20. EFFECT OF STATUS OR TENURE ON UNIT PLACEMENT AND ELIGIBILITY TO VOTE

In both unit placement and eligibility to vote, the status of employees and their tenure are major considerations. The job classifications of employees do not always determine whether or not they will be included in a unit. Treated here are questions which pertain to (1) part-time employees; (2) temporary employees; (3) seasonal employees; (4) student workers; (5) dual-function employees; and (6) probationary employees, including trainees and clients in rehabilitation settings.

20-100 Part-Time Employees

20-110 Generally

362-6712

460-5067-4200

Part-time employees are included in a unit with full-time employees whenever the part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours, and working conditions of the full-time employees in the unit. *New York Display & Die Cutting Corp.*, 341 NLRB No. 121 (2004); *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003); *Fleming Foods*, 313 NLRB 948 (1994). *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Farmers Insurance Group*, 143 NLRB 240, 245 (1979). Such part-time employees are described as "regular part-time employees."

In *Arlington Masonry Supply, Inc*., supra at 819, the Board described its policy for determining part-time eligibility:

> The test to determine whether one is a regular part-time employee versus a casual employee "takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions." *Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979). "In short, the individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Pat's Blue Ribbons*, 286 NLRB 918 (1987).
>
> The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the quarter preceding the eligibility date. See *Davison-Paxon* [infra at sec. 20-120].

Thus, where the number and identity of drivers and other employees fluctuated from week to week but a substantial number reported and worked fairly regularly over a period of several months, and during an 8-month period 70 of approximately 120 to 125 drivers worked in three or more consecutive weekly pay periods, with many more working in 10 or more consecutive weeks, the Board concluded that this "is scarcely the pattern of a temporary, part-time or casual work force." *Fresno Auto Auction*, 167 NLRB 878 (1967). The brevity of the employee's tenure may be a factor in determining part-time status, but it is not dispositve. In *New York Display & Die Cutting Corp.*, supra, the Board found regular part-time status for an employee who was hired 9 days before the election.

The Board in this case made the further comment that "In determining the relative regularity or permanence of the employment in the proposed unit, we believe this fact outweighs those considerations having to do with the individual's freedom to determine his own work schedule or to report for work intermittently." The fact that they were carried on the payroll as part-time workers did not "alter the character of the work force as a cohesive group of individuals with a

strong mutual interest in their working conditions." Id. See also *Henry Lee Co*., 194 NLRB 1107 (1972).

Following this principle, part-time employees who worked principally on weekends performing the same work as full-time workers were included in a unit of full-time employees. *Bob's Ambulance Service*, 178 NLRB 1 (1969). And where for a representative 2-week payroll period each employee averaged 33 hours of work, they were found to be regular part-time employees. *Shannon & Luchs*, 166 NLRB 1011 (1967).

As has been noted, the similarity of interests between full-time and part-time employees is a determinative factor. *Newburgh Mfg. Co*., 151 NLRB 763 (1965); *Berea Publishing Co*., 140 NLRB 516 (1963); *Great Atlantic & Pacific Tea Co*., 119 NLRB 603 (1957). In evaluating the part-time status of employees, consideration is given to regularity and continuity of employment, the similarity of duties and functions to those of full-time employees, the similarity of wages, benefits, and other working conditions, and the supervision of the part-time employees. *V.I.P. Movers*, 232 NLRB 14 (1977); *L & A Investment Corp*., 221 NLRB 1206, 1207 (1975); *Lancaster Welded Products*, 130 NLRB 1478 (1961); *Mensh Corp*., 159 NLRB 156, 158 (1966). The work history of the employees in question is also considered (*Columbus Plaza Hotel*, 148 NLRB 1053 (1964)), as is the turnover rate among that classification of employees (*Lewis & Coker Supermarkets*, 145 NLRB 970 (1964); *Vindicator Printing Co*., 146 NLRB 871 (1964)).

Various standards, such as hours worked per day or week, or days worked per calendar period, have been applied in different industries to determine whether a part-time employee is regular or casual. *Davison-Paxon Co*., 185 NLRB 21, 23–24 (1970); *C. T. L. Testing Laboratories*, 150 NLRB 982 (1965); *Motor Transport Labor Relations*, 139 NLRB 70 (1962).

