

GUIDE FOR HEARING OFFICERS
IN NLRB REPRESENTATION AND
SECTION 10(K) PROCEEDINGS



N.L.R.B.
GUIDE
FOR
HEARING
OFFICERS



NATIONAL LABOR RELATIONS BOARD

GUIDE FOR HEARING OFFICERS IN REPRESENTATION AND SECTION 10(K) PROCEEDINGS

OFFICE OF THE GENERAL COUNSEL



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I am pleased that the Agency is able to provide you with this updated edition of the “Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings.” One of the most important responsibilities of field employees is to serve as hearing officers in a representation case or 10(k) proceeding. The hearing officer must ensure that the hearing is conducted in accord with Agency procedures and that the resulting record is free of cumulative or irrelevant testimony yet sufficient to allow for an informed determination of disputed issues by the Board or the Regional Director. The Guide’s availability on the Agency’s website (www.nlr.gov) makes it particularly valuable to practitioners inside and outside the Agency.

One of my goals as General Counsel is to improve on the high quality product that has always been the hallmark of Board casehandling. This updated version of the Guide will assist in achieving that goal in representation case work. For the first time, the Guide provides direct references to *An Outline of Law and Procedure In Representation Cases* and provides instruction on conducting postelection hearings. The Guide is designed to assist hearing officers in doing the most effective job of developing the record. Advance preparation and exploration of issues with the parties are critical to success as a hearing officer. The suggested lines of inquiry provide a resource both for advance preparation and for dealing with issues that may arise during the hearing. However, as always, the responsibility lies with the hearing officer to research potential issues and to develop specific inquiries that are relevant to the issues at hand.

This edition reflects the efforts of many individuals. I want to recognize the members of the committee who were responsible for updating the Guide: Louis Cimmino, Deputy to the Assistant General Counsel, who served as chairperson of the committee; Wayne Gold, Regional Director, Region 5, Baltimore; Rhonda Aliouat, Regional Attorney, Region 3, Buffalo; D. Michael McConnell, Assistant to the Regional Director, Region 17, Kansas City; Ariella Bernstein, Supervisory Field Examiner, Region 29, Brooklyn; and Lafe Solomon, Director of the Office of Representation Appeals. The committee was also assisted by David Leach, Deputy Regional Attorney, Region 2, Manhattan, who drafted some portions of the manual, and Steve Shuster, Assistant to the Regional Director, Region 5, Baltimore, who assisted in reviewing some portions of the manual.

My thanks also to the reviewers of the manuscript: Gary Kendellen, Regional Director, Region 22, Newark, and Assistants to the Regional Directors Elbert Tellem, Region 2, Manhattan; Robert Chester, Region 18, Minneapolis; and Randy Malloy, Region 8, Cleveland.

This guide will be a valuable training resource for the field. I hope that you will find it useful in the years to come.

Arthur Rosenfeld
General Counsel

PREFACE

This Guide has been prepared by the Office of the General Counsel to provide guidance to hearing officers in conducting hearings in NLRB representation proceedings and Section 10(k) hearings.

The Guide emphasizes techniques of conducting the hearing and developing a complete record. It is designed only to provide procedural and operational guidance to the Agency's staff and is not intended to be a compendium of substantive or procedural law, nor a substitute for knowledge of the law. Similarly, the Guide does not constitute rulings or directives of the Board or the General Counsel, and is not a form of authority binding on either the Board or General Counsel.

As to matters on which the Board has issued rulings, the Guide seeks to accurately describe and interpret Board law; while the Guide can thus be regarded as reflecting Board policies as of the date of its preparation, in the event of conflict, it is the Board's decisional law, not the Guide, that is controlling. Similarly, while the Guide reflects casehandling policies of the General Counsel as of the date of its preparation, such policies may be revised or amended from time-to-time.

Although it is expected that the Agency's Regional Directors and their staffs will follow these guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances.

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FOREWORD

Preelection representation case hearings are formal proceedings conducted in accordance with Section 102.63 et seq., of the Board's Rules and Regulations. It is part of the investigation to determine whether a question concerning representation exists, and therefore is nonadversarial in character. A preelection representation hearing is conducted by a hearing officer, whose duty is "to inquire fully into all matters in issue and to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act." (Rules and Regulations, Section 102.64(a).)

Postelection representation case hearings are also formal proceedings conducted in accord with Section 102.69(d) of the Board's Rules and Regulations. In a postelection hearing, by contrast with preelection case hearings, the hearing officer makes credibility resolutions and issues a report setting forth his/her findings, conclusions and recommendations.

The entire election process seeks to resolve a question concerning representation (QCR). The Agency's staff is engaged in an investigation of that QCR and the proceedings, whether formal or informal, or preelection or postelection, are nonadversarial.

A 10(k) hearing is conducted pursuant to Section 102.89 et seq., of the Board's Rules and Regulations and Section 101.34 of the Board's Statements of Procedure, and is nonadversarial. In a 10(k) hearing, the "primary interest of the hearing officer is to ensure that the record contains a full statement of the pertinent facts as may be necessary for a determination of the issues by the Board." Statements of Procedure, Section 101.34.

In the aid of the above duties, the hearing officer may call and question witnesses, question witnesses called by the parties, and call for and introduce appropriate documentary evidence, being limited only by the relevance of the evidence to the issues. Such actions may be particularly necessary to explore matters not raised by the parties. The hearing officer has the authority to seek stipulations, confine the taking of evidence to relevant disputed issues and exclude irrelevant and cumulative material. The services of the hearing officers are equally at the disposal of all parties to the proceeding in developing the material evidence.

This Guide is a checklist of steps to be considered and techniques available for utilization by the hearing officer in preparing for and conducting the hearing, as well as a ready reference to some procedural aspects of the hearing. The contents are a guide to the hearing officer in the exercise of his/her discretion in conducting the hearing and are necessarily of selective applicability depending on the issues and posture of a given case.

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I. INTRODUCTION

This manual is intended to give guidance to hearing officers and to serve as a reference source for them when conducting preelection, postelection and Section 10(k) hearings. Included in the manual are procedural guidelines to follow in preparing for and conducting the hearing, substantive issues to be covered at the hearing and suggested questions and/or areas of inquiry to be explored on various issues. This manual should supplement the prehearing preparation of hearing officers, not take the place of that preparation.

The R case hearing is a formal proceeding, the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a full record, and nonadversarial.

As a formal proceeding, an R case hearing should be conducted at a place conducive to the maintenance of a judicial atmosphere. If it cannot be held in a Regional Office hearing room, it should be held, if possible, in a courtroom. If the space secured proves inadequate or accommodations are poor, the Board agent should take remedial action, if possible. At the hearing, the conduct of the parties should be dignified, both on and off the record. Smoking is prohibited.

The R case hearing is conducted by a hearing officer who is normally a Board agent from the Region in which the hearing is held. The hearing officer is not an advocate of any position and must be impartial in his/her rulings and in conduct both on and off the record. The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing. NLRB Casehandling Manual, Part Two, Representation Proceedings (CHM) Sections 11187-11188. The hearing officer ensures that a full and complete record is obtained, upon which the Regional Director can make a decision regarding the issues. While the record must be complete, it is also the duty of the hearing officer to keep the record as short as is commensurate with its being complete. This also minimizes the significant costs associated with a hearing.

In a preelection hearing, the hearing officer does not make any recommendations or participate in any phase of the decisional process. He/she may or may not be the same agent who handled earlier or who may handle later phases of the same case.

In a postelection hearing, the hearing officer makes credibility resolutions, findings of fact, conclusions of law and recommendations to either the Regional Director or the Board. Since those determinations must be based solely on the record made in the hearing, he/she may not be the same agent who handled any phase of postelection processing of the case.

