7. EXISTENCE OF A REPRESENTATION QUESTION

The granting of a petition for an election is conditioned by Section 9(c)(1) of the Act on a finding that a question of representation exists. This depends first on whether the petition filed with the Board has a proper basis. The ultimate finding of the existence of a representation question hinges on considerations such as the qualifications of the proposed bargaining representative, whether an election is barred by a contract or a prior determination, the appropriateness of the proposed bargaining unit, and other factors. These are discussed under appropriate headings in chapters which follow. The general rules affecting the representation question are discussed here.

7-100 General Rules

7-110 Prerequisite for Finding a Question Concerning Representation

301-5000

316-3300

316-6701-3300

Normally, a question concerning representation is found to exist when the union has made a demand for recognition which the employer has refused. However, shortly after the adoption of the 1947 amendments to the Act, the Board rejected a contention that Section 9(c)(1) of the amended Act made such a demand and refusal mandatory prior to the filing of a petition. A prior demand and refusal, it was decided, is not a jurisdictional prerequisite to proceedings on the merits in a representation case. *Advance Pattern Co*., 80 NLRB 29 (1949). Consequently, the petition need not show the recognition was requested, *Girton Mfg. Co*., 129 NLRB 656 (1961), or that it was denied, *Seaboard Warehouse Terminals*, 129 NLRB 378 (1961); and *Plains Cooperative Oil Mill*, 123 NLRB 1709 (1959).

The demand for recognition need not be made in any particular form. *American Lawn Mower Co*., 108 NLRB 1589, 1589–1590 (1954). The filing of a petition itself is deemed a demand for recognition. *Gary Steel Products Corp*., 127 NLRB 1170 (1960); and *National Welders Supply Co*., 145 NLRB 948 (1964).

7-120 The General Box Rule

316-6783

339-7562

347-4001-4500

347-4030-1800

A petition may be entertained even though a union has been voluntarily recognized as the employees' bargaining agent, since only through certification can the union secure whatever protection is afforded under Section 8(b)(4) as well as the benefits of the administrative "one year rule'' developed by the Board. *General Box Co.*, 82 NLRB 678 (1949); *Pacific States Steel Corp*., 121 NLRB 641 (1958); and *Central Coat, Apron, & Linen Service*, 126 NLRB 958 (1960). See also *Food & Commercial Workers Local 1996 (Visiting Nurse Health System)*, 336 NLRB 421 (2001) (dismissing 8(b)(4) case when charged union was certified). "Even recognition of and a current contract with a petitioning union does not bar a petition for certification by that union.'' *General Dynamics Corp*., 148 NLRB 338 (1964); *Duke Power Co*., 173 NLRB 240 (1969); and *Empire Dental Co*., 219 NLRB 1043 (1975). Moreover, an employer, as well as a recognized bargaining agent, is entitled to the benefits of certification under what has become known as the *General Box* rule, even though the employer has recognized the union for many years. *Pennsylvania Garment Mfrs. Assn.*, 125 NLRB 185, 186 fn. 7 (1959). However, an employer's petition is barred by a current contract to which it is a party for the entire term of the

contract, even when the union is not certified and the employer seeks the benefits of certification. *Absorbent Cotton Co*., 137 NLRB 908 (1962). In *Seven Up Bottling Co*., 222 NLRB 278 (1976), the Board found that a petition filed by a union certified a little more than a year before did not raise a question concerning representation when the union and the employer were engaged in bargaining as a result of that certification.

In adopting the *General Box* rule, the Board reasoned that the benefits of certification would provide greater protection to an already recognized union against raids of competing unions. For this reason, a petition filed by a recognized uncertified labor organization is treated by the Board as an exception to its contract-bar rules. Once a petition is filed under the *General Box* exception, it is viewed by the Board the same as any other petition that raises a question concerning representation. Thus, the contracting union's contract cannot thereafter act as a bar, and other unions are permitted to intervene. *Ottawa Machine Products Co*., 120 NLRB 1133 (1958); *Puerto Rico Cement Corp*., 97 NLRB 382 (1951); and *McGraw-Edison Co*., 199 NLRB 1017 (1972).

