and Indian Reservations in Section 14 below). In the exercise of administrative discretion, the Board has adopted standards for the assertion of jurisdiction based on the volume and the character of business done by the employer. When drafting stipulations on jurisdiction, the hearing officer should refer to the standards listed below and use the sample stipulation language provided.

1. Definition of ''Retail'' and ''Nonretail''

For purposes of applying the jurisdictional standards, retail sales are considered as including sales to a purchaser who desires to satisfy his/her own personal wants or those of his/her family or friends. Nonretail sales constitute sales of goods or merchandise to trading establishments of all kinds, to institutions, to industrial, commercial and professional users and to government bodies. *Bussey-Williams Tire Co.*, 122 NLRB 1146 (1959).

2. Nonretail Standard

$50,000 outflow or inflow, direct or indirect.

Direct outflow refers to goods shipped or services furnished by the employer outside the State.

Indirect outflow refers to sales of goods or services to users meeting any Board standard except indirect inflow or outflow.

Direct inflow refers to goods or services furnished directly to the employer from outside the State in which the employer is located.

Indirect inflow refers to the purchase of goods or services which originated outside the employer's State, but which it purchased from a seller within the State who received such goods or services directly from outside the State. Direct and indirect outflow or direct and indirect inflow may be combined; however, outflow and inflow may not be combined. *Siemons Mailing Service*, 122 NLRB 81 (1958).

3. Retail Standard

$500,000 annual gross volume of business (include evidence of statutory jurisdiction; see below for discussion of statutory jurisdiction). *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

4. Statutory Jurisdiction

In all cases involving gross volume standards, some proof of statutory jurisdiction must be made. *Longshoremen ILWU Local 13 (Catalina Island Sightseeing)*, 124 NLRB 813 (1959). Thus, there must be evidence that the employer's activity in interstate commerce exceeds the de minimis level. *Somerset Manor Inc.,* 170 NLRB 1647 (1968) ($1800 more than de minimis); *W. Carter Maxwell*, 241 NLRB 264 (1979) ($6000 more than de minimis).

5. Enterprises Engaged in Both Retail and Nonretail Operations

In cases involving enterprises engaged in both retail and nonretail operations which constitute a single-integrated business, the Board will assert jurisdiction if the employer's operations meet either its retail or nonretail standards. *Man Products*, 128 NLRB 546 (1960).

6. Period Used for Computation

(a) Generally, any preceding yearly period proximate to the filing of the representation petition will be utilized in the computation. *Jos. McSweeney & Sons, Inc.*, 119 NLRB 1399 (1958).

(b) In asserting jurisdiction over employers operating for less than 1 year, the Board will project the period involved to obtain an annual figure. *Marston Corp.*, 120 NLRB 76 (1958) (4-1/2 months); *Plumbers Local 106 (Columbia-Southern Chemical)*, 110 NLRB 206 (1954) (2 months); *American Television*, 111 NLRB 164 (1955) (1 week).

7. Employer's Refusal to Give Commerce Facts

The Board will assert jurisdiction in any case in which the employer has refused, upon reasonable request by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional standards where the record, developed at a hearing duly noticed, scheduled and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the employer's operations satisfy the Board's discretionary jurisdictional standards. *Tropicana Products*, 122 NLRB 121 (1958). In order to establish a proper basis for utilization of the *Tropicana* rule, commerce information should be subpoenaed for the hearing whenever the employer has refused to furnish such information or has indicated that it will not voluntarily do so at the hearing. (See sample *Tropicana* subpoena language in Appendix D). If the employer refuses to comply with the *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the Employer is engaged in more than de minimis interstate commerce. Such secondary evidence may include evidence from employees regarding the employer's operations (e.g., shipping and receiving information, utility bills) Dun and Bradstreet reports and information secured from the employer's website.

8. Capital Expenditures

The Board will not assert jurisdiction over an employer's business on the basis of its nonrecurring capital expenditures alone. *Magic Mountain, Inc.*, 123 NLRB 1170 (1959).

9. Labor Organization

When a labor organization is acting as an employer vis-à-vis its own employees, the same jurisdictional standards are applied to the labor organization as to any other employer. *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1957).

10. Multiemployer Associations

All members of multiemployer associations who participate in or are bound by multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes. *Siemons Mailing Service*, supra.

11. Contracts with Governmental Entities

In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board announced that henceforth it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act . . ." in deciding whether the Board will exercise jurisdiction over private sector employers who work under contracts with federal, state, or local governments. This policy reversed the Board's prior practice of examining the relationship between the employer and the government entity to determine whether "the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." *National Transportation Service,* 240 NLRB 565 (1979); *Res-Care*, *Inc.,* 280 NLRB 670 (1986). In announcing the test in *Management Training*, the Board reversed *Res-Care*, a policy which had itself overruled the "intimate connection" test of *Rural Protection Co.*, 216 NLRB 584 (1975).

12. Sample Commerce Stipulations

Businesses Requiring Gross Volume Standard and Statutory Standard:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer in the conduct of its operations derived gross annual revenues in excess of (insert standard).[1] During the same period, the employer purchased and received (or sold

[1] Amusement and Gaming–$500,000
Art museums, cultural centers & libraries–$1,000,0000
Blood bank–$250,000
Building and Construction industry–retail or nonretail standards
Businesses in DC–plenary standard
Cemeteries–$500,000
Colleges, universities, private schools–$1,000,000

and shipped) goods, supplies and materials in excess of (insert standard) directly from (or to) points located outside the State of ___.

Direct outflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods valued in excess of $50,000 directly to points located outside the State of ___.

Direct outflow—goods—projected:

The employer is engaged in (describe business operations). Based on a projection of its operations since about (date) , at which time the employer commenced its operations, the employer will annually sell and ship from its (indicate location) facility goods valued in excess of $50,000 directly to points located outside the State of ___.

Indirect outflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods and materials valued in excess of $50,000 to (name enterprise/s) located within the State of ___. (Name enterprise/s) is/are engaged in (describe business operation) and (describe which standard, other than an indirect standard, this/these enterprise/s meet/s).