A. Prehearing Preparation

The hearing officer must fully prepare for the hearing. In advance of the hearing, the hearing officer should be aware of all issues in the case and of the types of information generally bearing on such issues, in order to prepare properly to conduct the hearing. In the context of a preelection hearing, the hearing officer should have a meeting with the appropriate Regional management and/or supervisory personnel in advance of the hearing to discuss the issues that may be raised and develop a plan for the conduct of the hearing.

Prior to a scheduled hearing, the basic facts with respect to each potential issue should be secured and the relevant issues should be researched. The hearing officer should discuss with the parties the critical issues, the law and the likelihood of the parties' positions prevailing. Attempts should also be made to arrive at a firm commitment regarding an election agreement. In this regard, it is the Agency's policy to make every effort to secure an election agreement whenever possible to avoid the delay and expense of a hearing.

Where an employer has refused to cooperate in providing commerce information prior to the hearing or has indicated that it will not voluntarily do so at the hearing, the Regional Director will have issued a subpoena as part of the prehearing preparations. *Tropicana Products*, 122 NLRB 121 (1958). See sample *Tropicana* subpoena language in Appendix D. The Regional Director's issuance of a subpoena of commerce information prior to the hearing is a proper basis for utilization of the *Tropicana* rule, i.e., if an employer refuses to comply with a *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the employer is engaged in more than de minimis interstate commerce, rather than seek enforcement of the *Tropicana* subpoena. See Section IV, A, Jurisdiction, for examples of appropriate secondary evidence. See also Section II, B, 5, *Tropicana* Subpoenas.

B. Hearing Preparation

1. Review CHM Sections 11010 (Initial Investigation) through 11124.4.
2. Make sure that all known or potential parties, intervenors or parties in interest have been contacted and/or served with a notice of hearing (NOH). Check for other labor organizations or other employers involved. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002) (all parties must receive the NOH at least 5 working days prior to the hearing, absent unusual circumstances or waiver).
3. Research prior cases involving the same employer and other cases involving similar issues.
4. Contact parties and attempt to work out all details for a consent/stipulated election agreement.

- (a) If agreement is reached, notify supervisor immediately.
 - (b) When contacting parties, obtain correct names and addresses of parties.
5. If agreement cannot be reached, question parties regarding the following hearing data:
- (a) Stipulations concerning: jurisdictional facts and concessions of jurisdiction, labor organization, questions concerning representation (QCR), history of bargaining, unit scope and unit composition. (Explore written stipulations. See Section D, below.)
 - (b) Availability of list of employee classifications, inclusions and exclusions.
 - (c) Issues that will be raised at hearing.
 - (d) Availability of documents, evidence and witnesses to support positions.
 - (e) Evidence and witnesses to support case should a party refuse to cooperate.
 - (f) Subpoenas. (See Section II, B, Subpoenas.)
 - (g) Need for an interpreter.
 - (h) If a party is unrepresented, see I, G, Unrepresented Parties.
6. Check date, time, and place of hearing. Verify arrangements for hearing room and court reporter. Secure court reporter's telephone number.
7. Examine formal papers for completeness and accuracy of documents.
8. Review case file thoroughly, noting issues and legal and procedural problems.
9. Discuss with his/her supervisor the issuance of subpoenas to obtain, for example, jurisdictional information in *Tropicana* situations (122 NLRB 121 (1958)) or position descriptions, in situations when supervisory status is in issue.
10. Prepare hearing outline.

C. Materials for Hearing

The hearing officer should have a kit that contains all of the materials set forth below:

1. Specific

- (a) Case file.
- (b) Formal papers, ready for introduction as exhibits, including:
 - (1) Petition and/or amended petition(s).
 - (2) Notice of representation hearing and affidavit of service.
 - (3) Notice of postponement (if any) and affidavit of service.
 - (4) Any other prehearing motions, orders or documents properly included in the formal papers.
- (c) Original and copy of appearance sheet (Form NLRB-1801).
- (d) Close of R Case Hearing (Form NLRB-856)—two copies.
- (e) Board Exhibit 2—Pre hearing stipulation form (See Appendix A)

2. General

- (a) Board's Rules and Regulations.
- (b) NLRB Casehandling Manual, Part Two, Representation Proceedings.
- (c) Guide for Hearing Officers in NLRB Representation Proceedings.
- (d) An Outline of Law and Procedure in Representation Cases.
- (e) Extra copies of Statement of Standard Procedures in Formal Hearing Held Before the National Labor Relations Board Pursuant to Petition Filed Under Section 9 of the National Labor Relations Act, as Amended (Form NLRB-4669).
- (f) Copies of blank subpoenas, ad testificandum and duces tecum.
- (g) Copies of blank appearance sheets (Form NLRB-1801).
- (h) Copies of blank consent election forms - Agreement for Consent Election (Forms NLRB-651 and 4931) and Stipulated Election Agreement (Forms NLRB-652 and 4932). (The basic difference between the consent agreement and the stipulated election agreement is that questions that arise after the election are decided by the Regional Director in a consent election and by the Board in a stipulated election.)
- (i) Withdrawal Request (Form NLRB-601).
- (j) Request to Proceed (Form NLRB-4551).
- (k) Copies of blank Report on Investigation of Interest (Form NLRB-4069).
- (l) Copies of blank R Case Petition (Form NLRB-502).
- (m) Copies of blank Report of Obligated Cost of Hearing Held or Hearing Canceled (Form NLRB-4237).
- (n) Telephone numbers of appropriate Regional personnel and Court Reporter.
- (o) Envelopes of various sizes addressed to the Regional Office.
- (p) Pencils and writing pad.

D. Prehearing Conference

Prior to the hearing, the hearing officer should prepare a *written* stipulation, for signature by the parties at the hearing, that covers all of the generally uncontested issues for hearings, i.e., the correct names of the parties, labor organization status, commerce information, etc., as well as any other issues that are known not to be in dispute, such as contract bar, bargaining history, demand for and refusal of recognition, etc. A sample stipulation appears as Appendix A. Preparation of such a stipulation prior to the hearing can save reporting costs and provide accurate information, while avoiding typographical and other errors that the transcript may contain as to details. Such a stipulation, once signed by the parties, should become a Board exhibit, usually Board Exhibit 2, and should be entered into evidence after the introduction of the formal papers (Board Exhibit 1; CHM Section 11192).

Prior to opening the hearing, the hearing officer should conduct a prehearing conference to determine the positions of the parties and discuss procedural matters. During the conference, the parties and the hearing officer can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, litigation of unnecessary issues and the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. The

likelihood of parties' positions prevailing should be candidly discussed. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. The hearing officer should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

During the prehearing conference, the hearing officer should inform the parties that where issues are raised involving a presumption under Board law, the party seeking to rebut that presumption has the burden of proof. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should inform the parties that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer will typically discuss the following topics at the prehearing conference:

1. The issues and each party's position on each issue.
2. All stipulations reached should be drafted in longhand preparatory to reading them into the record at the appropriate time, e.g., commerce, supervisors who are not in dispute, unit description, etc. A sample stipulation which could be used to deal with the preliminary matters at the hearing, including statement of standard procedures, the formal papers, labor organization status, question concerning representation, contract bar and jurisdiction, if they are not in issue, is contained in Appendix A of this manual (Board Exhibit 2).
3. The hearing officer should determine the size and structure of the Employer's work force and the size of the agreed upon unit, as well as the number of individuals in disputed categories. The hearing officer should determine the managerial hierarchy and a description of the organization of the plant, including departments and numbers of employees in departments and job classifications.
4. Explore with the parties the need for amendments to the petition, including amendments to correct the name of the company, labor organization and unit description wherever appropriate.
5. Related R or C cases in the Region or another Region.
6. Show the formal papers to the parties and explain what they are to parties unfamiliar with the Agency's processes.
7. The hearing officer should make one last effort to secure an election agreement. **If successful, do not release the court reporter until the consent/stipulated election agreement is concluded.**

If an agreement is executed, the hearing should not be opened; the subsequent approval of the agreement serves as a withdrawal of the notice of hearing.

