18. STATUTORY LIMITATIONS

Section 9(b) of the Act limits Board unit determination in three respects. The first relates to professional employees, the second to craft units, and the third to guards. The first and third limitations are treated here. The second because of a considerable body of law and significant policy changes was treated separately in an earlier chapter.

18-100 Professional Employees

177-9300

355-2260

470-1700

18-110 The Statutory Mandate

355-2260

401-2570-1450

Section 9(b)(1) provides that professional employees may not be included in a bargaining unit with nonprofessionals unless they vote in favor of such inclusion. The term "professional employee" is defined in Section 2(12), as follows:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

In *Leedom v. Kyne*, 249 F.2d 490 (D.C. Cir. 1957), the District of Columbia Court of Appeals construed the limitation in Section 9(b)(1) as intended to protect professional employees and held that the professionals' right to this benefit does not depend on Board discretion or expertise and that denial of this right must be deemed to result in injury. The United States Supreme Court (358 U.S. 184 (1958)), affirmed this ruling.

Where the Board has sufficient information to put it on notice that there is an issue as to the professional status of employees, it must conduct an inquiry and cannot rely on the failure of the parties to raise the issue. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999).

Section 9(b)(1) precludes the Board from deciding that any unit is appropriate which contains both professional employees and nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a unit. This is done procedurally by conducting what has been termed a "*Sonotone*" election. See *Sonotone Corp.*, 90 NLRB 1236, 1241–1242 (1950) (discussed in more detail in the chapter on Self-Determination Elections); *Barnes-Hind Pharmaceuticals*, 183 NLRB 301 (1970); *Firestone Tire Co.*, 181 NLRB 830 (1970); and *New England Telephone Co.*, 179 NLRB 527 (1969).

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, subsequent *Sonotone* elections are required in the same unit regardless of whether the professionals have

already voted for inclusion in the overall unit. *American Medical Response,* 344 NLRB 1406 (2005).

18-120 Professionals Defined

177-9325

470-1700

440-1760-4300

Section 2(12)(a) defines a professional employee in terms of the work the employee performs, and it is the work rather than individual qualifications which is controlling under that section. *Aeronca, Inc.,* 221 NLRB 326 (1975). Thus, in finding, for example, that engineering assistants are not professional employees, the Board did not pass on the individual qualifications of each engineering assistant but on the character of the work required of them as a group. *Chesapeake Telephone Co*., 192 NLRB 483 (1971); and *Loral Corp*., 200 NLRB 1019 (1972). See also *Avco Corp*., 313 NLRB 1357 (1994).

This is not to say that the background of individuals within a disputed group is an irrelevant consideration, for background is examined for the purpose of deciding whether the work of the group satisfies the "knowledge of an advanced type" requirement of Section 2(12)(a). The latter should be compared with Section 2(12)(b) which makes personal qualifications a determinative factor by defining a professional employee "as any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)." If a group of employees is predominantly composed of individuals possessing a degree in the field to which the profession is devoted, it may logically be presumed that the work requires knowledge of an advanced type. *Western Electric Co*., 126 NLRB 1346, 1348–1349 (1960). Such a requirement is not conclusive. *Express News Corp.*, 223 NLRB 627 (1976).

Thus, the requirement that professionals possess "knowledge of an advanced type" does not mean that such knowledge be acquired through academic training alone. Although the background of an individual is relevant, it is not the individual's qualifications but the character of the work required that is determinative of professional status. *Express News Corp*., supra (journalists held not professional). *A. A. Mathews Associates*, 200 NLRB 250 (1972) (engineer-inspectors); *Syosset General Hospital*, 190 NLRB 304 (1971) (pharmacists, technicians); *Chrysler Corp*., 154 NLRB 352 (1965) (manufacturing engineers); and *Ryan Aeronautical Co*., 132 NLRB 1160 (1961) (engineers). Formal education is not a prerequisite for finding professional status where individuals perform work normally attributable to professionals. *Robbins & Myers, Inc.*, 144 NLRB 295 (1963). Nor can salary be used as a test of professional status. *E. W. Scripps Co*., 94 NLRB 227, 240 (1951). See also *Avco Corp*., supra.