When, however, it was found that the petitioner sought an election for the precise purpose of bringing in the intervenor as bargaining agent for the employees, not for the benefit of obtaining a certification, the effect was to establish a purpose behind the filing of the petition other than certification. In these circumstances, the Board concluded that there was no basis for applying the *General Box* exception to the petition and no reason for removing the contract between the petitioner and the employer as a bar. *McGraw-Edison Co*., supra.

When, however, the unions involved were legitimate rivals contesting for the right to represent the sought-after employees, the situation was considered different and elections were directed, despite the fact that the petitioner sought to withdraw its petition after intervention occurred. *Jefferson City Cabinet Co*., 120 NLRB 327 (1958). "We consider the presence of such a rivalry,"' said the Board in *McGraw-Edison Co*., "to be a determining factor in *General Box* cases of this type."

7-130 The Effect of Private Dispute Resolution Mechanisms

Often the Board is confronted with requests that it consider the decision of an arbitrator or of another forum in determining whether there is a question concerning representation. Alternatively, parties will often ask that the Board stay its proceedings pending a decision by such a tribunal. As the paragraphs that follow reflect, the Board's general policy is to refuse such requests. The existence of these proceedings, however, may have some bearing on whether there is a question concerning representation or on the processing of the "R" case.

7-131 Grievances and Arbitration

240-3367-8312

316-3301-5000

385-7501-2581

The pursuit of representation rights through the grievance arbitration machinery of a contract does not raise a question concerning representation—and hence an RM petition will not lie—if the union is merely seeking those rights as an accretion to the contract unit. *Woolwich, Inc*., 185 NLRB 783 (1970). In *Woolwich*, the Board distinguished accretion from attempts to secure representation in a separate bargaining unit. In the latter situation the demand for recognition through the means of a grievance will raise a question concerning representation. See also *United Hospitals*, 249 NLRB 562 (1980), and *Valley Harvest Distributing*, 294 NLRB 1166 (1989). But if a union seeks to add a group only as an accretion, and an arbitration award improperly finds the accretion, the Board will consider the matter, albeit usually in a UC rather than an RM context. *Williams Transportation Co*., 233 NLRB 837 (1977). See also *Ziegler, Inc*., 333 NLRB 949 (2001). When the union has processed a grievance through arbitration and has obtained a favorable award granting it representation rights, the Board must decide whether to defer to that

award as a resolution of what would otherwise have been a question concerning representation. In *Raley's, Inc*., 143 NLRB 256 (1963), the Board held that it had the authority to defer to an arbitrator's award in a representation matter. Shortly after the Board's *Raley's* decision, the Supreme Court held that a representation dispute was arbitrable. *Carey v. Westinghouse*, 375 U.S. 261 (1964). Although *Carey* could have had the effect of reinforcing the *Raley's* policy, Board case law has generally declined to defer to arbitration awards in the representation case area. See *Hershey Foods Corp*., 208 NLRB 452 (1974), and *Commonwealth Gas Co*., 218 NLRB 857 (1975). In *St. Mary's Medical Center*, 322 NLRB 954 (1997), the Board noted that it will defer when the issue turns solely on interpretation of the parties contract. See also *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832 (1991), where the Board discussed the legality of lawsuits to enforce arbitration decisions that conflict with a Board representation decision. Pursuing a grievance to include nonunit employees where the grievance is incompatible with a decision of the Board or a Regional Director is an unfair labor practice. *Allied Trades Council*, 342 NLRB 1010 (2004).

The Board's deferral policies enunciated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Dubo Mfg. Corp*., 142 NLRB 431 (1963), in which the Board will either require grievance arbitration (*Collyer*), or stay its proceedings pending resolution of an existing grievance (*Dubo*), are not applicable to issues which are representational. See *Marion Power Shovel Co*., 230 NLRB 576 (1977); *Massachusetts Electric Co*., 248 NLRB 155 (1980); *Super Value Stores*, 283 NLRB 134 (1987); *Williams Transportation Co*., supra; and *Tweedle Litho, Inc.*, 337 NLRB 686 (2002).

Nor will the Board defer to the award of an arbitrator in a representation matter "except in the narrow class of cases where the sole and dispositive issue is one of contract interpretation," *Advanced Architectural Metals, Inc.*, 347 NLRB 1279 (2006).