Examples of such determinations follow:

In retail department stores, part-time employees who worked a minimum of 15 days in the calendar quarter before the eligibility date were considered regular part-time. *Scoa, Inc*., 140 NLRB 1379 (1963).

Part-time taxi drivers working 1 or 2 days a week were included in the unit found appropriate. *Jat Transportation Corp*., 128 NLRB 780 (1960); *Cab Operating Corp.*, 153 NLRB 878 (1965); *Checker Cab Co*., 141 NLRB 583 (1963).

All part-time employees who worked at least 8 hours per week were included (*Chester County Beer Distributors*, 133 NLRB 771 (1961)), as were employees who worked 20 hours per week. (*Farmers Insurance Group*, supra.)

Part-time blood collectors who work an average of 5 to 25 hours per week and whose hours are scheduled in advance were included in the unit. *St. Luke's Episcopal Hospital*, 222 NLRB 674, 678 (1976). See also *Leaders Nameoki, Inc.*, 237 NLRB 1269 (1978) (4 hours for department store personnel).

Employees who regularly averaged 4 hours a week for the last quarter prior to the eligibility date were regarded as having a sufficient community of interest to warrant inclusion. *V.I.P. Movers*, supra; *Allied Stores of Ohio*, 175 NLRB 966 (1969).

Part-time employees working approximately one-quarter of the available workdays in the quarter of a year preceding an election were included in a production and maintenance unit of a newspaper printer and publisher. *Suburban Newspaper Group*, 195 NLRB 438 (1972).

An annuitant working regularly but limited in hours and pay so as not to decrease his annuity was included in the unit. *Consolidated Supply Co.*, 192 NLRB 982, 986 (1971).

Where there is a wide disparity in the numbers of hours worked by part-time employees, the Board may fashion an appropriate standard to assure an equitable formula. Compare *Marquette General Hospital*, 218 NLRB 713 (1975), with *Sisters of Mercy Health Corp*., 298 NLRB 483 (1990), and *Northern California Nurses Assn*., 299 NLRB 980 (1990). See also *Beverly Manor Nursing Home*, 310 NLRB 538 (1993).

Regular part-time employees are characteristically included in a retail store unit. Where all part-time selling employees worked a regular and substantial amount of time and had a sufficient community of interest with full-time employees, the Board dismissed a petition for a proposed unit which was restricted to so-called regular sales employees. *Sears, Roebuck & Co.*, 172 NLRB 1266 (1968).

The fact that an employee has a regular full-time position elsewhere does not destroy his community of interest with employees at his part-time employment if the other criteria are met. *Tri-State Transportation Co.*, 289 NLRB 356 (1988); *Joclin Mfg. Co*., 144 NLRB 778 (1963). But where such an employee will only work at his part-time job as his full-time position allows, and there is therefore no established working pattern, the employee may be considered irregular and casual. *Haag Drug Co.*, 146 NLRB 798 (1964). Compare, *V.I.P. Radio*, 128 NLRB 113 (1960).

See also section 20-120 and 140

20-120 "On-Call" Employees

362-6734

460-5067-8200

"On-call" employees may or may not be considered regular part-time employees, depending on the specific nature of their employment. Where they are employed sporadically, with no established pattern of regular continuing employment, they are excluded from the unit. *Piggly Wiggly El Dorado Co*., 154 NLRB 445, 451 (1965); *G. C. Murphy Co.*, 128 NLRB 908 (1960).

But where "on-call" employees have a substantial working history, with a substantial probability of employment and regular hiring, and meet any other criteria established by the Board, they are considered regular part-time employees. *Davison-Paxon Co*., supra; *Steppenwolf Theatre Co.*, 342 NLRB No. 7 (2004), applying the *Davis–Paxon* formula and distinguishing the *Juilliard School*, 208 NLRB 153 (1974), formula.; *Berlitz School of Languages*, 231 NLRB 766 (1977); *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975); *Columbus Plaza Motor Hotel*, supra; *Bailey Department Stores Co*., 120 NLRB 1239 (1958). See also *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994).

The Board used "dual function" analysis in determining whether employees were eligible to vote in an election of parking lot employees where the individuals worked full time for the employer in other positions. The Board rejected the "on call" analysis of the Regional Director. *Syracuse University*, 325 NLRB 162 (1997).