The Board makes its finding of professional status independent of other Government decisions. For example, a nonprofessional classification of certain employees under the Wage and Hour Act does not affect a Board finding of professional status. *Standard Oil Co.*, 107 NLRB 1524 fn. 8 (1954). Likewise, the fact that persons acting in a professional capacity are not licensed to practice their profession in the State is irrelevant. *Westinghouse Electric Corp.*, 89 NLRB 8, 30 fn. 83 (1950).

In addition to meeting the specific requirements of Section 9(b)(1), the petitioner must have an adequate showing of interest among the professional employees to warrant a self-determination election for them. *Continental Can Co*., 128 NLRB 762 (1960).

As is true of other bargaining units, the professional unit cannot be an arbitrary segment of the professional employees. *Pratt & Whitney*, 327 NLRB 1213 (1999), and *General Electric Co*., 120 NLRB 199 (1958). In *Permanente Medical* Group, 187 NLRB 1033 (1971), the Board called

for a self-determination election for professionals "on a basis coextensive with the existing bargaining unit."

The Board found the duties and responsibilities performed by a group of engineers basically professional in nature. Although proper performance of such work required a high degree of technical competence and the use of independent judgment with respect to matters of importance to the employer's financial and other managerial interests, "such characteristics are typical of the work which Section 2(12) . . . defines as 'professional' work." *Westinghouse Electric Corp*., 163 NLRB 723, 726 (1967). The contention by the employer that some of the responsibilities of the engineers were "managerial" was therefore rejected. A review of Board precedents (fn. 19) supported this inclusion. In the same case, the Board noted that, in evaluating the critical record facts, it did not regard as relevant the title held by an engineer on any given work assignment for "it is clear that an individual's status under the Act is determined by his job content and responsibilities rather than by his title" (fn. 18).

Programers who were not required to have a prolonged course of specialized intellectual instruction and study were not regarded as professionals, although the machines they worked on were "more sophisticated" than those used previously. They were included in a unit of office and technical employees. *Safeway Stores*, 174 NLRB 1274 (1969).

In the health care field, registered nurses are generally held to be professionals (*Centralia Convalescent Center*, 295 NLRB 42 (1989)), as are those waiting to pass their examinations. *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975). In *Group Health Assn*., 317 NLRB 238 (1995), the Board decided to henceforth apply a rebuttable presumption that medical technologists are professionals. See *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999). For a more complete listing of professionals in health care, see *General Counsel Memorandum* 91-4 (June 5, 1991), available on the Agency website.

18-130 Previously Established Units

347-4040-3333-6767

The Board has held that Congress did not intend the enactment of Section 9(b)(1) to render inappropriate previously established units combining professional and nonprofessional employees and that this section does not bar parties to an earlier established bargaining relationship in such a unit from continuing to maintain their bargaining relationship on the same basis. See, for example, *Corporacion de Servicios Legales*, 289 NLRB 612 (1988). The sole operative effect of Section 9(b)(1) is to preclude the Board from taking any action that would create a mixed unit of professionals and nonprofessionals without according the professionals the opportunity of a self-determination election. Accordingly, where it was conceded in a unit clarification proceeding that all categories of employees whose unit status sought to be clarified were nonprofessional, the Board determined that some such categories were identical to those of other nonprofessional categories and properly belonged in that unit. Section 9(b)(1) did not, in the Board's view, bar granting the relief sought in the form of unit clarification. *A. O. Smith Corp*., 166 NLRB 845 (1967). Compare *Lockheed Aircraft Corp*., 155 NLRB 702 (1965); *Lockheed Aircraft Corp*., 202 NLRB 1140 (1973); *Utah Power & Light Co*., 258 NLRB 1059 (1981), in which the Board directed an election among professionals who had not had an opportunity for self-determination; and *Russelton Medical Group*, 302 NLRB 718 (1991), an unfair labor practice case, where the Board declined to issue a bargaining order for a combined professional/nonprofessional unit because the professionals had never had a self-determination opportunity.