The Board has indicated that it may permit representation questions to be resolved in an arbitration forum in circumstances arising out of neutrality agreements or after acquired clauses. *Central Parking System*, 335 NLRB 390 (2001). But see discussion of *Shaw's Supermarkets*, 343 NLRB 963 (2004), infra at section 9-620.

The Board has also found that a union is estopped from utilizing the Board's processes where it sought to use the benefits of its contract while seeking to avoid its arbitration provision to resolve a unit question. *Verizon Information Systems*, 335 NLRB 558 (2001). See also *Tweedle Litho*, supra.

In *Postal Service*, 348 NLRB 25 (2006), the Board distinguished *Verizon* finding that it would accept a petition filed after completion of the arbitration process. The Board found that a settlement agreement providing for arbitration did not provide an "express agreement" that the employer would not file a petition with the Board.

The Board may, however, hold postelection proceedings in abeyance pending determination of contractual grievance and arbitration procedures. In doing so the Board has stated that deferral would "avoid inconsistent outcomes and would respect the parties' decision to resolve disputes through the arbitration machinery." *Morgan Services*, 339 NLRB 463 (2003), and cases cited there.

See also sections 9-620, 12-500, and 23-113.

7-133 No-Raid Agreements

240-3367-1731

These agreements present two different issues for the Board. (1) Should it defer to a decision of a no-raid tribunal set up by labor organizations, and (2) should the Board stay its processes during the pendency of such procedures? As to the former, the Board has responded in the negative primarily because it will not defer the resolution of a question concerning representation to a private dispute resolution mechanism. See *Cadmium & Nickle Plating*, 124 NLRB 353 (1959); *Jackson Engineering Co.*, 265 NLRB 1688, 1701 (1982); *Anheuser-Busch, Inc.*, 246

NLRB 29 (1979); *Great Lakes Industries*, 124 NLRB 353 (1959); and *Weather Vane Outerwear Corp*., 233 NLRB 414 (1977). See *VFL Technology Corp*., 329 NLRB 458 (1999), for a brief description of these proceedings and of a disclaimer arising out of one of them. The Board does authorize its Regional Directors to stay the processing of a representation petition for 30 days during the pendency of a no-raid proceeding. See CHM sections 11017–11019.

7-140 Ability to Determine Unit as Affecting Representation Question

316-6701-5000 et seq.

347-8020

A petition is premature, and therefore raises no question concerning representation, when the future scope and composition of the unit is in substantial doubt. The petition will not be held in abeyance pending the hiring of a representative and substantial employee complement. *K-P Hydraulics Co*., 219 NLRB 138 (1975); and *Pullman, Inc*., 221 NLRB 954 (1975). See also section 10-600 discussion of Expanding Unit.

However, in an industry in which projects are continually being started and completed at different times, and different employees may be hired for each job, the existence of a nucleus of employees who obtain continuous employment is sufficient for the holding of a representation election. *S. K. Whitty & Co*., 304 NLRB 776 (1991); *Oklahoma Installation Co.,* 305 NLRB 812 (1991); *Queen City Railroad Construction*, 150 NLRB 1679 (1965); *Dezcon, Inc*., 295 NLRB 109 (1989); and *Wilson & Dean Construction Co*., 295 NLRB 484 (1989).

Similarly, when an employer often hired extra employees during its peak business season but operated continuously on a year-round basis with a substantial complement of year-round employees, the Board held that the business was "cyclical in nature, rather than the kind of seasonal business which requires postponement of the election until the employee complement is at its peak." *Baugh Chemical Co*., 150 NLRB 1034 (1961); and *Mark Farmer Co*., 184 NLRB 785 (1970).

A question concerning representation found by the Board continues to exist after a successor employer has taken over the enterprise when there has been no change in any essential attribute of the employment relationship. *Texas Eastman Co*., 175 NLRB 626 (1969). But when there has been a basic change in the operation, a new question concerning representation arises. Thus, when the consolidation of two shops of one employer was found comparable to a new operation, a petition gave rise to a question concerning representation which was unaffected by the intervenor's contention of a multiplant unit. *General Electric Co*., 185 NLRB 13 (1970). And when the character and scale of the operation drastically altered the scope of the original unit petitioned for and found appropriate, the original petition no longer provided the basis for a determination of representatives. *Plymouth Shoe Co*., 185 NLRB 732 (1970).