Communications–$100,000
Cooperatives and condos–$500,000
Credit Union–retail or nonretail standard
Day care centers–$250,000
Head Start–$250,000
Homemaker services–$100,000
Hospitals–$250,000
Hotel and Motels–$500,000
Instrumentalities Links, and Channels of Interstate Commerce–$50,000
Law firms and legal services–$250,000
National Defense–substantial impact
Newspapers–$200,000
Nursing Homes–$100,000
Office buildings–$100,000 of which $25,000 from other entity engaged in commerce
Private Clubs–$500,000
Private nonprofit educational institutions–$1,000,000
Private not for profit galleries–$1,000,000
Professional sports–no monetary standard necessary
Public Utilities–$250,000
Radio and TV–$100,000
Residential Apartment Housing–$500,000
Retail–$500,000
Social service organizations–$250,000, unless Board found lower standard
Symphonies–$1,000,000
Taxicabs–$500,000
Territories–statutory
Transit System–$250,000
Visiting nurse services–$100,000

Direct and indirect outflow—goods—combine:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods and materials valued in excess of $____ directly to points located outside the State of ___ and directly to (name enterprise/s) located within the State of ___. (Name enterprise/s) is/are engaged in (describe business operation) and (describe which standard, other than an indirect standard, this/these enterprise/s meet/s).
Direct outflow—services:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer performed services valued in excess of $50,000 in States other than the State of ____.
Direct inflow—goods:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of $50,000 directly from points located outside the State of ___.
Direct inflow—goods—projected:
The employer is engaged in (describe business operations). Based on a projection of its operations since about (date) , at which time the employer commenced its operations, the employer will annually purchase and receive at its (indicate location) facility goods and materials valued in excess of $50,000 directly from sources located outside the State of ___.
Indirect inflow—goods:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of $50,000 from other enterprises, including (identify other enterprises), located within the State of ___, each of which other enterprises had received those goods directly from points located outside the State of ___.
Direct and indirect inflow combined—goods:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of $____ directly from sources located outside the State of ___ and goods valued in excess of $___ from other enterprises, including (identify other enterprises), located within the State of ___, each of which other enterprises had received those goods directly from points located outside the State of ___.
Direct inflow – services:
The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased services valued in excess of $50,000 which were furnished to the employer at its (indicate location) facility directly from points outside the State of ___.

13. Enterprises Regarding Which Board Jurisdiction is an Issue

(a) Religious Schools

In *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the Supreme Court found that the Board did not have jurisdiction over church-operated schools. The Board has interpreted *Catholic Bishop* to apply to the religious purpose of the school as the basis for exclusion of jurisdiction. Thus, the Board asserted jurisdiction in *University of Great Falls*, 331 NLRB 1663 (2000) on the basis that the school did not have a significant religious character. However, the DC Circuit denied enforcement; *University of Great Falls v. NLRB*, 278 F.3d 1335 (DC Cir. 2002). See also *St. Edmunds Elementary School*, 337 NLRB No. 189 (2002). Research the most recent Board cases on this issue prior to proceeding to hearing.

(b) Indian Reservations

The Board has held that Indian tribes and their self-directed enterprises located on tribal reservations are implicitly exempt as government entities within the meaning of the Act. *Fort Apache Timber Co.*, 226 NLRB 503 (1976). However, the Board has distinguished that and other cases and asserted jurisdiction where the tribal enterprise is located off the reservation. *Sac & Fox Industries*, 307 NLRB 241 (1992).

(c) Railway Labor Act Issues

Under Section 2(2) of the Act, the Board does not have jurisdiction over employers subject to the Railway Labor Act (RLA). The RLA covers common carriers such as railroads and airlines engaged in interstate or foreign commerce. When there is an arguable issue in a representation case as to whether the employer is a person subject to the Railway Labor Act, a hearing is held at the Regional Office level and the record is transmitted to the Executive Secretary. The Board may submit the record of the hearing to the National Mediation Board for a determination of this question. In *Federal Express Corp.,* 317 NLRB 1155 (1995), 323 NLRB 871 (1997), the Board referred the jurisdictional issue to the NMB and deferred to the NMB's determination that it had jurisdiction. To the contrary, the Board asserted jurisdiction in *United Parcel Service,* 318 NLRB 778 (1995), without referring the issue to the NMB, due to the primarily ground nature of the delivery service, as opposed to delivery by air. Relevant information needed to resolve this issue includes the following (see Memorandum OM 90–83):

a. Company Provides Transportation by Rail or Air

1. Is it a ''Common Carrier''?
   (a) Are the company's services ''held out'' to the public?
      (1) Do they advertise, even if only to a small specialized market?

(2) Do they provide transportation for hire?

(3) Does the company provide railroad or airline work for only one customer? If not, enumerate the customers.

(b) Does the company have one or more established places of business? If so, where?

2. If the company is a ''Common Carrier,'' is it also engaged in interstate or foreign commerce?

(a) Air Carriers

(1) Do they cross state lines or U.S. national borders in the course of providing either cargo or passenger service?

(2) Do they have interline or freight forwarding agreements with airlines? If so, with which airlines?

(3) Do they carry air cargo?

(4) Do they carry the U.S. mail?

(5) Do they have a contract to provide services for the U.S. Government?

(6) Do they have any substitute service agreements and, if so, with which airlines?

(7) Are they certified by the FAA? If so, what type of certificate do they hold and can it be submitted into evidence?

(b) Rail Carriers

(1) Are they a rail ''carrier'' pursuant to the National Surface Transportation Board jurisdiction (i.e., do they provide freight or passenger service by rail)?

(2) Does the company interact with other railroads, e.g., through the exchange of freight or passengers, or have rights of way over another railroad's routes.

(3) Are its tracks used by other railroads?

(4) Does it provide freight service?

(5) Does the company make contributions to the Railroad Retirement Fund?

b. The Company is Not a Common Carrier by Air or Rail Engaged in Interstate or Foreign Commerce, but is:

1. Directly or indirectly owned or controlled by or under common control with a rail or air carrier engaged in interstate or foreign commerce.

(a) Ownership by an Air or Rail Carrier

(1) Is the subject company directly owned by an airline or railroad?

(2) Is the company indirectly owned by an airline or railroad?

