11. AMENDMENT, CLARIFICATION, AND DEAUTHORIZATION PETITIONS, FINAL OFFER ELECTIONS AND WAGE-HOUR CERTIFICATIONS

In our consideration of types of petitions in an earlier chapter, we described in bare outline the six types, reserving for amplification in the individual chapters the variety of areas of law and procedure involved in the handling of certification petitions (RC), employer petitions (RM), and decertification petitions (RD). The remaining three types of petitions, however, are susceptible of treatment in a single chapter. These are petitions for amendment of certification (AC), petitions for clarification of unit (UC), and petitions for deauthorization of union security (UD). Also included in the chapter are final offer elections and wage-hour certifications.

11-100 Amendment of Certification (AC)

355-8800

385-2500

Flowing from the Board's express authority under Section 9(c)(1) to issue certifications is the implied authority to amend them. Under Section 102.60(b) of the Board's Rules and Regulations, Series 8, a party may file a petition to amend a certification to reflect changed circumstances, such as a merger or changes in the name or affiliation of the labor organization or in the site or location of the employer, where there is a unit covered by a certification and no question concerning representation exists. For amendment on a change of location see *South Coast Terminals,* 221 NLRB 197 (1976).

When the amendment amounts to nothing more than a mere change in name or location, the Board will routinely grant the amendment. When, however, the amendment is sought to reflect a change brought about by an affiliation or merger with another labor organization, different considerations will apply. In merger or affiliation situations, the Board historically required that two conditions be met before it would grant an AC petition. First, there must have been a vote on the change that satisfied minimum due process and second, there must have been a substantial continuity between the pre and postaffiliation bargaining representative. *Hammond Publishers,* 286 NLRB 49 (1987); and *Hamilton Tool Co.,* 190 NLRB 571 (1971).

The Supreme Court severely limited the due process test when it held that a union is not required to permit nonmember bargaining unit employees to vote on the decision to merge or affiliate. *NLRB v. Financial Institution Employees,* 475 U.S. 192 (1986).

For a number of years thereafter, the Board debated the due process issue. Finally, in *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB No. 19 (2007), it "decided to abandon the due process requirement for union affiliation." Thus, there is no longer anything left of the first part of the Board's test. For a history of that test see the *Kravis* decision. The Board has decided to apply the *Kravis* principle retroactively. *Allied Mechanical Services,* 352 NLRB No. 83 (2008).

In the wake of *Financial Institution Employees,* supra, the Board was presented with a series of cases raising the second part of its test—continuity. In *Western Commercial Transport,* 288 NLRB 214, 217 (1988), the Board rejected an 8(a)(5) charge because the affiliation of the certified union with another union resulted in "a sufficiently 'dramatic' change in the identity of the bargaining representative to raise a question concerning representation." The Board found that the certified union lost its autonomy, that its officials had no major role in the organization, and that these officials were replaced by officials of the other labor organization. The substantial changes in size (136-employee unit affiliated with 8500-member organization), organization structure and administration diminished the rights of the membership to such an extent as to warrant a fundamental change in the character of the certified union. See also *Mike Basil*

Chevrolet, 331 NLRB 1044 (2000);; *Avante at Boca Raton, Inc*., 334 NLRB 381 (2001); *Garlock Equipment Co.,* 288 NLRB 247 (1988); and *Chas. S. Winner, Inc.,* 289 NLRB 62 (1988). Cf. *Sioux City Foundry*, 323 NLRB 1071 (1997), enfd. 154 F.3d 832 (8th Cir. 1998); *CPS Chemical Co.,* 324 NLRB 1021 (1997); *Seattle-First National Bank*, 290 NLRB 571 (1988), where there was no change in officers as a result of the affiliation; *News/Sun-Sentinel Co.,* 290 NLRB 1171 (1988); *National Posters*, 289 NLRB 468 (1988); and *Minn-Dak Farmers Cooperative*, 311 NLRB 942 (1993).. For n analysis of the continuity question in the context of a trusteeship, see *Quality Inn Waikiki*, 297 NLRB 497 (1989). See also *Potters Medical Center*, 289 NLRB 201 (1988), involving the merger of international unions; *City Wide Insulation*, 307 NLRB 1 (1992); and *Service America Corp.,* 307 NLRB 57 (1992).