For other professional employee issues, see section 21-400.

18-200 Plant Guards

401-2575-2800

440-1760-5300

18-210 The Statutory Mandate

177-3950-9000

Section 9(b)(3) provides that the Board shall not certify a labor organization "as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." This provision takes into account potential conflicts of interests by requiring that a guard union be free to formulate its own policies and decide its own course of action, with complete independence from control by a nonguard union.

The statutory mandate has been held to preclude the Board from ordering bargaining in a mixed unit as a remedy for an unfair labor practice. *Temple Security, Inc*., 328 NLRB 663 (1999), enf. denied 230 F.3d 909 (7th Cir. 2000), and *Wells Fargo Corp*., 270 NLRB 787 (1984). See also section 12-130.

18-220 Guards Defined

401-2575-2800

To be a "guard" within the meaning of the Act, an employee must enforce against employees and other persons rules to protect the property of the employer's premises. *Petroleum Chemicals*, 121 NLRB 630 (1958).

Several examples may be cited:

Watchmen whose primary duty is to check for fire hazards are not "guards" within the meaning of the Act. *Woodman Co.*, 119 NLRB 1784 (1958). See also *Burns Security Services*, 300 NLRB 298 (1990), in which the Board in an extensive opinion reviewed its policies with respect to the guards status of firefighters, enf. denied 827 F.2d 32 (8th Cir. 1991). In addition, see *Burns Security Services*, 309 NLRB 989 (1992), another case remanded by the Eighth Circuit. But where at least 25 percent of the firemen's time is spent performing guard duties, and it is apparent that enforcement of company rules is a continued part of their responsibility and is a significant portion of the requirements of their job, they were held to be guards within the meaning of the Act. *Reynolds Metal Co.*, 198 NLRB 120 (1972). Compare *Boeing Co*., 328 NLRB 128 (1999), where the Board found that property protection duties assigned to firefighters during a strike are not sufficient to make them guards.

Watchmen who make plant rounds, punch clocks, enforce company rules, and prevent unauthorized individuals from entering plant property are "guards" within that definition. *Jakel Motors*, 228 NLRB 730, 742–743 (1988); and *West Virginia Pulp & Paper Co*., 140 NLRB 1160 (1963). See also *Allen Services Co*., 314 NLRB 1060 (1994).

Plant department employees at a protective service company who install and maintain electrical alarm devices are not "guards" as they receive no guard training, work under different supervision from that of the full-time guards, and are dispatched only when it is known that the cause of the alarm is some malfunction of the alarm device. *American District Telegraph Co.*, 128 NLRB 345 (1960).

Employees performing passive monitoring of their employers customers are not guards. *Wells Fargo Alarm Services*, 218 NLRB 68 (1975), and *American District Telegraph Co.*, 160 NLRB 1130 (1966).

The Third Circuit has held that Section 9(b)(3) is not limited to guards employed to protect property belonging to their own employer or to guards who protect against the conduct of fellow employees. In reaching the conclusion that Section 9(b)(3) does not confine the concept of a guard to one who guards the premises of his own employer, the court construed the language of

that section as follows: The guard to whom the statute refers is one who enforces rules to protect the property of "*the* employer"—not *his* employer. These rules are enforced "against employees and other persons," not against *fellow employees*. Furthermore, the duties of a guard who comes within Section 9(b)(3) include the protection of "the safety of persons on *the* [not his] employer's premises." Finally, the court pointed out that Congress was seriously concerned with preventing the creation of divided loyalty by not permitting guards to join "a production workers union." *NLRB v. American District Telegraph Co*., 205 F.2d 86 (3d Cir. 1953).