(b) Factors Indicating Direct Control

(1) The airline or railroad for which the subject company performs services has the authority to:

(a) Hire or fire employees.
(b) Impose or effectively recommend discipline, discharge or screening of new hires.
(c) Set wages and benefits.
(d) Make assignments or transfers of personnel.
(e) Directly supervise the employees' work.
(f) Set staffing levels.

(c) Factors Indicating Indirect Control

(1) Employees are trained by airline or railroad or follow airline or railroad's training procedures.
(2) Employees are subject to the same hiring profile as a carrier.
(3) Employees wear the airline or railroad carrier's uniforms.
(4) Airline or railroad provides equipment or space to company.
(5) Percentage of company's work which is for airline(s) or railroad(s).
(6) Employees are held to same performance standards as similarly situated individuals at carrier.

2. Where the company is controlled by a common carrier and the company also performs services traditionally performed in connection with air or rail transportation, such as those listed below, address the issues set forth above in Section (b)1.

Airline Industry (this listing excludes the obvious jobs of pilot, mechanic, flight attendant, ramp service agent, customer service agent, office clerical employee).

(a) Fuelers and refuelers.
(b) Aircraft cleaners, ramp workers.
(c) Skycaps, baggage runners, wheelchair attendants.
(d) Security guards, security screeners.
(e) Maintenance crew for airline ground equipment.
(f) Bus drivers (transport of airline employees or passengers, usually on airport grounds).
(g) Airline caterers.
(h) Individuals responsible for pickup or delivery of air freight.

Railroad Industry (again this listing excludes the obvious categories such as locomotive engineers, firemen, carmen, clerks, conductors, trainmen, laborers, maintenance of way employees, signalmen, yardmasters).

(a) Employees responsible for repair or maintenance of railcars.
(b) Truckers, unless NSTB certified as a "motor carrier."
(c) Intermodal loaders and unloaders.

B. Single Employer, Joint Employer, Alter Ego

1. Single Employer

The distinction between single and joint employer is often blurred. A ''single employer'' will be found to exist in circumstances when two nominally separate entities are in actuality a single-integrated enterprise. There are four principal factors examined by the Board in determining whether the various entities constitute a single-integrated enterprise. These factors deal with the extent to which there is:

(a) Functional interrelation of operations.
(b) Centralized control of labor relations.
(c) Common management.
(d) Common ownership or financial control.

Radio Union v. Broadcast Service of Mobile, 380 U.S. 255 (1965).

A finding that ostensibly separate entities constitute a single employer is not dispositive of the issue of whether employees of the various entities constitute a single appropriate unit for purposes of collective bargaining. The scope of such unit is determined primarily on the basis of community of interest among the various groups of employees involved including such factors as:

(a) Bargaining history and the extent to which any exists.
(b) A functional integration of operations.
(c) Differences in the types of work and skills of employees.
(d) A centralization of management and supervision, particularly as to labor relations and control of day-to-day operations.
(e) Contact and interchange among the employees involved.

South Prairie Construction Co., 231 NLRB 76 (1977); *Edenwald Construction Co.*, 294 NLRB 297 (1989), and cases cited therein.

See *An Outline of Law and Procedure in Representation Cases,* Section 14–500.

2. Joint Employer

In order to establish the existence of ''joint employers,'' it is not necessary to demonstrate that the various entities form a single-integrated enterprise. Rather, as described by the Third Circuit in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (1982), 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 chosen to jointly share or codetermine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). See also *M.B. Sturgis, Inc.,* 331 NLRB No. 173 (2000).

In "joint employer" situations, the scope of the unit will be determined based on a community of interest analysis. Consent of the employers is no longer required to combine in a single unit employees jointly employed with employees singly employed. *M.B. Sturgis, Inc*., 331 NLRB No. 173 (2000) (reversing *Lee Hospital*, 300 NLRB 947 (1990)). If the petitioner seeks to represent a bargaining unit consisting of one employer only, the Board does not require a petitioner to name the joint employers or to litigate the existence of a joint employer relationship. *Professional Facilities Management, Inc*., 332 NLRB 345 (2000); *Outokumpu Copper Franklin, Inc*., 334 NLRB 263 (2001). If this issue is raised, see Section III, H, Contingent Employees.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–600.

If a party to the proceeding asserts that the employer is a joint employer with an exempt entity, see Section IV, A, Jurisdiction.

3. Alter Ego

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); *Advance Electric*, 268 NLRB 1001, 1002 (1984). It is also relevant to consider "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy Continental Corp*., 265 NLRB 1301 (1982). Although alter ego issues often arise in an unfair labor practice context, the Board is not precluded from making such a determination in connection with the resolution of a representational issue. *Elec-Comm, Inc*., 298 NLRB 705, 706 fn.2 (1990); *All County Electric Co*., 332 NLRB 863 (2000).

Note: Although the questions below have been separated for single and joint employer, a party may take the position at the hearing that the employers are either single or joint employers. In those situations, the hearing officer must make sure that both sets of questions are covered.

See *An Outline of Law and Procedure in Representation Cases,* Section 14–700.

Single employer/alter ego

Relevant Questions:

1. Common ownership/management

   (a) Are the various entities separately incorporated or chartered?
   (b) Identify for each entity its respective officers, directors and stockholders, including the degree of ownership interest and any familial relationships.
   (c) Describe the managerial and supervisory hierarchy of each of the entities, the degree to which there is overlapping responsibility and authority among such individuals and any familial relationships.

(d) Describe the extent to which the owners, officers, directors, stockholders, managers and supervisors play an active role in the operation of the entities.