7-150 Statutory Exemption Under Section 8(b)(7)(C) of the Act—Expedited Elections

578-8075-6056

Petitions filed under the circumstances described in the first proviso to Section 8(b)(7)(C) of the Act are specifically exempt from the requirements of Section 9(c)(1). Section 8(b)(7)(C) provides that it is an unfair labor practice for a union to picket an employer for the purpose of forcing it to recognize or bargain with an uncertifled union, or forcing employees to select the union as their collective-bargaining representative, unless a petition is filed under Section 9(c) within 30 days of the commencement of the picketing. Under the first proviso to Section 8(b)(7)(C), when a petition is filed in these circumstances, the Board directs an election in the appropriate unit without regard to the provision of Section 9(c)(1) or the absence of a showing of interest on the part of the union. See Rules 102.77; Statements of Procedure, Sections 101.22 to 101.25; and CHM sections 10244.3 and 11312.1k.

The basic ground rules and conditions necessary to trigger the 8(b)(7)(C) expedited election machinery are spelled out in *C. A. Blinne Construction Co.*, 135 NLRB 1153 (1963). Thus, as indicated by the Board, Section 8(b)(7)(C) represents a compromise between a union's picketing rights and an employer's right not to be subject to blackmail picketing. Unless shortened by a union's resort to violence, see *Eastern Camera Corp.*, 141 NLRB 991 (1963), 30 days was defined as a reasonable period, absent a petition being filed, for the union to exercise its rights. Picketing beyond 30 days is an unfair labor practice. The filing of a petition stays the 30-day limitation and picketing may continue during processing of the petition.

As the Board made clear in *Blinne*, supra, however, a union cannot file a petition, engage in recognitional picketing, and obtain an expedited election unless an 8(b)(7)(C) charge is filed. A union cannot, of course, file an 8(b)(7)(C) charge against itself. *Blinne*, supra at 1157 fn. 10.

In short, the expedited election procedure represents a compromise which seeks to balance competing rights. This compromise extends an option to an employer faced with recognition or organization picketing. Thus, upon the commencement of such picketing, an employer may file an 8(b)(7)(C) charge.

By the plain language of the first proviso to Section 8(b)(7)(C), the expedited election procedure is available *only* when a timely petition if filed, i.e., no more than 30 days after the start of picketing for an 8(b)(7)(C) object. Petitions filed *after* 30 days are processed under normal "R" case procedures and do not serve as a defense to 8(b)(7)(C) picketing which has exceeded 30 days. See *Crown Cafeteria*, 135 NLRB 1153, 1185 fn. 4 (1962); and *Moore Laminating*, 137 NLRB 729, 732 fn. 6 (1962).

For other material on Expedited Elections, see sections 5-610 and 22-122.

7-200 Rules Affecting Employer Petitions

7-210 Union Claims or Conduct

308-8050

316-3375

316-6725

Although a question of representation may be brought to the Board's attention by the filing of an employer petition, the question is raised only by an affirmative claim of one or more labor organizations asserting representation of a majority of employees in an appropriate unit. *Amperex Electric Corp*., 109 NLRB 353, 354 (1954). Thus, a finding of a representation question is predicated on a union claim of representative status. *Westinghouse Electric Corp*., 129 NLRB 846 (1961); and *Bowman Transportation*, 142 NLRB 1093 (1963).