When a contract specifically covered in one bargaining unit all the employer's film servicing locations, the on-call technicians performed the same work as the full-time technicians, and the contract also specifically provided for the employment of on-call technicians and for their remuneration on a flight-serviced basis, the on-call technicians were included in the unit. *Bell & Howell Airline Service Co*., 185 NLRB 67 (1970).

In determining the number of working hours, the Board counted time spent by home health care workers in completing paperwork and in delivering mandatory paperwork to the office. It did not count time spent consulting with other personnel. *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997).

For related discussion see Irregular Part-Time Employees, section 20-140 below.

For a discussion of "on-call" nurses see the health care cross listed in section 20-110 above.

For a related discussion of "on-call employees," see section 23-450.

20-130 Part-Time Faculty Members

460-5067-4200

The Board determined in *New York University*, 205 NLRB 4 (1973), that the differences between members of the full-time and members of the part-time faculty are so substantial in most

colleges and universities that it would no longer adhere to the principle announced in *University of New Haven*, 190 NLRB 478 (1971), of including regular, part-time faculty in the same unit with full-time faculty. Thus, the Board now "excludes adjunct professors and part-time faculty members who are not employed in 'tenure track' positions." Also see *Catholic University*, 205 NLRB 130 (1973). However, the Board has found a separate unit of part-time faculty members to be appropriate when the employees sought share a community of interest. *University of San Francisco*, 265 NLRB 1221 (1982). Cf. *Goddard College*, 216 NLRB 457 (1975).

20-140 Irregular Part-Time Employees

362-6730

460-5067-7700

We turn now to part-time employees whose work periods are sporadic or casual. These are normally termed "irregular part-time employees." Within the framework of the basic rationale which delineates the dichotomy between "regular" and "irregular," close cases often arise. The absence of the required factors for finding regular part-time status inevitably leads to a finding of "casual" status. *Royal Hearth Restaurant*, 153 NLRB 1331 (1965). Considerations such as the ability of an employee to accept or reject employment or to vary the number of hours worked according to personal choice are relevant to the determination. Thus, the option of employees on a list subject to call to reject or accept employment is relevant to but not determinative of casual employment. *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Tri-State Transportation Co*., 289 NLRB 356, 357 (1988); and *Manncraft Exhibitors Services*, 212 NLRB 923 (1974). Infrequent employment also leads to such a finding. *Callahan-Cleveland, Inc*., 120 NLRB 1355, 1357 (1958); *Colombia Music & Electronics*, 196 NLRB 388 (1972).

In *Mercury Distribution Carriers*, 312 NLRB 840 (1993), the Board held that an employee's option to turn down work and the fact that the employee did not call in every day does not preclude a finding of regular part-time employee.

For related discussion see On-Call Employees, section 20-120 above.

20-200 Temporary Employees

362-6718

460-7000

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *Personal Products Corp*., 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433 (1958); *United States Aluminum Corp*., 305 NLRB 719 (1991); *NLRB v*. and *New England Lithographic Co*., 589 F.2d 29 (1st Cir. 1978). On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries. *Indiana Bottled Gas Co*., 128 NLRB 1441 fn. 4 (1960); *Owens-Corning Fiberglas Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc*., 125 NLRB 619 (1959); and *E. F. Drew & Co.*, 133 NLRB 155 (1961).

A permanent and regular nonunit employee who is temporarily transferred to a unit position is not eligible to vote if the assignment is finite and reasonably ascertainable. *Marian Medical Center*, supra.

Temporary employees who have achieved permanent status prior to the eligibility date are eligible to vote. *Gulf States Telephone Co*., 118 NLRB 1039, 1041 (1957). Thus, where employees were hired to fill full-time or part-time jobs with the understanding that their employment may be terminated at any time but remained in continuous service for a period longer than 1 year and under company policy achieved permanent status, they were found eligible

to vote. It is the employee's status as of the eligibility date that is determinative. Events occurring after the eligibility date are irrelevant to such a determination. *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982); and *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992). See also *Apex Paper Box*, 302 NLRB 67 (1991), concerning laid-off employees recalled after the eligibility date but prior to the election, and *WDAF Fox 4*, 328 NLRB 3 (1999), where a divided Board found that the employer changed what had been a fixed termination date.

Where the employer calls back a substantial number of the same employees, even though they are described as "temporary," each year, they are included in the unit. *Tol-Pac, Inc*., 128 NLRB 1439 (1960). Compare *Recipe Foods*, 145 NLRB 924 (1964); *LaRonde Bar & Restaurant*, 145 NLRB 270 (1963).

