21. SELF-DETERMINATION ELECTIONS

355-2201-5000

There are circumstances in which no final determination is made in the decision and direction of election, but instead voting groups are established and the finding of an appropriate unit is deferred pending ascertainment of the wishes of the employees as reflected by a "self-determination" election. This practice had its origin early in the Board's history (*Globe Machine & Stamping Co*., 3 NLRB 294 (1937), and has continued since then, taking on more varied forms as time goes on. See also *Armour & Co.*, 40 NLRB 1333 (1942). For a discussion of the history of *Armour-Globe* elections see *NLRB v. Raytheon Co*., 918 F.2d 249 (1st Cir. 1990), and *Syracuse University*, 325 NLRB 162 (1997). See also CHM section 11091.

A self-determination election is typically held where (1) the several units proposed by competing labor organizations are equally appropriate, as in the case of a separate unit vis-a-vis a comprehensive unit; (2) craft or traditional departmental severance is involved; (3) such an election is instrumental in effectuating a statutory requirement as in the case of an election under Section 9(b)(1) involving professional employees; or (4) the issue is the inclusion of a group in an existing unit as against continued nonrepresentation.

"Globed" employees do not automatically come under the terms of a preexisting collective-bargaining agreement. *UMass Memorial Medical Center*, 349 NLRB 369 (2007); *Wells Fargo Armored Service Co*., 300 NLRB 1104 (1990); and *Federal-Mogul Corp.*, 209 NLRB 343 (1974)..

Examples of each type of self-determination election will be found below. The decisions selected should be consulted for the specific language explaining the various eventualities possible under the self-determination procedure. The subject of "pooling" is considered separately.

21-100 Several Units Equally Appropriate

355-2201

355-2220-8000

420-7360 et seq.

When a comprehensive unit is appropriate but a smaller unit is also appropriate, and one union seeks the larger unit and another seeks the smaller unit a self-determination election may be directed.

Where a petitioner sought a three-location unit and intervening unions requested three separate units, one for each location, the direction of election provided for three voting groups with the understanding that if a majority of the employees in each group voted for the petitioner, an overall unit would be certified, but in all other circumstances each group would constitute an appropriate unit for purposes of certification. *City Electric*, 225 NLRB 325 (1976), and *Martin-Marietta Corp*., 139 NLRB 925 (1962).

A comprehensive unit of all the employer's production, distribution, and maintenance employees was found appropriate, but also appropriate, in the light of a bargaining history of separate representation for two specialized groups (plant maintenance and vehicle maintenance employees), were separate units of the latter. In these circumstances, the Board established three voting groups: (1) vehicle maintenance employees, (2) plant maintenance employees, and (3) production and distribution employees. The direction of election provided that, if a majority of the employees in groups (1) and (2) voted for separate representation, and a majority of group (3) voted for representation by the union seeking the larger unit, the three unions would be certified; but if a majority of the employees in groups (1) or (2) did not vote for the union seeking to represent them in a separate unit their votes would be "pooled" with those in group (3). *Whiting Milk Co*., 137 NLRB 1143 (1962).

Separate groups of lithographic employees, photoengravers, and production and maintenance employees were accorded self-determination elections. If a majority of the first and/or second group selected the union seeking to represent them separately, they would be taken to have expressed a desire for a separate unit, but if a majority in either or both did not vote for the union seeking separate representation, that group would be appropriately included in the plantwide unit and their votes "pooled" with those in the third voting group. *Court Square Press*, 151 NLRB 861, 865–866 (1965). See section 21–600 below for discussion of "pooling."

21-200 Craft and Traditional Departmental Severance

355-2240

Self-determination elections are directed where craft or traditional departmental severance is granted. Where a petitioner sought to sever a unit of powerhouse employees from an overall production and maintenance unit, severance was granted, particularly in view of the short history of bargaining on a more comprehensive basis. In these circumstances, and on the basis of additional factors present in the case, a finding was made that a powerhouse unit constituted an appropriate grouping for a severance election. Accordingly, no final unit finding was made but an election was directed in a powerhouse voting group, and provision was made as follows: If a majority in that group voted in favor of the petitioner, they would constitute an appropriate unit and a certification would issue to that effect, but if they voted for the intervenor they would remain part of the existing unit and a certification signifying that fact would issue. *Towmotor Corp*., 187 NLRB 1027, 1029 (1971).