Union conduct sufficient to constitute an affirmative claim for recognition may take many forms. It may, for example, be picketing (*Bergen Knitting Mills*, 122 NLRB 801, 802 (1959)), and *Rusty Scupper*, 215 NLRB 201 (1974), including picketing for an 8(f) agreement, *Elec-Comm, Inc*., 298 NLRB 605, 706 fn. 5 (1990), or a demand for a new contract (*Mastic Tile Corp*., 122 NLRB 1528 (1959)). Such picketing is to be distinguished from a mere request that an employer sign an 8(f) agreement. In *Albuquerque Insulation Contractor*, 256 NLRB 61 (1981), the Board held that such a request did not amount to a present demand for recognition. *Albuquerque* was reaffirmed in *PSM Steel Construction*, 309 NLRB 1302 (1992), which analyzed the issue in light of *John Deklewa & Sons*, 282 NLRB 1375 (1987), and distinguished *Elec-Comm, Inc*, supra at fn. 15. Accord: *Western Pipeline, Inc*., 328 NLRB 925 (1999), in which the Board further concluded that an unsubstantiated claim that the employer was an alter ego of the signatory contractor and obligated to sign the contract, was nothing more than a request to sign an 8(f) agreement and therefore did not raise a question concerning representation.

In *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), the Board found that picketing and boycotts, accompanied by requests for a neutrality card check agreement do not constitute a demand for recognition and thus do not warrant processing an RM petion. Accord: *Brylane, L.P.*,

338 NLRB 538 (2002). Where however such a demand is accompanied by evidence of a current organizing campaign, the Board will find a recognitional objective. *Rapera, Inc.*, 333 NLRB 1287 (2001).

In 2006, the Board granted review of a Regional Director's decision to dismiss a petition based on the *New Otani* principle. The grant of review was published. See *Marriott Hartford Downtown Hotel*, 347 NLRB 865 (2006). Later, however, in an unpublished order the Board affirmed the Regional Director's decision. At the time of this printing the issue is pending at the Board albeit in another case.

A work assignment dispute does not, however, raise a question concerning representation *A. S. Abell Co*., 224 NLRB 425 (1976). Silent acquiescence by one union in the recognition demand of another union with whom it had jointly sought to organize the petitioning employer's plant constitutes an implied demand sufficient to support the employer's petition. *Atlantic-Pacific Mfg. Corp.*, 121 NLRB 783 (1958). In *Kingsport Press*, 150 NLRB 1157 (1965), the union had been engaged in an economic strike for more than a year when the employer filed its petition. but the union continued to claim recognition as bargaining agent for certain employees. Although the employer was willing to recognize the union and negotiate with it while its status as the certified representative continued, the Board found that the employer's purpose in filing the petition was to question that status and to determine, through an election, whether the union remained the choice of a majority of the employees in the bargaining unit. In these circumstances, the Board, citing *Bowman Transportation*, supra, found that the petition raised a question concerning representation.

In *Windee's Metal Industries*, 309 NLRB 1074 (1992), the Board found that the informational picketing there did not amount to a "claim to be recognized" and reaffirmed the longstanding position that Section 9(c)(1)(B) requires evidence of a "present demand for recognition" in order to process the RM petition. The Board described the legislative history of Section 9(c)(1)(B) and the history of its interpretation by the Board. Additionally, the Board distinguished the facts in *Windee's* from those cases in which the union engages in postdisclaimer picketing together with a present demand for recognition. In this latter circumstance, the Board will process the RM petition. (See also sec. 8-100, Disclaimer.)

For related discussion, see section 9-620.

7-220 RM Petitions/Incumbent Unions

316-6725-5000

When an employer petitions the Board for an election as a means of questioning the continued majority status of a previously certified incumbent union, it must, in addition to showing the union's claim for continued recognition, demonstrate a basis for seeking an election. Prior to its decision in *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board required that the employer show "by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *U.S. Gypsum Co*., 157 NLRB 652, 656 (1966). This was known as the *U.S. Gypsum* rule and before its promulgation, an employer-petitioner under Section 9(c)(1)(B) had to show only that the union had claimed representative status in the unit and that the employer had questioned it. In *Levitz*, the Board lowered the standard for filing an RM petition in these circumstances to a "good-faith uncertainty" that a majority of the unit employees continue to support the union. In doing so, the Board abandoned the unitary standard that it had applied for withdrawal of recognition, filing RM petitions and polling. See *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). Instead the Board set a higher standard for withdrawal—"actual loss of majority"—and maintained the "uncertainty" standard for filing a RM petition. See also *Raven Government Services*, 331 NLRB 651 (2001). Although in *U.S. Gypsum* and *Levitz*, the union was a *certified* incumbent, the rationale of the decisions do not preclude application to *any* incumbent, certified or not. Nor do they affect employer petitions involving claims by unions asserting representative status in an effort to obtain initial recognition.