2. Functional Interrelation of Operations

(a) What were the circumstances surrounding the formation of the various entities, including their purpose.
(b) What is the nature of the business of each of the entities? Are there any similarities or identical business purposes?
(c) Are the operations of each business functionally interrelated or integrated with one another?
(d) Are there any common customers?
(e) Do any of the entities have customers other than those asserted to be related entities?
(f) Are the various entities held out to the public as or operate in a manner that the public would perceive them to be one and the same entity? For example, do employees of the entity wear any uniforms or other identifying insignia of the other or drive vehicles or use equipment which bear the other's identity?
(g) What are the business locations of the various ostensibly separate entities? Do they share any of the following:

(1) Business location
(2) Office staff and services
(3) Telephone/fax/computers
(4) Accounting/bookkeeping services
    (a) bank accounts
    (b) insurance
(5) Legal services
(6) Advertising, including internet websites
(7) Sales force
(8) Supplies and equipment
(9) Supervision
(10) Maintenance and janitorial services

(h) What is the nature and frequency of interchange and/or transfer of employees between entities?
(i) What is the nature and frequency of interchange and/or transfer of supervision between entities?
(j) What is the nature and extent of work contact among employees of the various entities? Are there any shared locker and other facilities; common training and instruction?
(k) What is the frequency of any exchange or borrowing of equipment? Is the related entity the primary or sole supplier of such equipment to the other entity? Are there other sources available for it to use?
(l) Compare the following among the various entities—similarities/differences in:

(1) Wages
(2) Overtime compensation
(3) Holidays
(4) Vacations

(5) Pensions
(6) Health, welfare and other insurance plans
(7) Hours of employment
(8) Work rules
(9) Layoff/recall policies

3. Labor Relations

(a) Who is involved in the formulation and effectuation of labor relations matters for the various entities? Is there any overlap of responsibility?
(b) Is there a common labor relations policy? What is such policy and how is it disseminated to employees of the various entities? Is there a common handbook or other material setting forth employer policies?
(c) Who is involved in the negotiation of any labor agreements and the discussion and resolution of any grievances arising under such agreements?
(d) Is there any sharing among the various entities of responsibility for determining matters governing essential terms and conditions of employment?
(e) What is the extent to which agents or principals of one entity control or meaningfully affect matters relating to the employment relationship in another entity in such areas as the hiring, firing, discipline, supervision and direction of employees.
(f) Is there any prior bargaining history among any of the various entities?

4. Financial Control

(a) How are financial arrangements maintained by the various entities? Are there separate or common:

(1) insurance policies
(2) bank accounts
(3) payroll
(4) tax statements
(5) Social Security filings and records
(6) withholding tax filings and records
(7) workmen's compensation filings and records
(8) unemployment compensation filings and records

(b) Have there been any loans extended from one entity to another? At a fair market rate of interest? Was one entity started as a result of capital provided by another? Any repayment or time table for such? Any security for the loan? Were loan agreements signed?
(c) Does one entity charge and obtain payment for any goods/services provided by it for another? Are the costs and terms the same as those extended to ''arm's length'' customers/competitors?
(d) Is credit extended for such goods/services provided and at the same terms and under the same arrangements as those established with ''arm's length'' customers/competitors?
(e) What is the amount of purchases and/or sales between the various entities? Is there an actual exchange of moneys or is it merely a paper transaction?
(f) Who owns the various real property and equipment? Is rent paid by one entity

to another? At fair market rates?
(g) Are there any written/oral lease arrangements? What are the terms and conditions of such?
(h) Do any of the entities or their owners, officers, directors or stockholders serve as guarantors of loans/credit extended to any of the other entities by a third party source?
(i) How are each of the entities' bookkeeping, auditing, accounting, and other business records maintained and handled?

Joint Employer

Relevant Questions:

1. Describe the business of each entity.

2. Describe the relationship of the entities to each other.

3. What are the job duties and functions performed by the employees of the various entities?

4. Compare similarities. Are duties functionally interrelated?

5. Compare the following among the various entities - similarities/differences in:

(a) Wage rates
(b) Fringe benefits—both in types and amounts
(1) Working conditions
(2) Work rules
(c) Location of their work
(d) Supervision
(e) Schedule of hours
(f) Frequency and degree of contact
(g) Criteria for hiring

6. How are these terms and conditions of employment determined or controlled? Explore whether the two entities share responsibility for decisions concerning employees' wages, hours and other essential terms and conditions of employment, including decisions relative to:

(a) Hiring
(b) Firing
(c) Discipline
(d) Work schedules (including time off)
(e) Job duties and requirements
(f) Work rules

C. Successor Employer

In *NLRB v. Burns International Security Services*, 406 U. S. 272, 80 LRRM 2225 (1972), the Supreme Court resolved two major issues. First, it fixed the fundamental criteria for establishing if a new employer has an obligation to bargain with the representative of its predecessor's employees and second, it established that a successor's obligation to bargain does not bind it involuntarily to its predecessor's collective-bargaining agreement. These principles have certain applications in representation cases. For a discussion of contract bar rules as they relate to the assumption of a contract by a successor employer,

See *An Outline Of Law And Procedure In Representation Cases*, Section 9–224.

Relevant Questions:

1. The full and correct name of the predecessor employer and the alleged successor employer.

2. When did the alleged successor assume control of and begin operations? Dates of such? Was there a hiatus between the dates on which the predecessor ceased operations and the alleged successor resumed operations?

3. What were the circumstances under which former employees of the predecessor were offered employment by the alleged successor?

4. The type of business operations engaged in by the predecessor as well as by the alleged successor. Explore the similarities/dissimilarities between the two entities in terms of:

(a) Products produced
(b) Services performed
(c) Customers
(d) Equipment and machinery
(e) Business location(s)
(f) Classifications of employees

5. Are a majority of the alleged successor's employees in the involved bargaining unit former unit employees of the predecessor? Describe the bargaining unit.

6. Did the alleged successor take over only a portion of the predecessor's business, facilities and work force? If so, do the employees of that portion of the predecessor's operations constitute a separate appropriate unit?

7. Do the terms of the agreement of sale involve a sale of assets or of stock? Enter into the record a copy of any written sales agreement and take testimony as to its terms, including:

(a) The dates when the agreement was negotiated and signed

(b) The effective date of transfer of ownership
(c) The disposition of inventory, equipment and machinery, real property, customer orders and contacts, bills receivable and established goodwill

8. After the sale, did the predecessor entity continue to exist and be actively involved in the ongoing operations of the alleged successor enterprise? Did the predecessor terminate its legal existence or otherwise cease to have any relationship to the ongoing operations of the alleged successor?

9. Does the sales agreement refer to the existence of a collective-bargaining agreement and any rights or obligations on the part of the alleged successor either to reject or adopt same?

10. Did the alleged successor extend voluntary recognition to the union? If so, what were the circumstances, including whether, and to what extent, the alleged successor employed any of the predecessor's employees at that time.

11. Did the alleged successor by word and/or action expressly adopt the predecessor's collective-bargaining agreement or adhere to its terms, including paying contractual wages and benefits, making benefit fund contributions and/or deducting union dues? Specifics.