See also *Eaton Yale & Towne, Inc*., 191 NLRB 217 (1971) (tool-and-die makers); *Memphis Furniture Mfg. Co*., 259 NLRB 401 (1981) (over-the-road truckdrivers); *Mason & Hanger-Silas Mason Co*., 180 NLRB 467 (1970) (tool-and-die makers and machinists).

Attention is specifically directed to the rule in elections involving severance only to the effect that the choices on the ballot are limited to the unions involved. The employees sought to be severed have the option of voting for severance or remaining in the plantwide unit. In other words, a severance election cannot result in a no-union choice. *General Dynamics Corp.*, 140 NLRB 1286 (1963); *Allan, Lane & Scott*, 137 NLRB 223 (1962); and *American Tobacco Co*., 115 NLRB 218 (1956).

In certain circumstances a union is precluded from seeking to represent a severed craft unit and the unit from which it was severed. *F. N. Burt Co.*, 130 NLRB 1115 (1961), and see *B. P. Alaska, Inc*., 230 NLRB 986 (1977).

21-300 Self-Determination Election for Craft or Traditional Department Employees Where no Prior Plantwide Bargaining History Exists

355-2201 et seq.

When no prior bargaining history on a plantwide basis exists, but separate craft or traditional departments are sought as well as a plantwide unit, the issue is not one involving severance. Nonetheless, a self-determination election is held in the respective voting groups.

Where one union sought a production and maintenance unit and another, in a cross-petition, a unit of plumbing-pipefitting employees, including instrument repairmen and welders, elections were directed in three voting groups: (1) plumber-pipefitters and welders, (2) instrument repairmen, and (3) production and maintenance employees, excluding employees in the first two groups. The direction of election set out the respective choices, including the selection of a representative in the plantwide unit. Thus, if a majority in group (1) or (2) selected the union seeking the separate units, they would be taken to have indicated their desire to constitute a separate bargaining unit. But if a majority in either of these groups did not vote for that union that group would be included in the production and maintenance unit and their ballots "pooled" with those for the third group. Finally, if a majority in the third group, including any "pooled" group, voted for the union seeking the comprehensive unit, that union would be certified as the

representative in that unit. *Union Carbide Corp.*, 156 NLRB 634 (1966). (See sec. 21–600 below for discussion of pooling.)

21-400 Professional Employees

355-2260 et seq.

440-1760-4300

Section 9(b)(1) of the Act prohibits the inclusion of professional employees in a unit with employees who are not professional, unless a majority of the professional employees vote for inclusion in such a unit. To carry out the statutory requirement, the Board has adopted a special type of self-determination procedure in an election known as a *Sonotone* election, so named after the lead case. *Sonotone Corp.*, 90 NLRB 1236 (1950).

In that case, the Board found that a unit comprising 9 professionals and 15 nonprofessionals may be appropriate, but, because of the proscription contained in Section 9(b)(1), elections had to be directed in two voting groups. The first group included all employees excluding professionals; the second, the professional employees alone. The ballots for the professionals were different from those used in other self-determination elections in that the professional employees were asked two questions: (1) whether they desired to be included in a group composed of nonprofessional employees, and (2) their choice with respect to a bargaining representative. If the professionals answered "Yes" to the first question, their votes were to be counted with those of nonprofessionals. If the answer was "No" their votes would be counted separately to decide which labor organization, if any, they wish to select to represent them in a separate unit. See also *Corporacion de Servicios Legales*, 289 NLRB 612 fn. 1 (1988), and *Centralia Convalescent Center*, 295 NLRB 42 (1989).