In practice, the question of "good-faith uncertainty" is treated as an administrative determination of the Regional Director, and is therefore not litigated at the hearing. The thrust of such determination is whether the employer is uncertain of the union's majority status, and not whether such status is in question. See *Levitz*, supra at 727–728, and CHM section 11042.

In *Levitz*, the Board noted two cases in which it had not found good-faith uncertainty. See *Henry Bierce Co.*, 328 NLRB 646, 650 (1999), enfd. in relevant part 234 F.3d 1268 (6th Cir. 2000), and *Scepter Ingot Castings, Inc.*, 331 NLRB 1509 (2000).

Once an incumbent union has accepted a contract offer, the employer cannot challenge its majority status by filing an RM petition even though a RD or rival RC petition could be filed assuming acceptance would not otherwise be precluded by the Board's control bar standards (chapter 9). *Auciello Iron Workers*, 317 NLRB 364, 374 (1995).

7-230 Accretions

316-3301-5000

347-8020-8067

420-2360

The subject of accretion is more fully discussed in section 12-500, infra. A merger of two groups of employees may in certain circumstances raise a question concerning representation. When one of the two groups is represented and the other is not, the issue of whether there is an accretion will depend on traditional community-of-interest matters and on whether the represented group is larger than the unrepresented group. See *Central Soya Co.*, 281 NLRB 1308 (1986), and *Special Machine & Engineering*, 282 NLRB 1410 (1987). But when the two groups have been represented by different labor organizations, the merger will raise a question concerning representation unless one of the represented unions clearly predominates. The fact that one group is slightly larger than the other will not be considered sufficient to find predomination. *National Carloading Corp.*, 167 NLRB 801 (1967); and *Martin Marietta Co.*, 270 NLRB 821 (1984). See also *F.H.E. Services*, 338 NLRB 1095 (2003).

Accretion analysis is inapplicable when the unit is fully described, i.e., defined by the work performed. See *Sun*, 329 NLRB 854 (1999); *Archer Daniels Midland Co.*, 333 NLRB 673 (2001); *Premcor, Inc.*, 333 NLRB 1365 (2001); and *Developmental Disabilities Institute*, 334 NLRB 1166 (2001). In *Premcor*, the Board summarized its position:

> Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion. Accordingly, an accretion analysis in these circumstances is inapplicable.

Nor does the accretion doctrine apply where the employee group sought to be accreted may separately constitute an appropriate bargaining unit. *Passavant Health Center*, 313 NLRB 1216 (1994).

As noted above, the subject of accretions is more fully discussed at section 12-500. In addition, see discussions of accretion in section 12-600 and in chapter 21.

7-240 Changes in Affiliation

316-3390

385-2525

In *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986) (*Seattle-First*), the Supreme Court set forth the standards for determining whether a change in the affiliation status of a certified union raises a question concerning representation. Chapter 11, section 100, infra, fully discusses the Board's AC petition procedures and policies. Briefly, however, an affiliation will raise a representation question where there is not a substantial continuity between the pre- and

postaffiliation union. See *Hammond Publishers*, 286 NLRB 49 (1987); *Western Commercial Transport*, 288 NLRB 214 (1988); *City Wide Insulation*, 307 NLRB 1 (1992); *Service America Corp.*, 307 NLRB 57 (1992); *Mike Basil Chevrolet*, 331 NLRB 1044 (2000); *Avante at Boca Raton, Inc.*, 334 NLRB 381 (2001); and chapter 11, section 100, infra.

For many years, the Board had a "due process" requirement for union affiliation matters. In *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB No. 19 (2007), it abandoned that requirement in light of the Supreme Court's *Seattle-First* decision. Similarly, the Board holds that lack of participation by nonmembers in an affiliation vote does not create a question concerning representation. *Deposit Telephone Co.*, 349 NLRB 214 (2007). *Kravis* is applied retroactively. See *Allied Mechanical Services*, 352 NLRB No. 83 (2008).