Temporary employees, who, despite that characterization, are retained beyond their original term of employment, and whose employment is thereafter for an indefinite period, are included in the unit. *MJM Studios*, 336 NLRB 1255 (2001); *Orchard Industries*, 118 NLRB 798 (1957). Also included are so-called temporary employees who have worked for substantial periods where there is no likelihood that their employment will end in the immediate foreseeable future. *Horizon House 1, Inc*., 151 NLRB 766 (1965). See also *Textile Workers UTWA*, 138 NLRB 269 fn. 3 (1962); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433 (1958); and *Personal Products Corp*., 114 NLRB 959 (1955). Even when an employee knows that a replacement is being sought, the employee remains eligible to vote if no definite date is set for the termination of employment. *NLRB v. New England Lithographic*, supra.

Temporary employees drawn from the same labor force each year, employed every year in substantial numbers for substantial periods of time, composed primarily of former employees, and working with and doing the same kind of work as the permanent employees have a sufficient interest in the conditions of employment to be included despite difference in working conditions, remuneration, and the temporary nature of the work. *F. A. Bartlett Tree Expert Co*., 137 NLRB 501 (1962).

Employees in a labor pool who are hired out to employer's customers on a day-to-day basis are casual laborers similar to stevedores and are entitled to the protection of the Act even though the employer does not exercise control over the entire employment relationship. *All-Work, Inc*., 193 NLRB 918 (1971). Eligibility, however, was limited to employees who had worked at least 7 days in the 90-day period preceding the Board's decision and direction of election at least 1 of which days was in the 30-day period preceding the decision.

In *Evergreen Legal Services*, 246 NLRB 964 (1979), the Board found that employees working under Comprehensive Employment and Training Act programs (CETA) were not temporary and should be included in a unit with regular full-time employees. See section 20-620 for a discussion of Trainees.

In one post-*M.B. Sturgis* case (see 14-600) (*M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) (the Board included the contingent employees supplied by a staffing agency in the unit of user employees. In doing so the Board found a "strong" community of interest. The Board did not however analyze the case under traditional temporary analysis even though the employees worked for a maximum of 15 months. *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001). Although *Sturgis* has been overruled by *Oakwood Care Center*, 343 NLRB No. 76 (2004), on the issue of consent for inclusion in multiemployer units, presumably, community of interest standards apply where that consent is given.

For a discussion of students or temporary employees see section 20-400, infra.

20-300 Seasonal Employees

460-5067-5600

Regular seasonal employees are those who have a reasonable expectation of reemployment in the foreseeable future; they are included in the bargaining unit. *L & B Cooling*, 267 NLRB 1 (1983); *P. G. Gray*, 128 NLRB 1026 (1960); *Musgrave Mfg. Co*., 124 NLRB 258 (1959); *California Vegetable Concentrate*, 137 NLRB 1779 (1962); *Baumer Foods*, 190 NLRB 690 (1971); *Knapp-Sherrill Co*., 196 NLRB 1072 fn. 2 (1972).

For discussion of students or temporary employees, see section 20-400, infra.

Temporary or casual seasonal employees are excluded. *L & B Cooling*, supra; *Post Houses*, 161 NLRB 1159, 1172–1173 (1966); *Root Dry Goods Co*., 126 NLRB 953 fn. 10 (1960); *F. W. Woolworth Co.*, 119 NLRB 480 (1957).

It is Board policy that unit placement and voting eligibility are inseparable issues; any employee who may be represented as the result of an election has the right to vote in the election. This policy, restated in *Post Houses*, supra; *Sears, Roebuck & Co*., 112 NLRB 559 fn. 28 (1955), is applicable not only to seasonal employees but to all employees who are entitled to be included in the bargaining unit.

Factors which militate in favor of finding employees regular seasonal employees warranting inclusion are:

20-310 Same Labor Force

460-5067-5600

The employer draws from the same labor force each season. *Seneca Foods Corp*., 248 NLRB 1119 (1980); *Maine Apple Growers, Inc*., 254 NLRB 501 (1981); *Kelly Bros. Nurseries*, 140 NLRB 82 (1962); *Carol Management Corp*., 133 NLRB 1126 (1961); and *Baumer Foods*, supra.