An amendment of certification, which is granted only where there is continuity of representation, is not affected by the Board's normal contract-bar rules. *Hamilton Tool Co*., supra at 573. However, in some circumstances, an amendment of certification will be denied. In one case, the Board stated it would, in effect, be subverting the policies of the Act by certifying a union through an AC proceeding which less than a year before had been rejected by a majority of the employees. *Williamson Co*., 244 NLRB 953, 955 (1979); *Bunker Hill Co.,* 197 NLRB 334 (1972). *Bedford Gear & Machine Products*, 150 NLRB 1 (1964); *Gulf Oil Corp*., 109 NLRB 861 (1954); and *United Hydraulics Corp.,* 205 NLRB 62 (1973).

When an RC petition has been filed and the Board finds no question concerning representation but rather a problem that can be resolved by clarification or amendment of certification, it may on its own initiative clarify or amend the existing certification. *Pacific Coast Shipbuilders Assn.*, 157 NLRB 384 (1966); and *220 Television, Inc*., 172 NLRB 1304 (1968).

If an AC petition clearly presents a question concerning representation, it must be dismissed, even in the absence of objections by any of the parties, because an amendment of certification is not intended to change the representative itself. *Uniroyal, Inc*., 194 NLRB 268 (1972); and *Missouri Beef Packers*, 175 NLRB 1100 (1969).

Note that petition for amendment of certification may be filed only for a unit covered by a certification while a petition for clarification of a bargaining unit may be filed either where the bargaining representative has a certification or is recognized by the employer under a contract but not pursuant to a certification.

The requirements and procedures for both of these types of petitions are set out in Sections 102.61(d) (clarification) and 102.61(e) (amendment) of the Rules and Regulations. CHM sections 11490–11498 and Section 101.17 of the Statements of Procedure. See also *MCA Distribution Corp*., 288 NLRB 1173 (1988), infra.

11-200 Clarification of Certification (UC)

Generally

316-3301-5000

355-7700

385-7501 et seq.

The Board's express authority under Section 9(c)(1) to issue certifications carries with it the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Thus, under Section 102.60(b) of the Board's Rules and Regulations, Series 8, a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists. (See also Sec. 101.17 of the Statements of Procedure.) As noted above the procedures for UC and AC petitions are described at CHM sections 11490–11498. These procedures provide resolution of these issues by administrative investigation or by hearing as appropriate. Note that when the Regional Director utilizes the former, a failure to cooperate may preclude an opportunity for a hearing to appeal. *MCA Distribution Corp*., supra.

The Board described the purpose of unit clarification proceedings in *Union Electric Co.*, 217 NLRB 666, 667 (1975):

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

See also *E. I. Du Pont, Inc*., 341 NLRB 607 (2004); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001); and *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999), quoting from *United Parcel Service*, 303 NLRB 326, 327 (1991).

> The limitations on accretion . . . require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*

When an RC petition has been filed and the Board finds no question concerning representation but rather a problem that can be resolved by clarification or amendment of certification, it may on its own initiative clarify or amend the existing certification. *Pacific Coast Shipbuilders Assn.*, 157 NLRB 384 (1966); and *220 Television, Inc*., 172 NLRB 1304 (1968).

In order to have a valid UC petition, there must be employees in the classifications sought to be added. See *Coca-Cola Bottling Co. of Wisconsin,* 310 NLRB 844 (1993). Similarly, work assignment disputes are not appropriate for a UC proceeding. *Coatings Application Co.*, 307 NLRB 806 (1992); compare *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913 (1989).

The Board will determine the status of disputed employees even though they belong to a unit represented by an uncertified union because national labor policy requires it to take all positive action available to eliminate industrial strife and encourage collective bargaining. Furthermore, it would be a needless expense for both the parties and the Government to compel an election where there is no serious doubt of the union's majority position. *Firemen & Oilers*, 145 NLRB 1521 (1964); *Seaway Food Town*, 171 NLRB 729 (1968); *Alaska Steamship Co*., 172 NLRB 1200 fn. 8 (1968); *Manitowoc Shipbuilding*, 191 NLRB 786 (1971); and *Peerless Publications*, 190 NLRB 658 (1971).