12. Did the alleged successor expressly refuse to adopt the predecessor's collective-bargaining agreement? If so, describe the refusal.

13. Did the successor maintain "substantial continuity of the employing industry"? Establish this by questions as to whether and to what extent:

(a) The business continues in the same form
(b) The successor operates out of the same location(s) as the predecessor
(c) The same or substantially the same work force is employed by the alleged successor
(d) The same jobs exist under the same working conditions
(e) The same management and supervision have been retained
(f) The same machinery, equipment and methods of production are used
(g) The same products are manufactured or the same services are offered

14. Describe changes instituted by the alleged successor in such matters as:

(a) Employees' working conditions
(b) Wages and benefits
(c) Working rules and employee policies
(d) Other terms and conditions of employment

15. Did the alleged successor merge or combine the operations of the predecessor employer with other preexisting operations? If so, were the employees involved in such preexisting operations already represented by a labor organization other than that which previously represented employees of the predecessor?

16. How many employees were there in each group or unit prior to such merger or

combination?

17. Following such merger or combination, have the predecessor's former employees retained or lost their identity as a separate appropriate unit for purposes of collective bargaining? Explore whether and to what extent the two groups of employees have been integrated with one another in terms of:

(a) Job duties and responsibilities
(b) Supervision
(c) Interaction and contact
(d) Interchange
(e) Common working conditions and facilities
(f) Similarities in benefits and applicable policies and work rules

D. Status as a Labor Organization

Section 2(5) of the National Labor Relations Act states:

> The term ''labor organization'' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

See *An Outline Of Law And Procedure In Representation Cases,* Section 6–110.

The employee group need not have a formal structure, constitution, bylaws, charter, written agreement, officers nor need it collect dues or fees to be a labor organization. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Steiner-Liff Textile Products Co.*, 259 NLRB 1064 (1982). For additional information on what constitutes a labor organization, see *Electromation, Inc.*, 309 NLRB 990 (1992) and *E.I. du Pont & Co.*, 311 NLRB 893 (1993). See also GC Memorandum 93–4, Guideline Memorandum Concerning *Electromation, Inc.*

Relevant questions for standard labor organization issues:

1. Name of representative and official position with organization

2. Full and correct name of organization

3. Affiliation, if any.

4. Do employees participate in the organization, e.g, do they attend meetings or vote in internal union elections? In what manner and to what extent?

5. Does the organization exist, at least in part, for the purpose of dealing with employers concerning "conditions of work" or concerning other statutory subjects such as

grievances, labor disputes, wages, rates of pay or hours of employment. Ask the witness to give specific examples of such activity.

Relevant questions for specialized labor organization situations:

1. If a guard unit is involved, ask if the union admits to membership or is affiliated directly or indirectly with organizations which admit to membership employees other than guards (for this to be an issue, the employees other than the guards must be statutory employees). *Children's Hospital of Michigan*, 299 NLRB 430 (1990). See Section VI, C, Guards and Watchmen.

2. If an issue is raised that participation of supervisors in the union disqualifies the union from being certified, ask:

(a) whether a supervisor(s) employed by the employer is in a position of authority within the labor organization and, if so, identify that person's role in the affairs of the labor organization.
(b) in the instance of a supervisory nurse employed by a third-party employer and holding a position of authority, whether there is some demonstrated connection between the employer of the unit employees concerned and the employer or employers of those supervisors which might affect the bargaining agent's ability to single-mindedly represent the unit employees. *Sidney Farber Cancer Institute*, 247 NLRB 1 (1980); *Sierra Vista Hospital*, 241 NLRB 631 (1979).
(c) if supervisors are officers of the petitioning labor organization, what steps, if any, has that organization taken to insulate its bargaining activities from supervisory influence. *Highland Hospital*, 288 NLRB 750, 752 (1988).

E. History of Collective Bargaining

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. *Red Coats, Inc.*, 328 NLRB 205 (1999). The rationale for this policy is based on the statutory objective of stability in industrial relations. If any party contends that an existing contract constitutes a bar, develop facts as outlined in Section F, Bars to Conduct of Election.

See *An Outline of Law and Procedure in Representation Cases,* Sections 12–220 through 12–229.

Relevant Questions:

1. How long has there been a collective bargaining relationship?

2. Introduce in evidence existing collective-bargaining contracts or prior contracts if they affect the issues.

3. If no copies of the contracts are available, obtain testimony and documents that show the following:

(a) Type of agreement: oral, written, signed or unsigned.
(b) Correct names of parties to the contract.
(c) Execution date, effective date, terms, termination date.
(d) Provisions for automatic renewal, opening, termination.
(e) Terms of recognition provisions.
(f) Terms of any union-security provisions.
(g) Describe unit covered and give classifications of employees covered by unit.
(h) Description of contract's substantial terms and conditions.
(i) Differences between classifications of employees covered by the contract and those affected by petition.
(j) If contract contains express provision for ratification, details of when ratification was obtained and employer was notified.

4. Has notice to terminate or modify been given pursuant to Section 8(d) of the Act? If so, when; by whom to: employer, labor organization, FMCS and relevant state agency; in what manner?

5. Was there a prior unit determination through voluntary recognition or election agreement?

6. Was this unit subject to any prior Board determination (official notice may be taken)?

(a) Citation
(b) Nature of proceeding
(c) Disposition by the Board
(d) If parties object to introduction of any evidence from prior record, witnesses should be called. If witness testified in prior proceeding, that record may be used to refresh their memories or for purposes of impeachment.

7. Has the bargaining history been conducted on a basis that is contrary to established Board unit policy, which may cause the history to be disregarded?

(a) Members only contracts
(b) Bargaining history based upon sex
(c) Bargaining history based upon race
(d) Inclusion of employees by agreement, despite lack of community of interest

8. Is there any history of collective bargaining in similar units at other facilities of this employer or in the same industry? If so, get all details of the composition of the bargaining units in comparable facilities. (Note - this factor is not controlling in unit determinations but will be considered.)