The Board adopted the decision of the Third Circuit in agreement with its findings as to the legislative intent and statutory construction and has since made "guard" determinations in conformity with the court's construction of Section 9(b)(3). See *American District Telegraph Co*., 160 NLRB 1130 (1966).

In a series of cases, the Board has been confronted with the guard status of courier-drivers, individuals responsible for the pickup and delivery of materials and freight. In *Purolator Courier Corp*., 300 NLRB 812 (1990), the Board reaffirmed the requirement that the driver must be responsible for protection rather than mere delivery in order to be found a guard and, in that case, found the courier-drivers not to be guards.

As already noted, a distinction exists between the guards discussed above and employees who merely work on protective equipment maintained by ADT but do not enforce rules to protect property or the safety of persons on customers' premises. See, for example, *American District Telegraph Co*., supra.

Employees who spend 10 to 90 percent of their time engaged in guard duties at a watchman and janitorial service company, notwithstanding that they also do general maintenance work when not doing guard duty, are "guards" as they are responsible for the safety of the building and its contents and are required to report to the police any threat to customer's property. *Watchmanitors*, 128 NLRB 903 (1960). See also *A. W. Schlessinger Geriatric Center*, 267 NLRB 136 (1983). In *Madison Square Garden*, 333 NLRB 643 (2001), a divided panel concluded that "supervisors" who resolve disputes at civic center events are guards within the meaning of the Act.

For a case distinguishing plant guards from janitors, see *Meyer Mfg. Corp.*, 170 NLRB 509 (1968), in which the individual involved had no authority to enforce rules to protect property or persons on the employer's premises; and while he had keys to the plant and did admit employees without prior authorization from the plant manager, he was nonetheless not required to keep people out of the plant.

In *Hoffman Security*, 302 NLRB 922 (1991), the Board found that receptionists were not guards in the circumstances of that case. Accord: *55 Liberty Owners Corp*., 318 NLRB 308 (1995); and *Wolverine Dispatch, Inc*., 321 NLRB 796 (1996). Gatemen and tower observers at a wildlife preserve were found not to be guards as their duties were directed to preserving safety during the normal operation of the facility. *Leon County Safari*, 225 NLRB 969 (1976). In *J. C. Penney Co*., 312 NLRB 32 (1993), the Board affirmed on review the decision of a Regional Director that chargeback clerks (persons primarily responsible for receiving, packing, and shipping merchandise) are not guards. The Regional Director distinguished these employees from the coinroom employees in *Brink's Inc.*, 272 NLRB 868 (1984). And in *Arcus Data Security Systems*, 324 NLRB 496 (1997), the Board affirmed a Regional Director who also distinguished *Brinks* and found inside and outside customer representatives not to be guards. Accord: *Tac/Temps*, 314 NLRB 1142 (1994) (checkers held not to be guards), and *Madison Square Garden*, 325 NLRB 971 (1998) (event staff employees not guards).

In *Crossroads Community Correctional Center*, 308 NLRB 1005 (1992), the Board found the correctional residence counsellors who are responsible for preparing inmates for life outside prison were guards in the circumstances there.

Security toll operators were in one case held to be guards within the meaning of the Act because they are employed to enforce, against persons seeking to use the expressway, rules to

protect the property and the safety of persons on the expressway premises. It was found immaterial that the operators did not themselves have the ultimate power of police to compel compliance by violators of the expressway rules. Rather, it was sufficient that they possessed and exercised responsibility to observe and report infractions, as this is an essential step in the procedure for enforcement of highway rules. Likewise, it was not determinative that this was not their only function, because it was a continuing responsibility and a significant portion of the requirements of the job. *Wackenhut Corp.,* 196 NLRB 278 (1972).

Guards who have been temporarily detailed out of a nonsupervisory guard unit, to serve as relief foremen, but are virtually certain to return to their original unit, have a status analogous to that of employees in temporary layoff at the time of an election and as such are eligible to vote in a guard unit election. *U. S. Steel Corp*., 188 NLRB 309 (1971).