Disaffiliation of a union from the AFL–CIO does not, standing alone, create a question concerning representation (*Laurel Baye Healthcare of Lake Lanier*, 346 NLRB 159 (2007), and *New York Center for Rehabilitation Care*, 346 NLRB 447 (2006)).

7-250 Employer Waiver

An employer who agrees not to file an RM petition during the life of an 8(f) agreement will be held to its agreement and the Board will not process the petition. *Northern Pacific Sealcoating*, 309 NLRB 759 (1992). (See also sec. 9-600.)

7-300 Rules Affecting Decertification Petitions

7-310 Who May File a Decertification Petition

316-6733

324-4060-2500

To raise a valid question concerning representation, a decertification petition need not be filed by an employee of the employer. *Bernson Silk Mills*, 106 NLRB 826 (1953). However, this does not mean that a supervisor may file a decertification petition. To permit supervisors to act as employee representatives would defeat one of the purposes of the Act, which was to draw a clear line of demarcation between supervisory representatives of management and employees because of the possibility of conflicts in allegiance if supervisors were permitted to participate in union activities with employees. *Clyde J. Merris*, 77 NLRB 1375 (1948). However, when the petitioner becomes a supervisor after the filing of the petition, the proceedings are not abated. *Weyerhaeuser Timber Co*., 93 NLRB 842 (1951); and *Harter Equipment*, 293 NLRB 647 (1989).

Thus, while ordinarily the Board does not allow the litigation of the issue of "employer instigation of, or assistance in, the filing of the decertification petition" in the representation proceeding (*Union Mfg. Co*., 123 NLRB 1633 (1959)), a petition filed by one of the employer's supervisors cannot raise a valid question and, as a result, the issue of supervisory status has to be determined in the decertification proceeding, if raised. *Modern Hard Chrome Service Co*., 124 NLRB 1235, 1236 (1959). The supervisory status of the petitioner in a decertification proceeding must in any event be decided, because an employee who is not a supervisor is included in the unit and is entitled to vote in the election and deferring this issue to an unfair labor practice proceeding could only result in costly delay of the representation proceeding. Id. at 1236.

A confidential employee may not file a decertification petition even if the employee is included in the unit. *Star Brush Mfg. Co.*, 100 NLRB 679 (1951).

In *Pan American Airways*, 188 NLRB 121 (1971), the incumbent union contended that a decertification petition should not be processed because the petitioner had misled the employees into supporting the petition by holding out the prospect of a big wage increase if they would decertify the union and support the Teamsters. A question concerning representation was found, however, although the Board noted parenthetically that the Teamsters withdrew from the case after the hearing, sought no place on the ballot, and would be precluded from obtaining an

election for a 12-month period after the election directed in this decision. See also *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

Related to the issue of who may file a decertification petition is the question of who may withdraw a petition. In *Transportation Maintenence Services*, 328 NLRB 691 (1999), a divided Board permitted withdrawal of the petition after the election was held, and the ballots impounded but before any counting of ballots.

See 10–800 for discussion of blocking charge rules and decertification petitions.

7-320 The Unit in Which the Decertification Election Is Held

355-3350

The general rule is that the bargaining unit in which the decertification election is held must be coextensive with the certified or recognized unit. *Campbell Soup Co*., 111 NLRB 234 (1955); *W. T. Grant Co*., 179 NLRB 670 (1969); *Bell & Howell Airline Service Co*., 185 NLRB 67 (1970); *WAPI-TV-AM-FM*, 198 NLRB 342 (1972); and *Mo's West*, 283 NLRB 130 (1989). Mindful of the fact that Congress made no provision for the decertification of part of a certified or recognized unit, the existing unit normally is the appropriate unit in decertification cases. Stated differently, a merger of units normally has the effect of destroying the separate identity of the prior units. *White-Westinghouse Corp*., 229 NLRB 667, 672 (1977). Accord: *Albertson's Inc*., 307 NLRB 338 (1992). Compare *West Lawrence Care Center*, 305 NLRB 212 (1991), where the RD petition was filed shortly after the merger and the Board ordered an election in the prior single unit.