If the possibility of an election agreement arises during the hearing, the hearing should be recessed for its consideration. If agreement is reached, the hearing should be adjourned indefinitely. It is unnecessary to insert the agreement in the record. The subsequent approval of the agreement serves as a withdrawal of the notice of hearing.

E. Before Opening the Record

At the hearing, the hearing officer should discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited. The hearing officer should take an active role in exploring all potential areas of agreement and narrowing the issues that remain to be litigated.

F. Opening the Hearing

After the preliminary matters set forth in the hearing officer outline and script are resolved, the hearing officer should open the record by specifying the issues that have been identified by the parties to be covered at the hearing. In order to help make the record clear, the hearing officer should have the parties state their positions on the issues at the beginning of the hearing.

1. Notification of Burdens

The hearing officer should specify on the record whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. For instance, if the Union has petitioned for a presumptively appropriate unit, such as the employees at a single facility of the Employer, and the Employer contends that the smallest appropriate unit must include the employees at all of its facilities, the hearing officer should inform the Employer that it has the burden of rebutting the single facility presumption.

If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

2. Hearing Officer's Role

The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted "for what it's worth." Cf. CHM Section 11217. In addition, the hearing officer should solicit stipulations and utilize offers of proof in order to achieve an uncluttered record. CHM Sections 11187.2, 11189(f) and 11226. Although difficult to accomplish, the hearing officer should make every attempt to organize the record so that each issue, and the evidence in support of the issue, is presented separately and

completely. In this way, the transcript will be organized according to the issues, to assist the decision writer in analyzing the issues and writing the decision.

The hearing officer may cross-examine and call and examine witnesses. The questions contained in the substantive sections of this manual should be used as a guide in examining witnesses. However, not every question on a particular issue set forth in this manual need be asked. The hearing officer may call for and introduce all appropriate documentary evidence, being limited only by the relevance of the evidence to the issues. It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

At the end of the hearing, if there are changes in the parties' positions, the hearing officer should make them clear on the record and should summarize the issues that have been resolved. Whenever the hearing officer's technical assistance is required by any party, e.g., how to amend a petition, it should be given.

When necessary to ensure the development of a record that is complete, concise and cogent, it may become necessary for the hearing officer to interrupt the presentation of a party and conduct some or all of the questioning of a witness or witnesses. However, it should be recognized that the hearing officer's responsibility for the development of a complete yet concise record may on occasion lead to an appearance of undue assistance to a party that does not itself introduce evidence in support of its positions or of undue interference with a party seeking to introduce immaterial, irrelevant or cumulative evidence. The hearing officer should explain his/her role in developing a full yet concise record. The hearing officer must also keep constantly in mind that, to the parties, he/she is the Board's representative and they expect him/her to be objective and considerate in the conduct of the hearing. Thus, the hearing officer, while meeting his/her primary responsibility to develop a full yet concise record, should also exercise self-restraint, give the parties prior opportunity to develop points and refrain from needlessly taking over.

G. Unrepresented Parties

Unrepresented parties (pro se) may not be familiar with our processes, the pertinent law or their burden of proof. The hearing officer should take the time to explain the process involved and the extent of their obligations, if any, and should be particularly sensitive to any language difficulty problems. The hearing officer should also explain the nature of the hearing and burdens of proof and that he/she has the right to seek subpoenas to compel the testimony of witnesses, call witnesses and question witnesses on cross-examination. However, the hearing officer is not obligated to advocate on behalf of a pro se party and is not required to develop extensive lines of testimony.

II. PROCEDURAL MATTERS

A. *Outline of Hearing*

This section of the manual contains instructional information on conducting a hearing and covering the key elements of the hearing, including the opening statement, introduction of Board exhibits, prehearing motions, intervention, jurisdiction, labor organization, question concerning representation, history of collective bargaining, bars to the conduct of an election and the appropriate unit. Incorporated in this manual as Appendix B is a script of the hearing, with the instructional information from this section deleted, which can be used by the hearing officer as an aid in providing continuity while conducting the hearing. Attached to the script is a sample of a chart that can be used by the hearing officer as an aid in tracking exhibits. For the hearing officer's convenience, a copy of the script can be downloaded from this manual, which is available on the Agency internet and intranet, for purposes of adapting the script to a particular case.

During the hearing, the hearing officer may find that parties are prepared to enter into stipulations. When obtaining a stipulation, the hearing officer should ensure that each party to the proceeding enters into the stipulation and that he/she receives the stipulation. Stipulations should be supported by facts and should not be conclusionary. All parties to the proceeding, including a decertification petitioner, must agree to the stipulation. A stipulation of fact is conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted. If the hearing officer is unable to obtain a stipulation on a key element of the hearing, as outlined in the script, he/she should refer to this and other sections of the manual for instructions and/or guidance on how to handle that or any other particular issue. The script is only an aid and is not intended to replace the substantive material contained elsewhere in the manual.

Appendix A to this manual is an exhibit that can be used to streamline the hearing by reducing some of the key elements of the hearing to written stipulations that can be introduced into the record. That exhibit (often Board Exhibit 2) can be used to resolve all issues on which there is no dispute, leaving those that are in dispute for litigation.

1. **Opening statement**

On opening the hearing, the hearing officer should read into the record the following statement:

The hearing will be in order.

This is a formal hearing in the matter of _____, Case No. _____ before the National Labor Relations Board. The hearing officer appearing for the National Labor Relations Board is _____.

All parties have been informed of the procedures at formal hearing before the Board by service of a Statement of Standard Procedures with the notice

of hearing. I have additional copies of this statement for distribution if any party wants more.

Will counsel please state their appearances for the record? . . .

For the Petitioner: _____

For the Employer: _____

For the Intervenor: _____

Are there any other appearances? . . . Let the record show no (further) response.

Fill out any additions to the appearance sheet.

Are there any other persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding?

. . . Let the record show no (further) response.

2. Introduction of formal papers

I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1(a) through 1 (—), inclusive, Exhibit 1(—) being an index and description of the entire exhibit. The exhibit has already been shown to all parties. Are there any objections to the receipt of these exhibits into the record? Hearing no objections, the formal papers are received in evidence.

Explain if necessary that the papers in question constitute a routine introduction of the documents which set up the issues for hearing; that admission of the document does not irrevocably establish the truth of any allegations therein; that any relevant evidence may be introduced irrespective of such allegations; and that, in any event, the Regional Director (Board) will pass on the validity of this and any other evidence. Whether or not objections are voiced, receive the formal papers in evidence.

Verify correct names of parties. Entertain motion to amend petition if necessary, to conform to the correct names.

If the parties agree to Board Exhibit 2, introduce that exhibit into the record as follows and then proceed to the appropriate section below:

The parties to this proceeding have executed and I have approved a document which is marked as Board Exhibit 2. That Exhibit contains a series of stipulations including, among other items, that the petitioner is a labor organization within the meaning of the Act, there is no contract bar and the Employer meets the jurisdictional standards of the Board. Are there any objections to the receipt of Board Exhibit 2?

Hearing no objection, Board Exhibit 2 is received in evidence.

If Board Exhibit 2 is not agreed upon, proceed with Section 3 below.

3. Prehearing motions

Identify and receive prehearing motions, rulings and referrals. Referrals include motions which the Regional Director has referred to the hearing officer for ruling (e.g., motions to quash subpoenas). If appropriate, rule on the motions at this time. If not, the hearing officer may want to indicate that he/she will withhold ruling on the motion until later in the hearing. Be sure to rule on all motions still remaining at the end of the hearing, except those that cannot be ruled on by the hearing officer, e. g., motions to dismiss the petition. (See Section II, G, Motions at Hearing).