18-230 Guards Unions

339-7575-7500

401-2575-2800

A petition for employees found to be "guards" will be dismissed when the union which seeks them also admits to membership employees other than guards. *A.D.T. Co*., 112 NLRB 80 (1955). Moreover, an intervening union which represents production and maintenance employees, including guards sought by the petitioner, will not be included on a ballot in an election directed for guards. *University of Chicago*, 272 NLRB 873 (1984). However, the Board has expressed its reluctance to apply Section 9(d)(3) so strictly that guards will be deprived of representation; thus, the noncertifiability of an alleged mixed union must be shown by clear and definitive evidence. *Burns Security Services*, 278 NLRB 565 (1986); *Rapid Armored Corp*., 323 NLRB 709 (1997); and *Children's Hospital of Michigan*, 317 NLRB 580 (1995).

Public employees are not guards within the meaning of the Act. *Dynair Services*, 314 NLRB 161 (1994). Therefore, a union which represents either guard or nonguard employees of municipalities is not thereby disqualified from representing statutory guards. *Guardian Armored Assets, LLC*, 337 NLRB 556 (2002); and *Children's Hospital of Michigan*, 299 NLRB 430 (1990), enfd. 6 F.3d 1147 (6th Cir. 1993).

A petitioner may be certified as representative of a guard unit even if it has received assistance in organizing from a union which admitted nonguard employees to membership where that assistance ended at petitioner's first meeting with the employees in the unit sought and no prospect was shown of further aid from the nonguard union. *Inspiration Consolidated Copper Co*., 142 NLRB 53 (1963). See also *Wackenhut Corp. v. NLRB*, 178 F.3d 543 (D.C. Cir. 1999), and *Lee Adjustment Center*, 325 NLRB 375 (1998).

Retention of an attorney to represent the employer's guards in forming the petitioner and in seeking a Board election, the expenditure of funds for which the petitioner is to be billed at a later date when it is in a more stable financial position, and other advice and acts of assistance in the organizational state are not enough to constitute indirect affiliation of the petitioner with the nonguard union. Moreover, indications in the record that the nonguard union intends to continue to render assistance and advice of an unspecified character to the petitioner does not warrant withholding from the latter the opportunity to be certified as representative of the employer's guards through a Board-conducted election. Rather, in the event the petitioner is certified and is then shown to have accepted material assistance from the nonguard union sufficient to constitute indirect affiliation, the Board will entertain a motion to revoke the certification. *Bonded Armored Carrier*, 195 NLRB 346 (1972).

Thus, where petitioner continued to accept substantial financial aid from the nonguard union and to permit the nonguard union to participate in its affairs, including negotiations and the organization and management of a strike, it was clear that the petitioner was not free to formulate its own policies and decide its own course of action with the complete independence from control

by the nonguard union which the Act requires. And the certification was accordingly revoked. *International Harvester Co.*, 145 NLRB 1747 (1964).

Where the circumstances compel a finding of indirect affiliation between a guard union and a nonguard union, the guard union's certification will be revoked notwithstanding the fact that the nonguard union does not represent employees in the same plant in which the guards involved were employed. In the case in question, the guard union had accepted substantial financial aid from the nonguard union and permitted the nonguard union to participate in its affairs, to negotiate with the employer on its behalf, to organize and direct its strike, and to determine the terms for settlement of the strike. *International Harvester Co*., supra.

See also sections 6-200 and -310.

18-240 Scope of Unit

339-7575-7500

401-7500

As to scope of a guards' unit, the Board policy is to include all of the employer's guards in a single unit unless "there is a subgroup with a separate community of interest that warrants separate representation." *University of Tulsa*, 304 NLRB 773, 774 (1991).

For other guard issues, see section 6-200, infra.

For a discussion of guards and contract bar see section 9-150.