F. Contract Bar

The major objective of the Board's contract bar doctrine is to achieve a reasonable balance between the frequently conflicting claims of industrial stability and freedom of employee choice. This doctrine is intended to afford the contracting parties

and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The burden of proving that a contract is a bar is on the party asserting the doctrine. There are many facets to the Board's contract bar doctrine. In order to constitute a bar, a contract must be written, signed by all parties, cover substantial terms, cover the petitioned-for unit, be of definite duration and not exceed 3 years. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

See *An Outline of Law and Procedure in Representation Cases,* Sections 9–100 through 9–1000.

Relevant Questions:

General contract bar principles:

1. Introduce into evidence contract asserted as bar.

2. Have parties state their contentions regarding why the contract is or is not a bar.

3. Timeliness of petition or rival claim.

   (a) Date contract was executed by both parties.
   (b) Date and manner in which notice to terminate or modify was given pursuant to Section 8(d) of the Act.
   (c) Termination date.
   (d) Effective date.
   (e) Was the contract executed at a time when there was a rival claim, i.e., when another union was claiming representative status or organizing? Explain and give facts.
   (f) Was the contract executed when an incumbent union continued to claim representative status?
   (g) Was the contract executed at a time when a nonincumbent union had refrained from filing a petition in reliance on the employer's conduct indicating that recognition had been granted or that a contract would be obtained without an election? *Greenpoint Sleep Products*, 128 NLRB 548 (1960).
   (h) If the contract was executed on the same date that the petition was filed, had the employer or the incumbent union been informed at the time of execution that a petition had been filed?
   (i) If it is contended that the contract does not represent the parties' actual agreement because of subsequent changes in its provisions, were the changes substantial and material or were they merely refinements of contractual language?
   (j) Agreement or evidence indicating that automatic renewal has been forestalled.
   (k) If a party contends that the contract has not been enforced, obtain evidence as to how it has been administered. Obtain evidence that contract has been administered. Obtain examples (e.g., dues deducted, pension and health insurance remittances, wage increases, sick and annual leave granted in accordance with the

contract).

4. Adequacy of contract.

(a) Is the contract written and signed or initialed by all parties?
(b) Does the contract contain substantial terms and conditions of employment? Specify.
(c) Does the contract contain an express provision requiring ratification? Has ratification been obtained? Date and manner.
(d) Was the employer notified that the contract had been ratified? Date and manner. Introduce copies of any written notification of ratification.

5. Duration of contract.

(a) Does the contract have a fixed term? What is the term of the contract? Is the current contract an extension of the prior contract?
(b) Did the contract get extended? If so, when? Was a new contract signed prior to the expiration of the prior contract? If so, when? What were the effective dates of the prior contract? Introduce copies of all pertinent contracts. If there is a premature extension of an earlier contract, inquire into the effective dates of both contracts so that the appropriate open period can be calculated.

6. Union security and checkoff provisions.

(a) Introduce the contract provisions in question.
(b) Extrinsic evidence as to the legality of the clause should not be received.

Special Situations:

1. Merger, Schism or Defunctness—change in contractual representative, internal union conflicts or when a labor organization ceases to function.

(a) If these issues are raised in a contract bar context, obtain evidence as set forth in Merger or Affiliation (Section H), Schism in Labor Organization, (Section I), or Defunctness of Labor Organization, (Section J), infra.

2. Expanding Units

A contract does not bar an election if executed before any employees have been hired or prior to a substantial increase in personnel. When the question of a substantial increase in personnel is in issue, a contract will bar an election only if at least 30-percent of the complement employed at the time of the hearing had been employed at the time the contract was executed and at least 50-percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. *General Extrusion, Inc.,* 121 NLRB 1165 (1958).

See An Outline of Law and Procedure in Representation Cases, Section 9–212.

(a) Was the contract executed before any employees had been hired?
(b) What percentage of the present work force was employed at the time the contract was executed?
(c) What percentage of the present job classifications existed at the time the

contract was executed? Even if the job classifications were not formally defined until some later time, were the work or job functions of such classifications in existence and being performed by unit employees at the time of the hearing?

(d) Ascertain the date upon which the parties agreed to apply the contract (i.e., retroactively, prospectively or upon execution).

3. Plant Shutdown, Merger, Relocation

A change in the nature of the unit can affect whether the contract continues to be a bar. Examples of such a change include plant shutdown, merger and relocation. In *General Extrusion Company, Inc.,* 121 NLRB 1165 (1958), the Board set forth the standard to be applied in each of these situations. With respect to a plant shutdown for an indefinite period of time, where employees have no reasonable expectation of reemployment, a contract does not serve as a bar. *El Torito-La Fiesta Restaurants,* 295 NLRB 493 (1989). With respect to a merger of operations, the contract does not continue to be a bar if the merger results in a new operation with major personnel changes. *Kroger Co.,* 155 NLRB 546, 548–49 (1965). With respect to a full relocation (i.e., where an employer relocates the entire bargaining unit to a new facility), the contract continues to be a bar if the operations at the new facility are substantially the same as those at the old facility and if transferees from the old facility constitute at least 40-percent of the new facility's employee complement. *Rock Bottom Stores,* 312 NLRB 400, 402 (1993).

See *An Outline of Law and Procedure in Representation Cases,* Sections 9–221 through 9–223.

(a) Describe the locations of all operations and their geographic proximity.

(b) Describe in detail the old operations.

(c) Describe in detail the new operations.

(d) Is the operation an entirely new one or a continuation of one or more of the old operations without substantial integration?

(e) What was the number of employees at the old operation?

(f) What is the number of employees at the new operation?

(g) Does the business transaction involve one employer or two or more employers? If so, describe the entities and the transactions involved, including any agreements related to the transaction.

(h) Was a new plant constructed or did one operation simply move to the location of the other? Was there a hiatus in operations?

(i) Is the same operation being resumed in the same or a new location?

(j) If there was a shutdown, how long was it?

(k) At the time of the closing, was a date fixed for reopening? When did the business reopen?

(l) What percentage or number of prior employees was recalled or transferred at the time of reopening?

(m) What percentage or how many of the present work force are new employees?

(n) Have the character of jobs and the functions of employees changed in the new operation?