Are there any prehearing motions made by any party that need to be addressed at this time (e.g., motions to quash subpoenas)?

4. Intervention

Appearances for prospective intervenors should have been made during the opening statement, but at this point, if intervention has been indicated, the actual motion to intervene should be solicited. The hearing officer should call attention to any prehearing motions to intervene which have been referred to him/her and ask for any current motions.

Are there any motions to intervene in these proceedings to be submitted to the hearing officer at this time? Are the parties aware of any other employers or labor organizations that have an interest in this proceeding?

The hearing officer hears no (further) response.

After soliciting the positions of the parties on the motion to intervene, the hearing officer must rule, for example:

If there is a motion to intervene:

M. _____, please state the correct and complete name of the Intervenor.

If there is no objection:

The motion of ____ for intervention herein is granted (denied).

Require motions to intervene to be offered in evidence, orally or in writing, setting forth the grounds for intervention and inquire of the other parties as to their positions. (Be sure to obtain the full and complete name of the intervenor.)

Before intervention is permitted, the prospective intervenor must produce a showing of interest. This may be any of the following:

- (a) Valid authorization card(s): Merely note the fact that a showing of interest has been made; under no circumstances introduce the cards into evidence. Indicate the level of intervention. However, if no showing is made, this fact may and should be announced on the record.
- (b) Current or recently expired contract; if the showing is a contract, a copy of it should be procured and placed in the record.
- (c) Any other evidence of a showing of interest that would be accepted from a petitioner.

The rights of an intervenor depend on the level of intervention based on its showing of interest. CHM Section 11194.5.

If an intervenor indicates an interest in groups apart or unrelated to that sought by the petition, it should be advised to file a separate petition, in which event the normal 30-percent showing of interest will be required.

If the hearing officer has any substantial doubt as to the propriety of permitting intervention by any person or labor organization, he/she should recess the hearing for a time sufficient to enable him/her to resolve the doubt. If such questions are not susceptible of prompt determination, the hearing officer should permit intervention for the time being, making it clear, however, that a final decision is being reserved.

If the hearing officer permits intervention and the Intervenor raises an issue with respect to the lack of receipt of the NOH at least 5 working days prior to the hearing, the hearing officer should consult the Regional Office. See discussion of *Croft Metals, Inc.*, 337 NLRB No. 106 (2002), supra, in Section I, B, Hearing Preparation.

5. Commerce/Jurisdiction

Possibilities of a stipulation of commerce facts should be explored off the record. If attained, the stipulation should be put on record; if not, testimony with respect to commerce and other aspects relevant to the Board's exercise of jurisdiction must be taken. Even when there is a stipulation that the Board's discretionary gross volume standards are met, there must be included sufficient data on actual inflow and outflow to establish de minimis statutory jurisdiction.

Will the employer please state its full and correct name for the record? (Is "Company" spelled out? Is "Incorporated" spelled out?)

If necessary: **Are there any objections to having the petition and other formal papers amended so that the name of the employer will correctly appear in the captions thereon as _____?**

Hearing no objection, the amendment is allowed.

After reading the stipulation prepared in advance or worked out off the record as to the business of the Employer:

Can it be stipulated that the Employer is engaged in commerce within the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board and that the commerce facts are as follows:

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

For questions to develop the record concerning commerce/jurisdiction, joint or single employer or successor employer issues, see Section IV.

6. Labor organization

The possibility of a stipulation that the unions involved are labor organizations within the meaning of Section 2(5) of the Act should be discussed off the record. If attained, the stipulation should be put on the record.

- M. _____, is the correct and complete name of the (Petitioner) that which appears on the petition filed in this case, _____?
- If necessary: Are there any objections to having the petition and other formal papers amended so that the name of the (Petitioner) will correctly appear in the captions thereon as _____?**
- Hearing no objection, the amendment is allowed.**

Can it be stipulated that the Petitioner herein, _____, is a labor organization within the meaning of the National Labor Relations Act, as amended?

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

Obtain the same stipulation for any Intervenor.

If no stipulation is obtained, the testimony of someone, such as a union representative, is required to establish that the organization is one in which employees participate and which “exists in whole or in part” for the purpose of representing employees with respect to their wages, hours and working conditions. For questions to develop the record concerning labor organization status, see Section IV, D, Status as a Labor Organization, *infra*.

7. Issues and burdens of proof

Will the parties please identify the issues for hearing and their positions on each issue?

Employer?

Petitioner?

Intervenor?

If the issue involves a presumption under Board law, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., single facility unit) involves a presumption under Board law and the burden lies with the party seeking to rebut the presumption. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

If the issue involves statutory exclusions, such as Section 2(11) supervisory status or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., supervisory status) involves a statutory exclusion and the party seeking to exclude employees on this basis bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

8. Disclaimers

If a labor organization at the hearing seeks to disclaim interest in representing the employees, the disclaimer should be in writing or on the record. The hearing officer should ask the parties whether they possess any evidence that the disclaiming labor organization has or is engaged in any conduct inconsistent with its disclaimer.

9. History of collective bargaining

Explore off-the-record the possibilities of a stipulation regarding any history of collective bargaining involving the unit in question, other organizational attempts that resulted in petitions being filed with the Agency and the identity of any union involved. If there is a collective bargaining history, obtain details about the nature and origin of that relationship and include those facts in any stipulation, e.g. voluntary recognition, Board-certified unit, prior Board proceedings involving the employer, 8(f) versus 9(a) recognition, multiemployer units or preexisting non-conforming health care units. If attained, the stipulation should be put on record. If there has been no history of bargaining, the record should reflect that fact. If a stipulation is not received, the history should be developed through witnesses or, if none are available, through statements of counsel. Existing and prior contracts that relate to all or part of the petitioned-for unit should be introduced into the record.

For questions to develop the record on bargaining history see Section IV, E, History of Collective Bargaining.

10. Cases pending in other Regions

The following question should be asked in all cases concerning petitions pending in other Regions, unless the facts adduced thus far in the hearing indicate that the question is unnecessary.

Are there any petitions pending in other Regional offices involving other facilities of the Employer?

M. _____, on behalf of the Petitioner?

M. _____, on behalf of the Company?

M. _____, on behalf of the Intervenor?

If an affirmative response is received, the hearing officer should inquire further in order to determine the impact, if any, on the present proceeding.

11. Bars to conduct of an election

On the basis of the information obtained concerning the bargaining history of the employees sought by the petition, inquiry can be directed to circumstances which might constitute a bar to the petition. Information concerning prior elections or recognition will be disclosed. The positions of the parties on possible contract bars to the petition should be obtained:

Do any of the parties contend that there is a contract bar to an election in this case?

M. _____, what is the position of the Employer?

M. _____, what is the position of the Petitioner?

M. _____, what is the position of the Intervenor?

If the parties agree that there is no bar, obtain the following stipulation:

Can it be stipulated that there is no contract or other bar in existence that would preclude the processing of this petition?

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (*if necessary*)

The stipulation is received.

If not already in the record, a copy of the contract should be placed in evidence. Develop record by way of testimony. For questions to develop the record on issues of contract or recognition bar, other types of agreements raised as bars, labor organization schism or defunctness and merger, see Section IV.

12. Appropriate unit

Read into the record the unit as described in the (amended) petition. Obtain a clear statement on the record reflecting the exact positions of the parties with respect to the appropriate unit. The petitioner may request and should be allowed to amend the petition to reflect changes in its unit contention. If necessary, recheck the showing of interest, off the record, if the Petitioner enlarges its requested unit.