Thus, when the employer, with the union's acquiescence, recognized and contracted with single-plant units rather than the previously certified multiplant unit, and the Board found the single-plant unit appropriate, a decertification election was ordered in the single-plant unit sought. *Clohecy Collision*, 176 NLRB 616 (1969). And, conversely, when the long, continuous pattern of bargaining between the union and the employer had brought about an effective merger of the individually certified units into a multiplant contractual unit, the Board dismissed a petition for a decertification election in one of the originally certified units. *General Electric Co*., 180 NLRB 1094 (1970); *Gibbs & Cox, Inc*., 280 NLRB 953 (1986); *Green-Wood Cemetery*, 280 NLRB 1359 (1986); and *Wisconsin Bell*, 283 NLRB 1165 (1987). See also *Duke Power Co.*, 191 NLRB 308 (1971), when because of the short period of time in which the units had been included in a systemwide agreement, they had not yet been irrevocably amalgamated into the larger collective-bargaining unit.

In *Albertson's Inc*., 273 NLRB 286 (1984), the Board directed an election in a single store unit where the employer had withdrawn from multiemployer bargaining where it had bargained on a multistore basis. The Board held that on withdrawal, the considerations for grouping the employer's eight stores no longer existed and as the most recent agreement was for a multiemployer unit, a unit that the Board would not have found appropriate in an initial unit determination, a decertification petition will be processed as to a single store appropriate unit. Yet see *Arrow Uniform Rental*, 300 NLRB 246 (1990), which limited *Albertson's* to a situation in which the employer's multilocation grouping in the multiemployer unit was not one which the Board would have certified.

When a new store was recognized by the employer as an accretion to the existing multistore unit but the Board, in the absence of evidence showing that the new store had been effectively merged into the existing unit, found it to be a separate appropriate unit, a decertification petition was entertained in that single store unit. *Food Fair Stores*, 204 NLRB 75 (1973).

When the union is the currently recognized majority representative of a mixed unit of guards and nonguards, the general rule would, in effect, constitute an acceptance of the appropriateness of the mixed unit, a position contrary to Section 9(b)(3) of the Act which prohibits the Board from deciding that a unit of guards and nonguards is appropriate. This statutory requirement thus necessitates an exception to the general rule. In such circumstances, a unit limited to guards

constitutes the appropriate unit in the decertification election. *Fisher-New Center Co.,* 170 NLRB 909 (1968).

A mixed unit of professional and nonprofessional employers presents a somewhat related problem. In such a case the Board will not direct a decertification election among the professional employees if they have previously voted for inclusion in the overall unit *Westinghouse Electric Corp*., 115 NLRB 530 (1956). When the professional employees have not had such an opportunity, the Board will make an exception to the general rule and direct a decertification election among the professionals. *Utah Power & Light Co*., 258 NLRB 1059 (1981). Compare *Group Health Assn.,* 317 NLRB 238 (1995). Note also that in *Group Health*, supra, the Board dismissed the petition because the professionals were specifically excluded from the unit and the Board was unable to conclude whether or not the unit was appropriate.

7-330 Categories Which may not be Included in the Unit in a Decertification Election

355-3350-6200

As a victory in a decertification election would entitle the union to a recertification as bargaining representative, and as the Board is without jurisdiction to include *agricultural laborers* or *supervisors* in such a unit, the status of individuals who may belong to those categories must be determined. Their exclusion from the unit, which is required by the Act, is not construed to constitute a change in the unit. *Illinois Canning Co*., 125 NLRB 699 (1960). See also *WAPI-TV*-AM-FM, supra, excluding supervisors.

7-340 Certification not a Prerequisite

Section 9(c)(1) of the Act provides that the decertification process may be invoked not only when a labor organization has been certified, but also when an uncertified organization is being currently recognized as the bargaining representative. *Lee-Mark Metal Mfg. Co*., 85 NLRB 1299 (1949); *Wahiawa Transport System*, 183 NLRB 991 (1970).

7-400 Effect of Delay and Turnover

In situations in which the courts have rejected the Board's bargaining order in a *Gissel* case (*NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)) and the Board is therefore now considering the representation case, it has consistently rejected employer contentions that the petition should be dismissed because of the long delay and/or because of employee turnover. *Sheraton Hotel Waterbury*, 316 NLRB 238 (1995).