(o) Details of changes in personnel that accompanied the change? (Obtain personnel facts before and after the change which will throw light on whether it is

"an entirely new operation with major personnel changes.")
(p) Is one or more of the incumbent unions seeking to represent the employees at the new operations?
(q) Were employees at the old operations represented and covered by a collective-bargaining agreement? Obtain contracts.
(r) If there is a purchaser, has it bound itself to assume the existing contract? Is the assumption expressed in writing? At the time of the assumption of the contract, did the employer employ at least 30-percent of those employed on the date of the hearing?
(s) Are there unrepresented employees? How many unrepresented employees are there in relation to the represented employees?
(t) Has the existing contract been amended to reflect the change in operations?
(u) Have management and supervisory personnel remained the same?
(v) On what date was the transfer process substantially completed?
(w) Where there is a merger of different groups of employees based a on change in the employer's operations, ask community of interest questions in Section V, A, Community of Interest.

4. Construction Industry

Section 8(f) of the Act provides that, in the construction industry, it is not unlawful for an employer to enter into an agreement covering construction employees, even though the union has not established majority status. An 8(f) agreement is not a bar to a petition. *John Deklewa & Sons*, 282 NLRB 1375 (1987). In the construction industry, a contract will constitute a bar if the union has achieved 9(a) status by contract language (*Central Illinois Construction*, 335 NLRB 717 (2001)) or by voluntary recognition (*Reichenbach Ceiling & Partition Co.,* 337 NLRB No 17 (2001)). The burden of proving the existence of a 9(a) relationship rests with the party asserting it. *John Deklewa & Sons*, supra, fn. 41.

See An Outline of Law and Procedure in Representation Cases, Section 9–1000.

(a) Describe the employer's operations.
(b) Is the employer engaged primarily in the building and construction industry?
(c) Place the contract in the record. Obtain parties' positions re: 8(f) or 9(a) contract status.
(d) Are the employees who are covered by the agreement engaged in the building and construction industry?
(e) If a party asserts 9(a) status:

(1) Has the union been certified by the Board as the representative of the unit employees?
(2) Did the union request recognition as the majority or Section 9(a) representative of the unit employees? Specifics.
(3) Did the employer voluntarily recognize the union? On what basis? Specifics.
(4) Was the employer's recognition based on the union's having shown or offered to show evidence of its majority support?

G. Recognition Bar [2]

When an employer has lawfully recognized a union, the parties are accorded an opportunity to bargain and a petition is barred for a "reasonable period of time" following the recognition. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Despite the existence of active and simultaneous organizing campaigns, an employer's voluntary recognition of a union bars the processing of a subsequent petition unless the petitioner demonstrates that it had a 30-percent showing of interest at the time of recognition. *Smith's Food & Drug*, 320 NLRB 844 (1996). The determination of whether the 30-percent showing existed at the time of recognition is an administrative matter not subject to litigation. *Smith's Food & Drug,* supra, at 847, fn.5. If this determination was not made prior to the hearing, the hearing officer should conduct an administrative investigation of the showing of interest by inspecting in camera the number of cards secured and their dates. The hearing officer should state on the record his/her findings in the administrative investigation, i.e., whether the union has an adequate showing of interest.

In the construction industry, voluntary recognition as a 9(a) representative must be based on a contemporaneous showing of majority support or an employer's acknowledgement of such majority support. Any challenge to the validity of a grant of 9(a) recognition based upon lack of majority status must be made within 6 months after the grant of recognition. *Reichenbach Ceiling*, 337 NLRB No. 17 (2001); *Casale Industries*, 311 NLRB 951 (1993).

See *An Outline of Law and Procedure in Representation Cases,* Section 10–500.

Relevant Questions:

Recognition:

1. When was recognition extended? If there is a written agreement, secure a copy. If more than 6 months have passed since the grant of recognition, no litigation should be permitted regarding the validity of the recognition.

2. On what basis was recognition extended?

3. Was the recognition based on a majority showing? Conduct an administrative investigation of the showing of interest, inspect in camera the number secured and the dates of the signed cards. If this has not been handled prior to the hearing, the hearing officer should state on the record his/her findings in the administrative investigation.

4. Did the employer extend recognition at a time when another union was organizing?

[2] In *MV Transportation*, 337 NLRB No. 129 (2002), the Board overruled *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), and determined that there is no longer a successor bar when a successor employer is obligated to or recognizes the union that previously represented the unit employees.

Has the rival union secured a showing of interest from employees in the petitioned-for unit? If so, conduct an administrative investigation of the showing of interest, inspect in camera the number of cards secured and their dates. If this determination was not made prior to the hearing, the hearing officer should state on the record his/her findings in the administrative investigation.

Reasonable Period of Time:

1. Are parties bargaining for an initial contract?

2. Who asked to bargain and when did they ask to bargain? Include telephonic and written correspondence between the parties relating to the request to bargain and the proposals of the parties.

3. When did the bargaining between the employer and the recognized union commence?

4. How many bargaining sessions have there been? Dates of the sessions? How long the bargaining sessions lasted?

5. Topics covered during bargaining—include proposals by the parties, counter proposals, agreements reached on issues and what issues remain.

6. What are the parties' positions as to whether impasse has been reached? If a claim of impasse is made, what is the basis for that claim?

H Merger or Affiliation

In considering the validity of a merger or affiliation between two unions or a union's affiliation with another labor organization, the Board considers whether the bargaining unit members were accorded due process and whether there has been a fundamental change in the identity of the selected representative which disrupted the continuity of representation. Where a merger or affiliation fails to satisfy the Board's due process requirements, a question concerning representation exists. The key inquiry in determining whether unit members were afforded due process is whether the members received adequate notice and opportunity to discuss the merger or affiliation, question the proposed course of action and vote on the matter by secret ballot. *Mike Basil Chevrolet, Inc.*, 331 NLRB 1044 (2000). In determining the issue of continuity of representation, the Board looks to the totality of the circumstances to determine whether there is a change in the identity of the representative as a result of the merger or affiliation. *Western Commercial Transport*, 288 NLRB 214 (1988).

See *An Outline of Law and Procedure in Representation Cases,* Sections 7–240 and 11–100.

Relevant Questions:

1. What entities were merged or affiliated? Size of units and locations of units merged or affiliated.

2. What changes resulted from the merger or affiliation? Were there changes in structure? Identity? Number of representatives? In the manner of unit member participation in the day to day issues arising at the workplace? Changes in stewards and/or officers or local officials? Bargaining representatives? Shop committees or negotiating committee members? Contract ratification procedures? Strike votes? Constitution? By-laws? Initiation fees? Dues? What changes were made in the unit employees' ability to have input regarding labor relations matters in their unit?