The Board will not entertain a unit clarification petition seeking to accrete a historically excluded classification into the unit, unless the classification has undergone recent, substantial changes. *Bethlehem Steel Corp*., 329 NLRB 243, 244 (1999). Accord: *Kaiser Foundation Hospitals*, 337 NLRB 1061 (2002), holding that the Board's decision in *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), was not intended to reverse this longstanding Board doctrine, and temporary employees who are jointly employed are not excepted from this principle. Further, absent recent substantial changes, the Board will not entertain such a petition, regardless of when in the bargaining cycle the petition is filed, even if there has been a change in the Board's decisional law. *Caesar's Palace*, 209 NLRB 950 (1974). See also *Premcor, Inc.*, 333 NLRB 1365 (2001), discussed infra at section 11-220.

The board has a "relitigation rule" that precludes a party from stipulating to the inclusion of a classification in the representation case and shortly thereafter seeking to exclude the position from the unit. *Premier Living Center*, 331 NLRB 123 (2000), and *I.O.O.F. Home of Ohio, Inc.*,

322 NLRB 921 (1997). There is an exception to this rule when the issue involves the inclusion of positions "that would violate basic principles of the Act." *Washington Post Co.,* 254 NLRB 168 (1981), and *Goddard Riverside Community Center,* 351 NLRB No. 84 (2007). Where there is such an issue, the Board will process the petition if it is filed at an appropriate time. (See sec. 11-210, infra.)

In *The Sun*, 329 NLRB 854, 859 (1999), a divided Board set out the test for deciding UC cases involving units defined by the work performed.

> Accordingly, we shall apply the following standard in unit clarification proceedings involving bargaining units defined by the work performed: If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met, the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate. [Footnote omitted.]

In doing so the Board also summarized the standards for UC determinations in traditionally described units. Compare *Archer Daniels Midland Co*., 333 NLRB 673 (2001).

11-210 Timing of UC Petition

A unit may be clarified in the middle of a contract term where the procedure is invoked to determine the unit placement of employees performing a new operation. *Crown Cork & Seal Co*., 203 NLRB 171 (1973); and *Alaska Steamship Co*., supra. It may also be clarified in midterm where the contract specifically excluded a group, such as supervisors, and there is a dispute as to the supervisory status of certain classifications of employees. *Western Colorado Power Co.,* 190 NLRB 564 (1971).

The Board refuses to clarify in midterm, however, when the objective is to change the composition of a contractually agreed-upon unit by the exclusion or inclusion of employees. To grant the petition at such a time would be disruptive of a bargaining relationship voluntarily entered into by the parties when they executed the existing contract. *Edison Sault Electric Co*., 313 NLRB 753 (1994), and *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977). *San Jose Mercury & San Jose News*, 200 NLRB 105 (1973); *Credit Union National Assn.,* 199 NLRB 682 (1972); and *Wallace-Murray Corp*., 192 NLRB 1090 (1971). In *Edison Sault Electric*, supra, the Board extended this policy to a situation in which the parties have agreed to a contract but have not yet signed the agreement.

The Board has an exception to its midterm prohibition against processing UC petitions where the matter is also being considered in the grievance arbitration procedure. In those circumstances, the Board holds "that processing of the employer's petition to confirm the historical exclusion of the disputed position is necessary to prevent the enforcement of a contradictory arbitration award." *Ziegler, Inc*., 333 NLRB 949 (2001), and *Williams Transportation Co*., 233 NLRB 837 (1977). The Board will, however, clarify the unit where the petition is filed shortly before expiration of the contract. *Shop Rite Foods*, 247 NLRB 883 (1980), and *University of Dubuque*, 289 NLRB 349 (1988).

A petition will also be entertained shortly after a contract is executed when the parties could not reach agreement or a disputed classification and the UC petitioner did not abandon its position in exchange for contract concessions. *St. Francis Hospital*, 282 NLRB 950 (1987), and cases cited therein. See also *Goddard Riverside Community Center*, supra. Similarly, a petition will be processed when the Board finds that the parties never recognized the disputed classification as part of the unit. *Parker Jewish Geriatric Institute*, 304 NLRB 153 (1990).

The Board has never set a precise time limit defining "shortly after." In *Baltimore Sun Co.*, 296 NLRB 1023, 1024 (1989), the Board processed a UC petition filed 11 weeks after contract execution. And in a somewhat unusual situation, the Board processed a petition filed almost a year after the parties reached agreement on the contract but not on the unit dispute issue. *Sunoco, Inc.*, 347 NLRB 421 (2006).