20-320 Former Employees

460-5067-5600

Former employees are given preference in rehiring or recall, whether the employer uses a preferential hiring list or not. *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974); *Aspen Skiing Corp*., 143 NLRB 707 (1963); *Brown Cigar Co*., 124 NLRB 1435 (1959); and *Micro Metalizing Co*., 134 NLRB 293 (1962).

20-330 Similarity of Duties, etc.

460-5067-5600

Duties, working conditions, supervision, and/or benefits are substantially similar for both permanent and seasonal employees. *Kelly Bros. Nurseries*, supra; *California Vegetable Concentrate*, supra.

20-340 Transition

460-5067-5600

The ability to go from seasonal to permanent employment. *California Vegetable Concentrates*, supra; *Micro Metalizing*, supra. Where there is a relatively stabilized demand for, and dependence on, such employees by the employer, and there is likewise reliance by a substantial number of the employees on a return to the employer each year, the employees in question have a sufficient community of interest with the permanent employees to be included in the unit. *Maine Apple Growers*, supra; *Kelly Bros. Nurseries*, supra; *California Vegetable Concentrates*, supra.

Factors which militate *against* finding employees regular seasonal employees may be found in the following cases:

Where there is a high turnover rate among seasonal employees, the employer does not follow a recall policy, and the seasonals rarely become permanent employees and do not share in the benefits received by the permanent employees, the employees are temporary or irregular seasonal employees without sufficient interests to be included in the unit. *Freeman Loader Corp*., 127 NLRB 514 (1960).

"Christmas extras," who do not generally return each year and have no expectation of continued employment, are excluded from the unit. *Root Dry Goods Co*., supra at fn. 10.

Where at the time of the hearing there had been only 1 recall of laid-off employees and a total of 75 temporary seasonal employees were hired, but there was no precise evidence as to what percentage of this number was returning from prior layoffs, the Board could not, on the basis of the 1 recall alone, find that "a sufficiently large number of temporary seasonal employees has a demonstrable expectation of being rehired." They were therefore excluded from the unit and deemed ineligible to vote in the election. *Maine Sugar Industries*, 169 NLRB 186 (1968).

Where employees hired during a seasonal peak are uncertain of reemployment, receive no fringe benefits, receive less pay than the regular employees in the unit, and have permanent full-time employment elsewhere, they are excluded from the unit. *Georgia Highway Express*, 150 NLRB 1649 fn. 4 (1965). See also *Candy Shops*, 202 NLRB 538 (1973), and *L & B Cooling*, supra.

Where a year-round operation had a fluctuating need for extra or on-call employees in a seasonal pattern, and the timing of the election may tend to exclude employees with substantial records of employment during peak periods, the Board included in the unit employees who worked a minimum of 15 days in either of the two 3-month periods immediately preceding the date of issuance of the direction of election. *Daniel Ornamental Iron Co*., 195 NLRB 334 (1972).

As the Board will not give controlling weight to bargaining history to the extent that it departs from clearly established Board policy, seasonal employees were included in the bargaining unit where they worked for a substantial portion of the year, had a near certain expectation of reemployment from year to year, worked alongside year-round employees under the same supervision, and where the employer under its new owners had undertaken new policies tending to eliminate distinctions previously existing between seasonal and year-round employees. *William J. Keller, Inc.*, 198 NLRB 1144 (1972).

20-350 Timing of Seasonal Elections

370-0750-4900

Board policy is to direct elections involving seasonal employees at as near the peak of the season in order to provide as many voters as possible with the opportunity to cast their ballots. *Libby, McNeill & Libby*, 90 NLRB 279, 281 (1950); *Brooksville Citrus Growers Assn*., 112 NLRB 707 (1955); *Bogus Basin Recreation Assn*., supra. On the other hand, circumstances may be such that the *highest* peak is not required. *Elsa Canning Co*., 154 NLRB 1810 (1965); *Fall River Dyeing Corp*., 272 NLRB 839 (1984), enfd. 775 F.2d 435 (1st Cir. 1985), affd. 482 U.S. 27 (1987). See also *Saltwater, Inc.*, 324 NLRB 343 (1997).

If the employer, despite hiring some employees seasonally, is engaged in virtually year-round production operations, and the number of employees in the year-round complement is relatively substantial, the employer's operation may be deemed "cyclical" and an immediate election directed. *Aspen Skiing Corp*., supra; *Baugh Chemical Co*., 150 NLRB 1034 (1965); See *Candy Shops*, supra.