3. Were unit members given notice of the merger or affiliation? How? When? In what manner?

4. Was a meeting conducted? When? Where? How was notice of the meeting provided to the unit members?

5. How many unit members attended the meeting?

6. Were unit members given an opportunity to discuss the merger or affiliation at the meeting?

7. Was a vote conducted? In what manner? What was the outcome?

8. What additional changes were made as a result of the merger or affiliation?

I. Schism in Labor Organization

In *Hershey Chocolate Corp.*, 121 NLRB 901 (1958), the Board held that three conditions must be present in order to find that a schism exists:

> 1. There must be a basic intraunion conflict affecting the contracting representative, i.e., a conflict over policy at the highest level of an international union, whether it is affiliated with a federation or within a federation, which results in a disruption of existing intraunion relationships.
> 2. The employees in the unit seek to change their representatives for reasons related to the basic intraunion conflict and have had an opportunity to exercise their judgment on the merits of the controversy at an open meeting, called with due notice to the members in the unit for the purpose of taking disaffiliation action for reasons related to the basic intraunion conflict.
> 3. The action of the employees in the unit seeking to change their representatives took place within a reasonable time after the occurrence of the basic intraunion conflict.

See *An Outline of Law and Procedure in Representation Cases,* Sections 9–410 through 9–413.

Relevant Questions:

1. What is the nature of the basic intraunion conflict causing schism? When did the conflict begin?

2. Did the conflict include policy at the highest level of the union? Or is it merely the result of disaffection among members of a local with action taken by an international? *Georgia Kaolin Co.*, 287 NLRB 485 (1987).

3. Was disaffiliation action taken at a meeting? Was it for reasons related to the policy conflict?

4. If a special meeting, who called the meeting?

5. Method of notification to members? Usual method?

6. Was notice given to all members? Was purpose of meeting made clear?

7. Location, time, and date of meeting? If not usual place or time, why?

8. Who presided? Number present? Number usually present?

9. Nature of vote and results.

10. Was disaffiliation action by local or overall group? Details.

11. Was the local union an amalgamated local or was it limited to the employer's employees?

12. Has the local union been suspended or expelled? Details.

13. If an amalgamated local, does the local group have autonomy?

14. Is the current action related to a suspension by the international? Details.

15. Has the contracting union continued in existence? Held meetings, collected dues, negotiated contracts, incurred obligations, paid per capita tax to the international, dispensed funds, handled grievances?

16. Does the employer still recognize the incumbent union?

17. Is the alleged schism coextensive with the bargaining unit?

18. Was the international notified of the intent and subsequent action to disaffiliate?

19. Did the disaffiliating union seek a charter from another international union? When, who, how handled?

20. Copies of minutes of meetings, contracts, disaffiliation resolution and pertinent correspondence.

21. How has the schism affected dealings with the employer in representing employees?

22. Who is the certified bargaining representative: the local, the international, or both?

J. Defunctness of Labor Organization

In *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958), the Board stated that a representative is deemed defunct if it "is unable or unwilling to represent the employees," but made it clear that "mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees."

See *An Outline of Law and Procedure in Representation Cases*, Section 9–420.

Relevant Questions:

1. Identify the allegedly defunct union.

2. Is the current contract in existence? If so, obtain copy.

3. Identify the union that is party to the contract: the local, the international or both? Is any other union a party to the contract?

4. Is the contract being enforced? In what manner? By whom? Concerning union-security requirements?

5. Details of any notice to terminate the contract and reply.

6. Has the employer unilaterally changed working conditions, wages, hours or benefits? Details. Extent of changes.

7. Are employees paying dues? Checkoff? If not, when did payments stop? If so, number paying?

8. Are grievances being processed? By whom? Manner? Describe.

9. Have employees withdrawn membership? Details.

10. Is the incumbent union unable or unwilling to represent the employees? Reason? Is this condition temporary or permanent? Since what date? Facts.

11. Have employees formed or become members of another union? Details.

12. If so, what action was taken regarding employees' withdrawal from the incumbent union and becoming members of the new organization?

K. Accretions to Existing Units

An accretion is an attempt to add a classification to the unit or exclude a classification from the unit in the absence of an election. The issue is normally raised in a unit clarification petition (UC). The issue can arise (1) where there is a newly created classification or (2) where an existing classification has undergone recent substantial changes in duties and responsibilities so as to create a doubt as to whether those individuals continue to fall within the category—included or excluded—that they occupied in the past. *Union Electric*, 217 NLRB 666 (1975). Where a new classification performs the same basic functions historically performed by the bargaining unit, a community of interest analysis may not be required.

The hearing officer must obtain evidence regarding the type of work performed by the employees involved as compared to the work performed by the unit. *Premcor, Inc.* 333 NLRB 1365 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001).

See *An Outline of Law and Procedure in Representation Cases*, Sections 11–200, 11–220 and 12–500.

Where the issues involve a new facility/operations, merged operations or a transfer of employees from one facility to another, see the questions set forth in Section F, 9.

Relevant Questions:

1. What is the name of the classification in issue? What are the skills, duties and responsibilities of employee(s) in that classification? What are the skills, duties and responsibilities of other unit employees?

2. What is the nature of the employer's business? Why was this classification created and how does this classification fit into the employer's organizational structure?

3. When was the classification created and how many employees are in the classification? When was the classification staffed?

4. What are the number and types of other classifications? How many employees are employed in these classifications?

5. Who represents employees in the employer's other job classifications? Get the details of the history of bargaining. Introduce contracts.

6. Have there been any contract negotiations between the employer and the union at this facility since creation of this classification? If yes, when was the bargaining? Was there any discussion of this classification during the negotiations? What was the result of those negotiations?

7. Who hired the disputed employees? Under what circumstances?

8. If employees were transferred into this classification from existing classifications, how and why was this done? How have their duties changed?

Except in situations governed by *Premcor* (involving a newly created position performing the same basic functions historically performed by the bargaining unit), it is necessary to conduct a community of interest inquiry. See Section V, A, Community of Interest.