The Board requires that there be a *Sonotone* election each time that there is an election in which professionals and nonprofessionals may be included in the same unit. Thus, there may be subsequent *Sonotone* election in the same unit regardless of whether the professionals have previously voted for inclusion in the overall unit. *American Medical Response,*344 NLRB 1406 (2006).

In *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999), the Board overruled a hearing officer who declined to take evidence in a postelection hearing on the professional status of medical technologists because the employer had not raised the issue before the election. Finding that the Region had sufficient information prior to the election to have been put on notice of the issue, the Board found that the Region should have investigated the alleged professional status of the technologists before the election. The Board ordered the hearing officer to take evidence on the professional status in order to determine whether a *Sonotone* election should have been held.

An election was directed among industrial engineers, on the basis of a stipulation, with the same type of ballot, i.e. (1) whether they desired to be included in a unit of technical employees, and (2) whether they desired to be represented by the petitioner. Thus, if a majority in the voting group vote for the petitioner *and* for inclusion in the existing technical union, that will be the appropriate unit. If a majority vote for the petitioner but against inclusion in the existing unit, they will constitute a separate unit. Finally, if they vote against the petitioner, they will remain unrepresented irrespective of the outcome of the first question. *Chrysler Corp.*, 192 NLRB 1208 (1971).

Elections based on an RM petition were directed among the professional employees of an art gallery in one voting group and among the other employees in another voting group. The employees in the nonprofessional voting group were polled whether or not they wished to be represented by the union. The employees in the professional voting group were asked two questions: (1) did they desire to be included in a unit of all employees, and (2) did they desire to be represented by the union. If a majority of the professionals expressed a desire to be included with the nonprofessionals, they would be so included and their votes counted together with those

of the nonprofessionals. But if they voted against inclusion, their votes would be separately counted to determine whether they wished to be represented by the union. *Minneapolis Society of Fine Arts*, 194 NLRB 371 (1972). See also *St. John of God Hospital*, 260 NLRB 905 (1982), in which the employer argued successfully that the professional unit complement was not representative or substantial.

For a situation where a *Sonotone* election was directed involving more than one union, see *Permanente Medical Group*, 187 NLRB 1033, 1035–1036 (1971).

A variation on a theme occurred in an election among members of a law school faculty. Finding that they were "oriented more closely with their chosen field than to the academic or university world," their particular interests were recognized by granting them a special kind of *Sonotone* election. Since either separate university and law school units or an overall unit would be appropriate, in the Board's view, and the desires of the law faculty being critical on this issue, elections were directed in two voting groups. Voting group (a) consisted of all full-time law faculty, excluding all other full-time faculty. Voting group (b) consisted of all full-time faculty except those in group (a). The employees in group (a) were asked (1) whether they desired to be included in the same unit with the remainder of the faculty; (2) if so, whether they wished to be represented by AAUP; and (3) if they preferred a separate unit, whether they wished to be represented by AAUP, LFA, or neither. Depending on their choice, directions were given in the decision for tallying their votes. *Syracuse University*, 204 NLRB 641 (1973). These elections are sometimes referred to as "*Armour*" *Globes*, after *Armour & Co.*, 40 NLRB 1333 (1942).

For a discussion of the appropriate procedures in a decertification election where the professionals were never given a separate opportunity to vote in a *Sonotone*)election see *Utah Power & Light Co.*, 258 NLRB 1059 (1981). See also *Corporacion de Servicios Legales*, supra. Compare *Group Health Assn*., 317 NLRB 238 (1995).

For other professional employee issues, see section 18–100, supra.

21-500 Inclusion of Unrepresented Groups

355-2220

420-7384

440-1780-4000 et seq.

When the incumbent union seeks to add a group of previously unrepresented employees to its existing unit, and no other labor organization is involved, the Board conducts another type of self-determination election. In such an election, if a majority of the employees vote against representation, they are considered as indicating a desire to remain unrepresented, but if a majority vote for the petitioner they are deemed to have indicated their desire to become part of the existing unit, represented by the incumbent union. *Warner-Lambert Co.*, 298 NLRB 993 (1990); and *Mount Sinai Hospital*, 233 NLRB 507 (1977) (regular part-time employees). See also *St. John's Hospital*, 307 NLRB 767 (1992). In these circumstances the voting group may be one employee, inasmuch as the certified bargaining unit would be more than a one employee unit.