The delay in conducting the election will not require a new showing of interest. *Bogus Basin Recreation Assn.*, supra.

20-400 Student Workers

362-6736

460-5067-4500

The voting eligibility of students presents a number of issues. In *St. Clare's Hospital*, 229 NLRB 1000 (1977), the Board described four categories of cases in which the issue of student eligibility to vote is presented:

1. Students employed by a commercial employer in a capacity unrelated to the student's course of study are eligible to vote if they otherwise meet the community-of-interest test.

2. Students employed by their own educational institution in a capacity unrelated to their course of study are generally excluded from voting on the view that their relationship to the unit is normally viewed as transitory. But they will be included if they share a community of interest with the unit employees. *University of West Los Angeles*, 321 NLRB 61 (1996).

3. Students employed by a commercial employer in a capacity that is related to the student's course of study are excluded from the unit because the students' relationship is primarily educational.

4. Students who perform services at their educational institution that are directly related to their educational program. Examples of this kind of relationship are medical interns and residents. In *Boston Medical Center*, 330 NLRB 152 (1999), the Board overruled *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), and held that interns and residents are employees under the Act. In *Brown University*, 342 NLRB No. 42 (2004), the Board found that graduate assistants are not employees who are eligible for collective bargaining.

Similar tests are applied to students employed on a part-time or temporary basis as are applied to all nonpermanent employees. Thus, for example, students who worked for a constant number of hours each weekend as night telephone operators, performing duties regularly required by the employer during these hours, were held to be regular part-time employees and included in the unit. *Fairfax Family Fund*, 195 NLRB 306 (1972). See also *Mount Sinai Hospital*, 233 NLRB 507, 508 (1977), and *System Auto Park & Garage*, 248 NLRB 948 (1980).

Student firefighters were excluded from a craft-type unit sought because they did not possess the skills or exercise the responsibility typically associated with firefighters. *Leland Stanford Jr. University*, 194 NLRB 1210 (1972).

Although the Board generally excludes summer employees from the appropriate unit, such employees nonetheless are deemed eligible to vote if, upon returning to school, their employment evidences regular part-time status. This should be distinguished from "a pattern of intermittent, sporadic employment." *Crest Wine & Spirits, Ltd.*, 168 NLRB 754 (1968). See also *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993).

In another case, a student who continued to work on Saturdays on a regular part-time basis when school began was found to be a regular part-time employee, but another student, as to whom there was no evidence that he continued his employment after resuming school on a full-time basis, was excluded from the unit. *Sandy's Stores*, 163 NLRB 728, 729 (1967). See also *Giordano Lumber Co.*, 133 NLRB 205, 207 (1961).

Where summer students were hired to fill seasonal vacancies, did not enjoy the same fringe benefits, and had no commitment for rehire during subsequent summers, they were held to be temporary employees and excluded from the unit. *J.K. Pulley Co.*, 338 NLRB 1152 (2003); *Fisher Controls Co.*, 192 NLRB 514 (1971). See also *Walgreen Louisiana Co.*, 186 NLRB 129, 130 (1970); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971); *Georgia-Pacific Corp.*, 201 NLRB 831 (1973).

In *Saga Food Service*, 212 NLRB 786 fn. 9 (1974), the Board declined to find appropriate a separate unit of student cafeteria employees.

20-500 Dual-Function Employees

177-8501-7000

362-6790

460-5067-4900

For the most part, the same community-of-interest tests are applied to dual-function employees as are applied to part-time employees. *Berea Publishing Co*., 140 NLRB 516 (1963); *Wilson Engraving Co*., 257 NLRB 333 (1980).

In enunciating this policy, the Board pointed out that the policies of the Act are best effectuated by according to each employee the same rights and privileges in the selection of the majority representative for the unit in which he works. It would perceive "no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer." (140 NLRB at 519.) Thus, employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. See *Harold J. Becker Co.,* 343 NLRB No. 11 (2004); *Medlar Electric, Inc*., 337 NLRB 796 (2003); *Ansted Center*, 326 NLRB 1208 (1998); *Air Liquide America Corp*., 324 NLRB 661 (1997). *Continental Cablevision*, 298 NLRB 973 (1990); *Alpha School Bus Co*., 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987); but see *Benson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), in which the circuit court denied enforcement of a Board Order inasmuch as Board determination that dual-function employees were entitled to vote in two separate units would require such employees to join two different unions to maintain their employment with the employer. Berea was reaffirmed in *Avco Corp*., 308 NLRB 1045 (1992). In *KCAL-TV*, 331 NLRB 323 (2000), the Board concluded that the dual function employee there had sufficient interest in each of the two units in which she worked as to permit her to vote in both elections.