Off the record, determine the disputed and agreed-on inclusions and exclusions. Explore the possibilities of a stipulation covering the scope of the unit, as well as any agreement on the composition. If attained, stipulations should be put on the record. If a stipulation is obtained with respect to the full unit, propose the following:

Can it be stipulated that a bargaining unit that includes _____ and excludes _____ is appropriate for the purposes of collective bargaining?

Read from the Petition or the off-the-record discussion notes of the unit.

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

If a stipulation is obtained only with respect to part of the unit, with the remainder of the unit being in issue, propose the following stipulation:

Can it be stipulated that any unit found appropriate by the Regional Director should include _____ and exclude _____?

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

Sample supervisor stipulation language:

Can it be stipulated that _____ is a supervisor within the meaning of Section 2(11) of the Act and as such possesses and exercises one or more of the following authorities: to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; utilizes independent judgment in exercising such authority; and, therefore, should be excluded from the bargaining unit?

M. _____, can you so stipulate for the Employer?

M. _____, can you so stipulate for the Petitioner?

M. _____, can you so stipulate for the Intervenor?

The stipulation is received.

Ascertain the following on the record:

(a) How many employees are employed at the facility?

(b) Which classifications do the parties seek to include; how many employees are in each classification?

(c) Which classifications do the parties seek to exclude; how many employees are in each excluded classification?

When possible, secure the number of employees in each classification at

the facility.

When stipulations are not received, take testimony and evidence with respect to unit scope and composition. Introduce a list, usually from the employer, of classifications and the number of employees in each unit, or alternatively, obtain oral testimony about these matters.

(d) Call an official of the employer familiar with the employer's operations, swear him/her in, then develop testimony to show, where relevant:

- (1) Products of the employer.
- (2) Supervisory or management hierarchy, including specific titles.
- (3) Departmental or divisional groupings of operations and the supervisors of each.
- (4) Physical arrangements of operations. If possible, a blueprint or schematic drawing of the facility should be introduced as an exhibit.
- (5) Operations and flow of product from department to department or job to job.
- (6) Number of buildings and distance between them.

For questions on developing the record for various types of units and employees' status and category issues, see Sections IV through VIII.

13. Framing issues

Frame the remaining issue(s) on the record. Have the parties agree on the issues for litigation.

It is my understanding that the issue(s) to be litigated today are _____
_____(e.g., the supervisory status of Mr. John Wayne, whether the quality control employees have a community of interest with the plant employees, single versus multi-location unit, etc.)

Are there any other issues of which I am not aware?

If no response, proceed to 14, Presentation of Evidence. If there is a response, let the parties state their positions on that issue, then proceed to 14, Presentation of Evidence.

14. Presentation of evidence

Generally the employer should begin, but the hearing officer can use his/her own judgment and have the parties present their evidence in whatever order makes the most sense. Ordinarily, a witness should be presented to testify about the overall structure of the Employer's operations and organization.

Employer, please present your first witness.
(Employer calls first witness.)

Stand and Swear in each witness: **Please raise your right hand. Do you**

solemnly swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

If the witness objects to swearing in the indicated fashion, ask the witness:
Do you solemnly affirm that you will testify truthfully at this hearing?

Swearing in an Interpreter: **Please raise your right hand. Do you solemnly swear that you are fluent in both English and _____ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to _____ (foreign language) and from _____ (foreign language) to English when called upon to do so during the hearing, so help you God?**

If the Interpreter objects to swearing in the indicated fashion, ask:
Do you solemnly affirm that you will translate truthfully at this hearing?

Ask the witness: **Please state your name and spell it for the record.**

(After Employer has rested, proceed to the next party)

Petitioner, you may call your first witness.

(After Petitioner has rested, proceed to the next party, if any)

Intervenor, you may call your first witness. (If necessary)

15. Completing the record

- (a) Summarize on the record those issues that the parties resolved during the course of the hearing.
- (b) Obtain on the record the exact final position of the parties regarding unit contentions, inclusions or exclusions or remaining issues raised during the hearing.
- (c) Recap on the record (1) the total number of employees in the unit sought, as well as any alternate unit, and (2) the total number of employees in each disputed category.
- (d) If you have not done so already, evaluate the showing of interest with respect to changes in the unit contentions and revise the Report on Investigation of Interest (Form NLRB-4069) accordingly.
- (e) Inquire if the labor organizations wish to proceed to an election in any alternate unit if the unit sought is found to be inappropriate by the Regional Director or the Board.
- (f) Inquire of the parties whether there are any further witnesses or evidence which they wish to present.
- (g) Rule on outstanding motions and receive or reject outstanding stipulations.
- (h) Inquire of court reporter as to estimated length of transcript.
- (i) Review notes to ensure that all issues, evidence and positions are covered.

(j) When appropriate, seek on the record a waiver of briefs. Provide parties the opportunity for oral argument in lieu of briefs. CHM Section 11242. If a waiver cannot be obtained, set time for briefs on the record. Except where good cause is shown, briefs are due within 7 days after the close of the hearing. See Section 102.67(a), Rules and Regulations and CHM Section 11244.2.

Make the following statement regarding ordering the transcript:

The parties are reminded that they should request an expedited copy of the transcript from the court reporter. If you fail to do so, late receipt of the transcript will not be grounds for an extension of time to file briefs.

16. Adjournment and closing

Adjournment:

If the hearing has not been completed but is being adjourned, the hearing officer should state:

If there is nothing further, the hearing will be adjourned to _____ (indefinitely).

Closing:

Before closing, review the **Closing Checklist**:

- (a) Be certain reporter has all exhibits.
- (b) Obtain estimate of number of pages of transcript from reporter, complete obligation document and provide it to the Regional Office.
- (c) Ensure appearance sheet (Form NLRB-1801) is correct and legible.
- (d) Complete Close of R Case Hearing Form NLRB-856.

When the hearing has been completed, the hearing officer should state:

If there is nothing further, the hearing will be closed.

Absent response:

The hearing is now closed.

When the hearing is being closed except for the subsequent receipt of an exhibit, the "closing" statement should be appropriately revised. CHM Section 11224.6.

Section 8(b)(7)(C) cases:

When the hearing has been completed, the hearing officer should state:

**This is a proceeding pursuant to Section 8(b)(7)(C) of the Act:
Therefore, the parties shall not file briefs without special permission
of the Regional Director but may state their respective positions fully
on the record prior to the closing of this hearing. Will each party
state his/her position at this time?
Employer . . . Petitioner . . . Intervenor.
The hearing is now closed.**

After the hearing has closed, the hearing officer should complete a Hearing Officer's Report. CHM Sections 11250–11252.

B. Subpoenas

The hearing officer should provide subpoenas to any party making a written request after the opening of the hearing. The parties may have been provided with some subpoenas by the Regional Office prior to the hearing. Pursuant to Section 11(1) of the Act, such issuance is automatic, upon request. The case name and number should be filled in before the subpoena is issued. Subpoenas are available to the parties subject to the standards set out in Section 102.66(c), Rules and Regulations.

If a party requests a large number of subpoenas, the hearing officer should ensure that the requestor's intention to subpoena a large number of witnesses does not conflict with the need for a concise as well as complete record and that the scheduling of necessary witnesses reasonably accommodates the need of the employer to avoid disruption of its operations. If a party appears to be engaging in en masse subpoenaing of witnesses as a harassment device, the hearing officer should inform the affected party to bring this concern to the attention of the Regional Director and request appropriate relief. *Rolligon Corp.*, 254 NLRB 22 (1981).

Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry. *Perdue Farms*, 323 NLRB 345, 348 (1997) (the information need only be 'reasonably relevant').

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph or by leaving a copy at the principal office or place of business of the person required to be served. See Section 102.113(c) and (e), Rules and Regulations. *Best Western City View Motor Inn*, 327 NLRB 468 (1999) (the attorney's affirmation of service is sufficient, without the postal return receipt card). The date of service is the day that the subpoena is deposited in the mail or with a private delivery service that will provide a record showing the date it was tendered to the delivery service or is delivered in person. See Section 102.112, Rules and Regulations.