In *University of Pittsburgh Medical Center*, 313 NLRB 1341 (1994), the Board ordered a self-determination election in a voting group of telecommunication specialists where it found the already represented group to be an appropriate unit, rejecting a contention that other employees at a related facility should be added.

An employer filed an RM petition alleging a representation question in a unit of employees, hitherto unrepresented, engaged in camera and related work. The union represented all the other employees. Finding that the employees named in the petition were not an accretion, the Board directed an election in a voting group of these employees, according them an opportunity by a self-determination election to express their desires with respect to being included in the existing bargaining unit currently represented by the union. If a majority cast their ballots for the union, they were to be taken to have indicated their desire to constitute a part of the existing unit, but if a

majority voted against the union they were to be taken to have indicated a desire to remain outside the existing unit. *NLRB v. Raytheon Co.*, 918 F.2d 249 (1st Cir. 1990); *Photype, Inc.*, 145 NLRB 1268 (1964); and *Carr-Gottstein Foods Co.*, 307 NLRB 1318 (1992).

In *UMass Memorial Medical Center*, 349 NLRB 369 (2007), the Board affirmed a Regional Director's order of an *Armour-Globe* election for a unit of per diem paramedics. The union already represented the regular paramedics and the parties had discussed the per diem paramedics during negotiations. The union did not request recognition at that time. Later, during the term of the agreement, the union filed a petition for a self-determination election to determine whether the per diem paramedics wished to be included in the unit. The Board agreed that a self-determination election was appropriate, that it was not barred by the contract and that policy against unit classification petitions during the term of an agreement was not applicable to a self-determination election because it is "meaningfully distinct from an accretion."

In a more complex case, an employer and a union, through collective bargaining, created two units: (1) "cold mold" employees, and (2) residual "hot mold" employees. As to the latter, both employer and the incumbent union agreed that they should not have the same representation as the "cold mold" employees. Either unit was found appropriate depending on the desires of the employees in a self-determination election, the second unit being a clearly defined group of employees who constituted the only unrepresented production and maintenance employees in the plant. Accordingly, the voters in the "hot mold" group were permitted to express their desires to be represented in a separate unit, or to be included in the existing unit, or to remain unrepresented. *Rostone Corp.*, 196 NLRB 467 (1972).

Under certain circumstances, however, the Board directs a single election among the employees in both the existing historical unit and an unrepresented fringe group at the same plant. These circumstances are when (1) a question of representation exists in the historical unit; (2) the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis; and (3) the exclusion derives from historical accident rather than from any real difference in functions or status, creating a fringe defect in the historical unit. "To grant a self-determination election to this group would, in practical effect, be to permit them to perpetuate that fringe defect by voting to maintain their unrepresented status." *D. V. Displays Corp.*, 134 NLRB 568, 571 (1962). See also reference in *Rostone Corp.*, supra.

Thus, employees who were excluded from the existing unit "through historical accident rather than upon the basis of any real difference in or interests from those of the production and maintenance employees" were appropriately a part of the comprehensive unit and on proper request will be included in such unit without being granted a self-determination election. *Century Electric Co.*, 146 NLRB 232, 243–244 (1964).

It follows, of course, that employees found to constitute an accretion to an existing unit are not granted a self-determination election. Instead, the existing unit is "clarified" by their inclusion. *Radio Corp. of America*, 141 NLRB 1134, 1137 (1963); and *Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1526 fn. 6 (1964).

It is also apparent, in the light of this reasoning, that when the unrepresented employees constitute an appropriate unit by themselves, the above rule, as enunciated in *D. V. Displays Corp.*, supra, does not apply since "no true fringe group" is involved. A self-determination election is therefore in order in such circumstances. *Ward Baking Co.*, 139 NLRB 1344, 1350 (1962). For an example of a nonaccretion finding and a resulting self-determination election, see *Almacs Inc.*, 176 NLRB 670 (1969).