For an interesting series of discussions on the timing of a UC petition see the three *Bethlehem Steel* cases decided the same day; *Bethlehem Steel Corp*., 329 NLRB 241 (1999); *Bethlehem Steel Corp*., 329 NLRB 243 (1999); and *Bethlehem Steel Corp*., 329 NLRB 245 (1999).

In two cases, the Board continued its practice of permitting the processing of a UC petition midterm where it is necessary to resolve a dispute that the parties have been unable to resolve. See *Kirkhill Rubber Co.*, 306 NLRB 559 (1992), petition processed during certification year where employees voted without challenge, but disagree as to their placement, and the parties cannot resolve the dispute. Compare *Firestone Tire Co.*, 185 NLRB 63 (1970), distinguished by the Board in *Kirkhill*. The second case is *Baltimore Sun Co.*, 296 NLRB 1023 (1989), where the petitioner reserved "the right to go to the Board" in the collective-bargaining negotiations. And see *Brookdale Hospital Medical Center*, 313 NLRB 592 fn. 3 (1993).

11-220 Accretion v. Question Concerning Representation

When a group or classification of employees sought to be added to a unit existed at the time the unit was certified, and these employees had no opportunity to participate in the selection of the bargaining representative, their unit placement raises a question concerning representation and a petition to amend or clarify will be dismissed. *Gould-National Batteries, Inc.*, 157 NLRB 679 (1966); *Bendix Corp*., 168 NLRB 371 (1968); *AMF Inc.*, 193 NLRB 1113 (1971); and *International Silver Co*., 203 NLRB 221 (1973). See also *Kaiser Foundation Hospitals*, 337 NLRB 1061 (2002). The same rule applies where the disputed jobs were in existence at the time of the certification; they were excluded from the certified unit as inappropriate; and the record shows no recent changes in the jobs that would make them appropriate for inclusion. *Mountain States Telephone Co*., 175 NLRB 553 (1969); *Lufkin Foundry & Machine Co.*, 174 NLRB 556 (1969); *National Can Corp.*, 170 NLRB 926 (1968); and *Sterilon Corp.*, 147 NLRB 219 (1964). See also *Williams Transportation Co.*, 233 NLRB 837 (1977). Similarly, when the employees have not been included in the unit for some time and the union has made no attempt to include the position of the unit, the Board may find that the position is historically outside the unit and that the union has waived its right to a UC proceeding. *Sunar Hauserman*, 273 NLRB 1176 (1984), and *Plough, Inc.*, 203 NLRB 818 (1973). Accord: *ATS Acquisition Corp.*, 321 NLRB 712 (1996), and *Robert Wood Johnson University Hospital*, supra.

When the disputed employees do not constitute an accretion to the unit represented by petitioner, the correct procedure to determine the issue of their inclusion is not a UC petition, but a petition pursuant to Section 9(c) of the Act seeking an election. *Coca-Cola Bottling Co. of Wisconsin*, supra. *Westinghouse Electric Corp.*, 173 NLRB 310 (1969); *Brockton Taunton Gas Co.*, 178 NLRB 404 (1969); *Roper Corp*., 186 NLRB 437 (1970); and *Bradford-Robinson Printing Co*., 193 NLRB 928 (1971). But see *Armco Steel Co.*, 312 NLRB 257 (1993), where the Board indicated a willingness to utilize UC proceedings to determine unit scope and even majority issues as part of a *Gitano* analysis (*Gitano Distribution Center*, 308 NLRB 1172 (1992); see sec. 12-600, infra). Accord: *Steelworkers Local 7912 (U.S. Tsubaki)*, 338 NLRB 29 (2002).

Note that when the disputed employees constitute an accretion to the unit represented by the intervenor, a UC petition filed by another union is dismissed and no question concerning representation is raised. *U.S. Steel Corp.*, 187 NLRB 522 (1971).

A claim of accretion does not generally raise a question concerning representation sufficient to support filing of an RM petition. *Woolwich, Inc.*, 185 NLRB 783 (1970).

A UC petition was dismissed where the Board concluded that an election was the appropriate means of testing the propriety of merging several different units represented by several different

unions, none of which claimed to represent all the employees involved. *LTV Aerospace Corp.*, 170 NLRB 200 (1973).

As with other representation matters, the Board will not defer a UC petition to an arbitration's decision, *Magna Corp.*, 261 NLRB 104, 105 fn. 2 (1982), and cases cited therein. See also *Advanced Architectural Metals, Inc.*, 347 NLRB 1279 (2006).