1. Petitions to Revoke

Pursuant to Section 102.66(c), Rules and Regulations, parties may seek to revoke

subpoenas either in whole or in part. Petitions to revoke should be in writing and filed within 5 days after the date of service of the subpoena (also called the "5 day rule"). The date of service for the purposes of computing the time for filing a petition to revoke is the date the subpoena is *received*. See Section 102.112, Rules and Regulations. However, there are times when petitions to revoke are submitted orally to the hearing officer or the petition to revoke may not be timely filed. Even if the petition to revoke does not explicitly comply with the Rules and Regulations, the hearing officer should rule on the substance of the petition to revoke.

To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995). This rule applies to both subpoenas ad testificandum and duces tecum.

The hearing officer must rule on petitions to revoke that are filed after the hearing opens. If the petition to revoke is submitted to the Regional Director prior to the opening of the hearing, the Regional Director may rule on the petition or refer it to the hearing officer for ruling. At the commencement of the hearing, the hearing officer may immediately be faced with a petition to revoke and may be asked for a ruling without the benefit of testimony. The hearing officer may defer ruling until later in the proceeding when it becomes more apparent whether the subpoenaed information is necessary.

Some of the most common reasons for revocation of subpoenas are:

(1) relevancy and materiality: the hearing officer must determine if and how the evidence sought will aid in completing the record. The hearing officer should require that the parties discuss the relevancy of the subpoenaed documents. The hearing officer should secure the parties' positions to see if there is room for compromise and an alternate source of information that may be satisfactory.

(2) burdensome and oppressive: a party may assert that accumulating documents is too difficult or the number of documents is too voluminous. However, it may be possible to narrow the request and eliminate the basis for the objection. This should be explored by the hearing officer.

(3) confidentiality: the subpoenaed party may contend that the documents to be produced are confidential because, for example, they contain confidential employee information, such as social security numbers, or because the subpoena seeks proprietary information. Where confidentiality is asserted, the hearing officer may wish to consider the motion to quash only after an in camera inspection. Such an inspection allows the hearing officer to inspect the documents privately, apart from the involved parties, to determine whether the material is relevant, privileged or not producible for other reasons and whether portions of the documents may be redacted to satisfy confidentiality concerns.

(4) failure to tender the appropriate witness fees: if a witness fee was not served with the subpoena, the subpoena is invalid and must be re-served with the

appropriate witness fee.

(5) proprietary information, such as production figures and profit and loss statements: the hearing officer may be faced with a claim that wage-related information is proprietary and confidential and not producible.

In sum, as noted above, if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection. The hearing officer should also look for areas of compromise, e.g., redaction of certain information or narrowing the scope of the subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed.

Whenever the hearing officer rules on a petition to revoke, his/her rulings and the basis therefor should be clear and on the record, i.e., refer to each item in the subpoena and explain the decision to require production in whole or in part. If a hearing officer rules that some portions of the subpoenaed documents are not producible because, for example, they are irrelevant or because they seek confidential information, he/she should grant the petition to revoke with respect to those portions of the subpoena and explain the basis for the ruling. The hearing officer may also choose to reserve ruling on all or part of the petition to revoke the subpoena until after hearing some testimony, in order to determine whether the subpoenaed information is necessary for a determination of the issues. On occasion, continuation of the hearing, even with an outstanding petition to revoke, may resolve the issue because sufficient testimony is secured and the subpoenaing party is satisfied that production of the documents is no longer necessary. Where there continues to be a dispute about the subpoenaed documents, the subpoena, petition to revoke, the parties' positions and the hearing officer's ruling should be placed on a separate subpoena record. See Section 2, Subpoena Record, below.

2. Subpoena Record

When there is an ongoing dispute regarding the production of subpoenaed documents, a separate subpoena record should be established. To make a subpoena record, the hearing officer should inform the court reporter to stop the proceeding and begin a new transcript for the subpoena record. The subpoena record should include:

- (1) a separate copy of the formal papers;
- (2) a copy of the subpoena at issue;
- (3) proof of service; and
- (4) any written petitions to revoke the subpoena. If there are any written rulings on the petition to revoke, those documents should be included in a Board exhibit. On the record, the hearing officer should indicate the purpose of the proceeding, that a subpoena has been properly served and that the subpoenaed party is refusing to comply with the subpoena. All parties should state their respective positions regarding the subpoenaed documents and the hearing officer's ruling should be made on the record.

The purpose of a subpoena record is to have a concise record of the dispute for the Regional Director and the Board.

3. Subpoena Enforcement

Section 102.31(d), Rules and Regulations, requires the Regional Director to institute enforcement proceedings “unless in the judgment of the [Regional Director] the enforcement of such subpoena would be inconsistent with law and with the policies of the Act.” Thus, upon the failure of any person to comply with a subpoena issued and upon the request of the subpoenaing party for enforcement proceedings, the hearing officer should advise Regional management of the enforcement request. After consultation with the hearing officer, the Regional Director will decide whether the subpoenaed documents are necessary for a determination of the issues. If the Regional Director determines that the subpoenaed documents are necessary, then, upon the request of a party, the General Counsel, “shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for enforcement of the subpoena.” The Region should prepare the enforcement papers, but is not a party to the proceeding and does not assume responsibility for prosecution of the enforcement proceedings. See Section 102.31(d), Rules and Regulations. *Best Western City View Motor Inn*, 325 NLRB 1186 (1998).

4. Contempt of Enforced Subpoena

If a district court orders compliance with the subpoena and the subpoenaed party continues to refuse to produce documents or to appear for testimony, then, upon request of the party on whose behalf the subpoena was issued, the Regional Director must institute contempt proceedings in U.S. District Court. However, contempt proceedings need not be instituted by the Regional Director, absent a request by the party on whose behalf the subpoena was issued. The Regional Director is under no obligation to institute contempt proceedings sua sponte and need only do so upon request of the subpoenaing party. *Best Western City View Motor Inn*, 325 NLRB 1186 (1998). Conversely, the party refusing to comply with the subpoena may be precluded from introducing secondary evidence on the matters covered by the dishonored subpoena. In such cases, the hearing officer should permit a brief offer of proof.

5. *Tropicana* Subpoenas

Where an employer has refused to cooperate in obtaining commerce information, the Regional Director should issue a subpoena. *Tropicana Products*, 122 NLRB 121 (1958). In order to establish a proper basis for utilization of the *Tropicana* rule, the Regional Director should subpoena commerce information prior to the hearing whenever the employer has refused to furnish such information or has indicated that it will not voluntarily do so at the hearing. (See sample *Tropicana* subpoena language in Appendix D)

If an employer fails or refuses to comply with a *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the employer is engaged in more than de minimis interstate commerce, rather than seek enforcement of the *Tropicana* subpoena. See Section IV, A, Jurisdiction, for examples of appropriate secondary evidence.

C. Witnesses

1. Oath

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. On recall, a witness need not be sworn again but should be asked to signify that he/she understands that he/she is still under oath.

2. Witness' Refusal to Answer Questions

If a witness refuses to answer a question that the hearing officer deems to be proper, the hearing officer can exercise his/her discretion to strike all testimony previously given by the witness on related matters. However, if a motion to strike a witness' testimony is made for a reason other than a refusal to answer, it should not be granted. Section II, G, 5, Motions to Strike.

If a witness appears under subpoena but refuses to answer questions, it is as if the witness did not appear at all. Accordingly, subpoena enforcement proceedings may be appropriate, where requested by the subpoenaing party. Section II, B, 3, Subpoena Enforcement. Under those circumstances, the district court judge should be notified that the subpoenaing party seeks an order compelling the witness to testify.