When, however, an incumbent union does *not* join in the petitioner's request to add unrepresented fringe employees to the existing unit, the Board directs separate elections for the existing unit and for the fringe group. The purpose is to allow the employees in the existing unit to continue to be represented by the incumbent union, if they wish. *Felix Half & Brother, Inc.*, 132 NLRB 1523 (1961). This situation is distinguishable from the case of unrepresented employees who are in a separate plant, and therefore not a fringe group, and the incumbent is

willing to go on the ballot for whatever larger unit the Board finds appropriate. *Ward Baking Co*., supra. Compare *Lydia E. Hall Hospital*, 227 NLRB 573 (1976), in which the Board rejected this procedure because of the danger of proliferating bargaining units in health care.

Board policy precludes the establishment of a separate unit of plant clerical employees where the union petitioning for them currently represents a unit of the production and maintenance employees. For that reason, in such a situation the Board directs an election among the plant clericals. If a majority votes for the petitioner, they are deemed to constitute a part of the existing production and maintenance unit. *Robbins & Myers, Inc*., 144 NLRB 295 (1963). See also *Armstrong Rubber Co*., 144 NLRB 1115, 1119 (1963), in which a second union sought to represent the plant clericals separately. For a discussion of the effects of such an election on a later filed decertification petition see *Beloit Corp*., 310 NLRB 637 (1993).

When a group of employees have been excluded from a unit by agreement of the parties and may otherwise under Board precedent be an appropriate unit, they may either constitute, as we have seen earlier, an appropriate "residual" group as the "only remaining unrepresented employees," or may appropriately be added to the existing unit. This occurred where conveyermen were the only remaining unrepresented group aboard the employer's ships, having been excluded by agreement of the parties. An election was directed among the conveyermen who were permitted to decide whether to constitute (1) a separate unit represented by the petitioner, (2) become part of the intervenor's existing unit of unlicensed seamen, or (3) remain unrepresented. *U. S. Steel Corp.*, 137 NLRB 1372 (1962).

21-600 Pooling of Votes

355-2280

420-7396

The "pooling of votes"in self-determination elections was first used in the *American Potash Corp*., 107 NLRB 1418 (1954). The rationale for pooling was stated initially in the dissenting opinion in *Pacific Intermountain Express* Co., 105 NLRB 480, 482–485 (1953), later adopted by the Board majority in *American Potash*). It was subsequently spelled out in greater detail in *Felix Half & Brother, Inc*., supra.

In *Felix Half*, two unions sought elections in different units. The incumbent union sought an election only in the existing unit which it currently represented; it did not seek an election among a residual group of previously unrepresented employees. A second union sought an overall unit, thus, in effect, seeking to merge into a single unit the previously unrepresented employees and the existing unit of employees currently represented by the incumbent.

In these circumstances, elections were directed in two voting groups: (1) the existing unit, and (2) the group of unrepresented employees. In the event that a majority of the employees in the existing unit selected the incumbent, and a majority of the unrepresented employees chose the petitioner, the Board would certify separate appropriate units. If, however, a majority of the employees in the existing unit did not vote for the incumbent, the Board would include the employees in the two voting groups in a single overall unit and would pool their votes. Thus, the votes for the union seeking the separate unit (the intervenor) would be counted as valid votes, but neither for nor against the union seeking to represent the more comprehensive unit (the petitioner). All other votes would be accorded their face value, whether for representation by the union seeking the comprehensive group or for no union. See also *Pasha Services*, 235 NLRB 871 (1978); *Sherwin-Williams Co*., 173 NLRB 316 fn. 5 (1969); *Parke Davis & Co*., 173 NLRB 313 fn. 11 (1969); and *Penn-Keystone Realty Corp*., 191 NLRB 800 fn. 24 (1971).