While Section 9(b)(1) does not require the Board to render inappropriate a mixed unit of professional and nonprofessional employees established voluntarily by the parties, it does preclude the Board from creating on its own initiative a new unit composed of both professionals and nonprofessionals without a self-determination election. Thus, when the employer and union have already established and maintained a bargaining unit encompassing both elements, they may continue to maintain their bargaining relationship, and the Board will process a UC petition without first affording the professional members of the unit a self-determination election. *A. O. Smith Corp*., 166 NLRB 845 (1967); and *International Telephone Corp*., 159 NLRB 1757, 1762 (1966). See *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247, 1251 (1963); but see *Wells Fargo Corp*., 270 NLRB 787, 788 fn. 6 (1984), questioning *Vincent Drugs*. When, however, the UC petition seeks to add professional employees to the unit without a separate election, the petition will be dismissed. *Gibbs & Cox, Inc.*, 168 NLRB 220 (1968); and *Lockheed Aircraft Corp*., 155 NLRB 702, 713 (1965).

In *Brink's Inc*., 272 NLRB 868 (1984), the Board was confronted with a UC proceeding involving a unit of guards represented by a nonguard union. The Board dismissed the petition as to do otherwise would "place an unduly narrow interpretation on the legislative intent" of Section 9(b)(3) of the Act.

In *Libbey-Owens-Ford Glass Co.*, 169 NLRB 126 (1968), the Board ordered an election in a UC proceeding. There, the petitioner was seeking to use the UC procedures to absorb into an existing certified multiplant unit represented by it separately existing single-plant units also represented by it. The Board, finding that either an employerwide unit or separate plant units would be appropriate and that there was no actual question concerning representation because employer did not dispute the union's representative status at any of the plants, held that the disputed employees should be given the opportunity to express their wishes. A later case involving the same employer, union, and issues, however, held differently. The decision in *Libbey-Owens-Ford Glass Co.*, 189 NLRB 869 (1971), was written by the dissenters in the first case and relied on the reasoning of that dissent. They held that unit scope, not representation, was in issue, and that there was no statutory authority for permitting employees to decide, "in a representational vacuum," which contract unit they wished. See also *PPG Industries*, 180 NLRB 477 (1969).

The creation of a new operation and a new unit typically raises a question concerning representation between the unions representing the formerly separate bargaining units, especially when neither group of affected employees is sufficiently predominate to determine exclusive bargaining status. *F.H.E. Services*, 338 NLRB 1095 (2003), relying on *National Carloading Corp.*, 167 NLRB 801 (1967).When a provision intended in fact as a formula for determining eligibility in an election has been inadvertently included in the unit description, the Board will clarify the unit description by eliminating the eligibility provision. *Detective Intelligence Service*, 177 NLRB 69 (1969).

When appropriate, the Board will treat an RC petition as a motion to clarify or amend a certification. Compare *220 Television, Inc*., 172 NLRB 1304 (1968); and *U. S. Pipe Co.*, 223 NLRB 1443 (1976).

If a new classification is performing the same basic function as the unit employees have historically performed, the new classification is properly"viewed as remaining in the unit rather than being added to the unit by accretion." *Premcor, Inc*., 338 NLRB 1365 (2001). See also *Developmental Disabilities Institute*, 334 NLRB 1166 (2001).

It is an unfair labor practice for an employer and union to "accrete" a group of employees that has been in existence and historically excluded from the unit. *Teamsters Local 89 (United Parcel Service)*, 346 NLRB 484 (2006).

In *Al J. Schneider & Associates*, 227 NLRB 1305 (1977), the Board dismissed a UC petition filed by the employer which presented the same unit question presented in an 8(a)(5) unfair labor practice case. In doing so, the Board stated that a unit placement issue is not presented when "the petition seeks a declaration by the Board; in advance of a disposition of the 8(a)(5) charges. The *Schneider* decision must, however, be read in conjunction with Exception 3 of the Blocking Charge rule. Thus, a Regional Director can secure Board approval to process a representation case first, including a UC petition, in which its resolution will resolve significant common issues. More recently, the Board indicated strong support for the use of UC proceedings to resolve unit scope as well as unit placement issues, particularly when the use of these proceedings will be more expeditious and will obviate the need for unfair labor practice proceedings. *Armco Steel Co.*, 312 NLRB 257 (1993).

For further discussion of accretions, see section 12-500.