One way to avoid subpoena enforcement proceedings is to ask the subpoenaing party to wait until the end of the hearing to evaluate whether the subpoenaed witness remains necessary. The subpoenaing party may find, at the close of the hearing, that there is sufficient record testimony in support of its position and there is no longer a need for the subpoenaed witness to testify. Thus, when faced with a request by a party to institute enforcement proceedings, the hearing officer should recommend to that party to await the completion of testimony and evaluate the need for the subpoenaed witness at that time. Note and advise the parties that a request for subpoena enforcement must be made before the record closes.

3. Failure to Appear

If a subpoenaed witness fails to appear at the hearing and the Regional Director or the hearing officer believes that a decision cannot be made in the absence of that witness' testimony, the Regional Director may consider subpoena enforcement upon the request of the subpoenaing party. However, that process can be lengthy and the Regional Director may decide that, in order to avoid a protracted proceeding, he/she should decide the case without the subpoenaed witness, if at all possible. The hearing officer or the Regional Director may also decide to call other witnesses instead of instituting subpoena enforcement proceedings.

4. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of other witnesses. Sequestration is a matter of right only in C cases, not in R cases. *Hamilton Nursing Home*, 270 NLRB 1357 (1984); *Fall River Savings Bank*, 246 NLRB 831 fn.4 (1979) (R cases hearings are not adversarial). In preelection R cases, sequestration of witnesses is not appropriate because the proceeding is non-adversarial in character and credibility questions are not resolved by the hearing officer. A hearing officer should not grant a motion to sequester witnesses in a preelection hearing. For sequestration in a postelection hearing, see Section IX F 6.

5. Hostile or Adverse Witnesses - Section 611(c) Witnesses

A witness who is either hostile or has interests adverse to the calling party may be asked leading questions and is subject to cross-examination by the party that called the witness. Under FRE 611(c), a witness is considered a hostile or adverse witness when that witness' relationship to the opposing party is such that his or her testimony may be adverse to that party. On rare occasions, FRE 611(c) may arise in a pre or postelection case. A foundation should be laid to establish that the witness falls within the parameters for invoking FRE 611(c). If a dispute arises regarding use of FRE 611(c) examination, seek guidance from Regional Office management.

D. Foreign Language Witnesses

Although non-English speaking witnesses have always appeared in the processing of representation cases, they now appear with greater frequency. Therefore, during the initial investigation of a representation case, the assigned agent should be alert to any potential foreign language issue and should inform the parties to apprise the Regional Office promptly of a need for interpreter services. The hearing officer should also be aware of the potential need for foreign language witnesses and should ensure that appropriate arrangements are made in order to avoid unnecessary expense or delay. In the event foreign language witnesses are required, the Regional Office must secure and pay for certified interpreter services. *Solar International Shipping Agency*, 327 NLRB 369 (1998).

The Agency's limited budget is always a concern in regard to the expenses related to processing representation cases, particularly at hearings. Board agents should take all reasonable steps to reduce costs, including interpreter costs. With respect to interpreter costs, the hearing officer should exclude irrelevant and repetitious material from the record. Also, in those circumstances where it is unclear whether a witness' testimony would be relevant or necessary and the witness would require a translator if called to testify, it may be appropriate for the hearing officer to request that the party which intends to call the non-English speaking witness identify, either through a formal offer of proof or any other method satisfactory to the hearing officer, the nature of the testimony

to be given by the witness. The hearing officer would then be able to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and assist the hearing officer with his/her decision regarding the need for the witness and an interpreter.

When swearing an interpreter, use the following oath:

Please raise your right hand. Do you solemnly swear that you are fluent in both English and _____ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to _____ (foreign language) and from _____ (foreign language) to English when called upon to do so during the hearing, so help you God?

E. Nonlitigable Issues

1. Matters which would constitute unfair labor practices, except for the legality of a clause in a contract urged as a bar, such as a union security clause. No extrinsic evidence should be introduced.
2. Showing of interest: if evidence of fraud is sought to be introduced at the hearing, the party desiring to present such evidence should be advised on the record to bring it administratively to the attention of the Regional Director within 5 working days; hearing should not be interrupted. CHM 11028.3

If there is an allegation of supervisory solicitation of the cards or the Petitioner is alleged to be a supervisor, it may be necessary to litigate supervisory status. With respect to the solicitation of cards, litigation is only necessary if the number of cards solicited by the alleged supervisor is sufficient to affect the adequacy of the showing of interest. The actions or activities of the card solicitor are not litigable at a preelection hearing.

3. Matters concerning internal union affairs, except in relation to schism, merger or defunctness issues.
4. Compliance with reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 or alleged violations of statutes other than the National Labor Relations Act.
5. The Region's investigation of a petition.
6. Enforcement of a subpoena (as opposed to ruling on the relevancy of materials sought by the subpoena and/or a petition to revoke a subpoena).
7. Evidence sought to be introduced to bar the issuance of a certification concerning a labor organization's discrimination in admission to membership because of race, immigration status, age, sex or national origin.

8. Requests to proceed.
9. Evidence with respect to the appropriateness of any *substantially different bargaining unit sought by a union* if that union has not submitted a petitioner's 30-percent showing of interest in that unit. *General Dynamics Corp.*, 175 NLRB 1035 (1969). Evidence as to a somewhat different unit may be taken.
10. Failure to comply with notice requirements of Section 8(d) of the Act.
11. Employer's objective considerations in RM cases.
12. Voting eligibility of strikers and strike replacements are not generally litigated at a preelection hearing. They are more commonly disposed of through challenged ballot procedures.
13. Mechanics of the election, including date, time, place of the election, or whether the election should be conducted by mail or manually.
14. Immigration status: pursuant to GC Memorandum 02-06, any party raising an employee's immigration status at a representation case hearing, either pre- or post-election, should not be permitted to adduce any evidence on this issue. The Board has held that an employee's immigration status has no impact on that employee's right to vote. *Intersweet, Inc.*, 321 NLRB 1, 17, fn. 68 (1996); *County Window Cleaning*, 328 NLRB 190 (1999) (challenge to a ballot overruled based on immigration status). Accordingly, hearing officers should not permit any testimony on this issue.

Although the issues listed above are not litigable, the hearing officer may permit brief offers of proof on the record, indicating the evidence a party would present. The offer of proof may also be in writing and can be placed in the record as an exhibit. The hearing officer should receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

F. Conduct of Representatives

The Board expects that the parties will conduct themselves in a professional manner at hearings. If a party at a hearing engages in misconduct, the hearing officer should request that the party conduct him or her self in an acceptable manner. If the party persists in misconduct, the hearing officer should remind him or her of the potential consequences, including sanctions, which could result from such behavior.

The Board's rules provide for two sanctions that can be applied to parties who engage in misconduct at hearings. Those sanctions are exclusion from the hearing and suspension or disbarment from further practice before the Board. The conduct of the party must be of an aggravated nature to justify the latter sanction. In addition to those

two sanctions, the Board has sometimes issued a note of censure or condemnation for less serious misconduct. Section 102.177, Rules and Regulations and OM 94–6, OM 97–2 and OM 01–80; *In re: Stuart Bochner*, 322 NLRB 1096 (1997); *In re: Joel I. Keiler*, 316 NLRB 763 (1995).

For the hearing officer, the sanction of exclusion from the hearing is one that may be invoked, due to a party's misconduct. Misconduct which could cause a hearing officer to invoke this sanction would include violence or threats of violence; subornation of perjury; or using rude, vulgar and/or profane language, if egregious. Before invoking the exclusion sanction, the hearing officer should discuss the matter with Regional Office management, as serious due process concerns are raised in this circumstance.