However, in a situation where alleged dual-function employees had only 3 percent or less of their time devoted to the type of work done by the employees in the unit, they had no such community of interest with them that would warrant their inclusion in the unit. They did not spend a substantial period of their time performing "identical" functions. *Davis Transport*, 169 NLRB 557 (1968). Moreover, where an employee, who was primarily involved in running a parts department and performing mechanic's duties, did some truckdriving on all or part of only 20 days in a year but without regularity, pattern, or consistent schedule, the Board found that he did not perform a sufficient amount of work in the truckdriver unit to demonstrate that he had a substantial interest in the unit to warrant inclusion. *Mc-Mor-Han Trucking Co*., 166 NLRB 700, 702 (1967). See also *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003); *Martin Enterprises*, 325 NLRB 714 (1998); *W. C. Hargis & Sons, Inc*., 164 NLRB 1042 (1967); *Continental Cablevision of St. Louis*, supra; *Landing Construction Co*., 273 NLRB 1288 (1984); *U.S. Pollution Control*, 278 NLRB 274 (1986). In *Pacific Lincoln-Mercury*, 312 NLRB 901 fn. 4 (1993), the Board noted that 5 to 10 percent of an employee's time doing unit work was insufficient to include him in the unit under the *Berea* standard. Compare *Medlar Electric*, supra (25 to 30 percent of time sufficient for dual-function status).

The inclusion of a dual-function employee within a particular unit does not require a showing of community of interest factors in addition to the regular performance of a substantial amount of unit work. *Fleming Industries*, 282 NLRB 1030 fn. 1 (1987).

Historical note: The *Berea* decision overruled *Denver-Colorado Spring-Pueblo Motor Way*, 129 NLRB 1184 (1961), which required that an employee spend over 50 percent of his time in unit work to be included in the unit, and restored the "sufficient interest" test and the equation of dual-function and part-time employees initially used in *Ocala Star Banner*, 97 NLRB 384 (1951).

While *Grocers Supply Co*., 160 NLRB 485 fn. 2 (1966), cited the *Denver* case, the result reached was consistent with the *Berea* rule.

The dual-function issue is also presented in situations where the employees have out-of-unit supervisory responsibilities. In *Adelphi University*, 195 NLRB 639 (1972), the Board included an individual in a unit of faculty members even though he had supervisory authority over his secretary. See also *New York University*, 221 NLRB 1148, 1156 (1975).

Later in *Detroit College of Business*, 296 NLRB 318 (1989), the Board rejected what had become the 50-percent rule—"any individual who supervises nonunit employees less than 50 percent of his time is not a supervisor." Instead, the Board stated that determinations of supervisory status would be made on the basis of a "complete examination of all the factors present to determine the nature of the individual's alliance with management." See also *Rite Aid Corp*., 325 NLRB 717 (1998), and *Legal Aid Society of Alameda County*, 324 NLRB 796 (1997).

Note—*Contract bar*—In *Otasco, Inc*., 278 NLRB 376 (1986), the Board held that contract bar principles preclude the inclusion of dual-function employees in a petitioned-for unit where they are already included in a unit covered by the contract. Similarly, the *Berea* principle cannot work to result in two units where otherwise there would be one. *Sunray Ltd*., 258 NLRB 517 (1981).

In *Meadow Valley Contractors*, 314 NLRB 217 (1994), the Board rejected a dual-function analysis where the employee had ceased performing nonunit work by the election eligibility date.

20-600 Probationary Employees, Trainees, and Clients (Rehabilitation)

20-610 Probationary Employees

460-5067-2100

"Probationary employees . . . receive and hold their employment with a contemplation of permanent tenure, subject only to the satisfactory completion of an initial trial period." *National Torch Tip Co*., 107 NLRB 1271, 1273 (1954); *Vogue Art Ware & China Co*., 129 NLRB 1253 (1961); and *Johnson Auto Spring Service*, 221 NLRB 809 (1975). Where their general conditions of work and their employment interests are like those of the regular employees (*Rust Engineering Co*., 195 NLRB 815 (1972)) and they have a reasonable expectation of continued employment (*Afro Jobbing & Mfg. Corp*., 186 NLRB 19 (1970)), probationary employees are included in the unit. The requirement of the completion of a probationary period does not militate against a finding that the employees are permanent. *Pacific Tile & Porcelain Co*., 137 NLRB 1358 (1962); *Sheffield Corp*., 123 NLRB 1454 (1959).