11-300 Deauthorization Petition (UD)

324-4060-5000

347-4040-3301-7500

362-3385

Under Section 9(e), the Board is empowered to take a secret ballot of the employees in a bargaining unit covered by an agreement between their employer and a labor organization, made pursuant to Section 8(a)(3), upon the filing with the Board of a petition by 30 percent or more of the employees in the unit alleging their desire that the authority for the union-security provision be rescinded. The Board certifies the result of such balloting to the labor organization and to the employer. A UD petition may not be filed by a supervisor. *Rose Metal Products*, 289 NLRB 1153 (1988).

In *F. W. Woolworth Co.*, 107 NLRB 671 (1954), the Board held that the 30 percent or more of employees who may make the request are employees from the bargaining unit covered by the contract, not just those from the group obligated to become union members by reason of the contract.

There must be a union-security clause in the contract in order to have a UD election. *Wakefield's Deep Sea Trawlers*, 115 NLRB 1024 (1956). However, the showing of interest need not postdate the effective union-security provision. *Covenant Aviation Security, LLC*, 349 NLRB 699 (2007).

When employees previously certified by the Board or recognized by the employer as separate units have, in effect, been merged into single unit and comprise the bargaining unit covered by the existing union-security agreement, a petition for a UD election in only two of the original separate units was dismissed. *Hall-Scott, Inc.*, 120 NLRB 1364 (1958). See also *S. B. Rest. of Huntington, Inc.*, 223 NLRB 1445 (1976).

Romac Containers, Inc., 190 NLRB 238 (1971), held that students who were summer employees but had joined the union were eligible to vote in a deauthorization election. Individuals who spend "a great majority of their time providing exempt public school bus services" were permitted to vote in a UD election because "in a union deauthorization election the Board does not define the bargaining unit." *Illinois School Bus Co.*, 231 NLRB 1 (1977).

The Board will give effect to a state election proceeding held within 1 year of a UD petition being filed. *Asamera Oil (U.S.), Inc.*, 251 NLRB 684 (1980).

A majority of eligible voters must vote for deauthorization in order for the proposition to prevail and in one case the Board found that employer conduct to encourage voter turnout was

"particularly significant" in determining that the conduct (changes in paycheck procedures) was objectionable. *United Cerebral Palsey Assn. of Niagara County*, 327 NLRB 40 (1998).

For a discussion of the effect of a threat not to represent the unit in the event the union is deauthorized, see *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247 (1999), and *Trump Taj Mahal Casino*, 329 NLRB 256 (1999).

The timeliness of a UD petition is determined under NLRA law, not State law (Colorado Peace Act). See *Albertson's/Max Food Warehouse*, 329 NLRB 410 (1999), reversing *City Markets, Inc.*, 216 NLRB 1020 (1983).

11-400 Final Offer Elections (CHM sec. 11520)

355-9500

Section 206 et seq. of the Act describes the procedures in which the President can seek an injunction against a strike or lockout which imperils the national health or safety. Such an injunction can continue for 80 days. After the first 60 days a Board of Inquiry appointed by the President reports on the status of negotiations including the "employer's last offer of settlement." Within 15 days thereof the Board conducts a secret-ballot election among the employees on the question of "whether they wish to accept the final offer of settlement of their employer." Within 5 days of the election, the Board certifies the result to the Attorney General.

11-500 Certificate of Representative Under FLSA (CHM sec. 11540)

This little used procedure is authorized by Section 7(b) of the Fair Labor Standards Act. The procedure calls for the Board to certify that a union is a "bona fide" representative of the employees of a given unit. Once certified, the union and the employer may as part of their collective bargaining vary somewhat the overtime provisions of the FLSA. This procedure is applicable to public employees' units as well as units in the private sector.

11-600 Revocation of Certification

A certification must be honored for a reasonable period, ordinarily 1 year, in the absence of "unusual circumstances." *Ray Brooks v. NLRB*, 348 U.S. 96, 98 (1954). There are three situations in which the Board has found unusual circumstances: (1) a defunct union (sec. 9-420); (2) a schism (sec. 9-410); or (3) a radical fluctuation in the size of the bargaining unit within a short time. Id.

An employer who is confronted with what it believes is such a situation must petition the Board for revocation of the certification. "Unusual circumstances" is not a valid defense in a refusal-to-bargain case. Id at 103. See also *KI (USA) Corp.*, 310 NLRB 1233 fn. 1 (1993).