20-620 Trainees

460-5067-1400

Trainees may or may not be included in the bargaining unit, depending on an evaluation of the interests of such employees compared to those of the regular employees. Present duties and interests are determinative, not future assignments. *Heckett Engineering Co*., 117 NLRB 1395 (1957). Thus, an employee who was engaged in a training program which might lead to a supervisory position at some indefinite time in the future was included in the bargaining unit. *Cumberland Shoe Corp*., 144 NLRB 1268 (1963). See also *Big "N," Department Store No. 307*, 200 NLRB 935 (1972); *Johnson Auto Spring Service*, 221 NLRB 809 (1975), and discussion of "management trainees" in chapter on Statutory Exclusions (supervisors), section 17-506.

Beginners with a reasonable expectancy of permanent employment, having a community of interest with other employees, are likewise eligible. *Gulf States Telephone Co*., 118 NLRB 1039 (1957); see also *Data Technology Corp*., 281 NLRB 1005, 1006 fn. 3 (1986). However, where trainees have different backgrounds from the employee in the unit and have a good probability of achieving supervisory status, their interests are different from production and maintenance

employees and they are excluded from such a unit. *Cherokee Textile Mills*, 117 NLRB 350 (1957); *WTOP, Inc*., 115 NLRB 758 (1956). See also *M. O'Neil Co*., 175 NLRB 514, 517 (1969).

Even where the Board would exclude a group of trainees from the unit if it were making the unit determination, the parties may agree to their inclusion. *Montgomery Ward & Co*., 123 NLRB 135 (1959).

Where "sales trainees" were paid 12 percent more than the beginning rate for warehouse employees, received bonuses for which the latter were not eligible, did not punch the clock, if successful as "sales trainees" were to become inside salesmen, and, if unsuccessful, terminated, but under no circumstances were they to become permanent warehouse employees, they were excluded from the unit. *Garrett Supply Co*., 165 NLRB 561, 562 (1967).

Similarly, where a former shop employee had become a sales trainee and his current duties and conditions of employment indicated that his community of interest lay with the sales engineers rather than with the rank-and-file employees in the bargaining unit, he was excluded from the unit. *East Dayton Tool* Co., 194 NLRB 266 (1972).

But where the purpose of a training program was to train employees to become capable of performing a variety of functions throughout the plant and many of them, although not all, are assigned to production classifications on completion of the program, they were included in the unit. *UTD Corp*., 165 NLRB 346 (1967). See also *General Electric Co*., 131 NLRB 100, 104–105 (1961).

See section 20-200 in this chapter concerning employees working under Comprehensive Employment and Training Act (CETA) programs.

20-630 Clients (Rehabilitation)

177-2478

460-5067-9500

Handicapped individuals who perform services for a social service organization as part of a rehabilitation program are not statutory employees. See *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991), and cases cited therein. As the Board indicated in *Goodwill*, the touchstone for this determination is the nature of the relationship between the employer and the individual. If it is a typical industrial relationship, Section 2(3) employee status is found. Alternatively, a rehabilitative relationship with working conditions that are not typical of the private sector will not result in a finding of employee status.

Where the Board has found that client/trainees and client/employees are not statutory employees and therefore excluded from the unit, it has held that the remaining nonhandicapped individuals, employed under conditions typical of the private sector, are employees and directed an election limited to these employees. *Goodwill Industries of Denver*, 304 NLRB 764 (1991).

In *Brevard Achievement Center*, 342 NLRB No. 101 (2004), the Board (3 to 2) reaffirmed "the primarily rehabilitative standard" applied in *Goodwill Industries of Denver* and *Goodwill Industries of Tidewater*.

In *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995), the Board found that a group of handicapped workers are employees as their relationship with the employer "is characterized by business considerations more typical of service employment in the private sectors." Accord: *Huckleberry Youth Programs*, 326 NLRB 1272 (1998).

For a discussion of jurisdiction over these facilities generally, see 1-319.