G. Motions at Hearing

1. Adjournments or postponements

It is the General Counsel's policy that hearings be conducted on consecutive days, wherever possible. If a party requests a postponement at some point during the hearing, authority to grant such a request rests with the hearing officer. The hearing officer should insist upon an adequate basis for any adjournment request prior to ruling on the request. However, since the parties were advised prior to the hearing that it would continue on consecutive days until completion (CHM Sections 11008, 11009.2(g), 11082.3, and 11143), such a request should rarely be granted and only under the most compelling circumstances. Therefore, when faced with a postponement request, the hearing officer should grant the request only on a showing of exceptional need. The hearing officer should reconcile two important policies—the prompt processing of R cases under the Act (CHM Sections 11000 and 11740) and the need for a complete and concise record (CHM Section 11188.1). Unwarranted delay should be avoided and, when possible, the hearing should proceed on those issues where progress is possible. Adjournments or postponements should be with the provision that the hearing will continue on consecutive days thereafter until completed. In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

However, if the hearing officer grants an adjournment at his/her discretion, he/she may adjourn to a specific later date or a different place. In so doing, he/she should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption.

The hearing officer should check with the Regional Office prior to granting any postponement, or any adjournment, unless it is routine (e.g., to continue the hearing on another day). If a party is requesting a postponement based on the failure to receive the NOH at least 5 working days prior to the hearing, the hearing officer should check with the Regional Office prior to ruling on the motion. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002).

If during the hearing the hearing officer concludes that a question concerning representation does not exist, he/she should recess the hearing and present the facts to the Regional Director.

2. Consent/stipulated election agreement

When a consent/stipulated election agreement is entered into after the hearing commences, the hearing officer should adjourn indefinitely. Approval of the agreement by the Regional Director constitutes withdrawal of the notice of hearing.

3. Amendment or filing of petition

(a) Motion to amend petition.

A petitioner may amend its unit at any time before the close of the hearing in the form of an alternative request. The petition will not be dismissed in the absence of prejudice to any party and if there is an adequate showing of interest in the new unit. Obtain the parties' positions concerning the amendment and, if possible, obtain consent to the motion. If a party is opposed, obtain the reasons for its opposition. In ruling on a motion to amend and whether an adjournment is appropriate, consider the following:

- (1) Completeness of record and timing of the amendment request.
- (2) Adequacy of notice and opportunity to prepare for hearing, including the availability of necessary witnesses and/or evidence.
- (3) Adequacy of showing of interest. All discussions of adequacy of showing of interest must take place off the record. If the Petitioner does not have an adequate showing in the amended unit, so advise the Petitioner off the record.

If the amendment sought is substantial, e.g., a material enlargement or a change in the scope of the unit, exercise the greatest care to see that the granting of the amendment and proceeding with the hearing will cause no prejudice to any interested persons or organizations. If an amendment to the petition and an adjournment request are granted, the adjournment should be to a specific date with the provision that the hearing will continue on consecutive days thereafter until completed.

(b) Filing of petition at hearing.

The hearing officer may accept a petition at the hearing for overlapping units if he/she believes it should be heard simultaneously with the pending petition. Should the hearing officer accept the petition, he/she should:

- (1) Adjourn for a short time.
- (2) Communicate with the Regional Office and inform it of the new filing.
- (3) Get a new docket number.
- (4) Advise the Regional Office of the parties' positions on consolidation and continuance.

On resumption of the hearing, the hearing officer should, if the Regional Director has decided on consolidation:

- (1) Introduce the new petition into the record.
- (2) State on the record the Regional Director's rulings, introducing the amended notice of hearing and order of consolidation, when possible, but when not, reserving exhibit numbers for later introduction of these documents.
- (3) Order a continuance when necessary.

4. Withdrawal or dismissal of petition

(a) Motion to withdraw before hearing.

- (1) Do not open hearing.
- (2) Reduce request to writing.
- (3) Contact Regional Director for approval.

(b) Motion to withdraw during hearing.

- (1) Require that motion be made on record or in writing and introduce in evidence.
- (2) Continue hearing indefinitely.
- (3) Contact Regional Director for approval.

(c) Motions to withdraw during adjournment of hearing.

- (1) Get approval of Regional Director.
- (2) Hearing need not be reopened.

(d) Motion to dismiss made at hearing: all such motions must be referred on the record to the Regional Director or the Board for ruling at such time as the record is considered by them. See Section 102.65(a), Rules and Regulations.

5. Motions to Strike

A party may submit a motion to strike testimony during a hearing. Section 611(a) of the Rules of Evidence provides authority for striking direct-examination testimony where the witness was nonresponsive on cross-examination. Motions to strike also may be based on incompetent testimony or answers to questions that are opinions rather than facts. In a preelection hearing, except under the limited circumstances described in Section II, C, 2, Witness' Failure to Answer Questions, the hearing officer should deny a motion to strike and advise the objecting party that the Regional Director and the Board will give the testimony the appropriate weight.

H. Appeals From Rulings

A request for special permission to appeal to the Regional Director or the Board a

ruling by the hearing officer on motions, objections and orders should be made promptly and in writing. A copy must be served on the Regional Director and the other parties. Section 102.65(c), Rules and Regulations. The other parties should be given an opportunity to respond to the special appeal.

The request should set forth the ruling, the reasons special permission should be granted and the grounds relied on for the appeal, including the prejudice that resulted from the ruling.

The hearing officer should recess the hearing long enough for the preparation of the request. The hearing officer is not required to recess the hearing immediately; the special appeal may be prepared at an appropriate breaktime. After the request has been prepared and submitted, the hearing should be resumed, even though the Regional Director or the Board has not passed on the request. Once all evidence is received (other than the issues raised by the special appeal), the hearing should be closed whether or not the Regional Director or the Board has ruled on the special appeal. After ruling on the special appeal, the Regional Director or the Board will take further action as is appropriate.

III. EVIDENTIARY MATTERS

Representation case hearings are investigatory proceedings. Although it is not required that the rules of evidence and trial procedure be strictly followed, they serve as a guide for helping the hearing officer make a sound record. See Section 102.66(a), Rules and Regulations. The most common objections to evidence are based upon relevance, materiality and hearsay. These issues and other evidentiary matters are discussed below.

A. Objections: Considerations in Ruling on Common Objections

Hearing officers are frequently faced with objections to oral testimony, a line of questioning, types of questions (e.g., leading questions, beyond the scope of direct examination, hearsay, etc.) and documentary evidence. When an objection is raised, the hearing officer should ask the basis for the objection. The other parties' positions should be solicited and the hearing officer should render a clear ruling on the record (either overruled or sustained) together with a brief statement of the basis for the ruling. The hearing officer should permit the party adversely affected by the ruling to make an offer of proof, if requested (see Section 9, Offers of Proof). Any documentary evidence which is ruled inadmissible may be placed in a rejected exhibit file.

1. Foundation

Before a witness testifies on a subject, the record should reflect the basis for his or her knowledge. The basis of the witness' knowledge goes to the competency of that witness to testify about a particular subject. The competency of the witness to testify goes to the weight given that testimony, not to its admissibility. For example, if a witness testifies about the job duties of employees in a specific classification, the record should clearly establish how the witness obtained the information. Does the witness supervise these employees? Is the witness employed in the job classification being discussed? Is the witness at the facility on a regular basis? When, where, what time and who was present are the types of preliminary fact questions which should be asked to establish the witness' ability and competency to testify. Foundation questions also may help determine if the testimony is going to be relevant. If a witness does not have personal knowledge of facts that are in issue, the hearing officer should ask the party presenting that witness whether a more competent witness is available to testify. Thus, hearing officers, while listening to the testimony, should interrupt where it is not probative. In extreme cases, where a party insists on further questioning of an incompetent witness, the hearing officer should ask for an offer of proof. See Section B, 8, Offers of Proof.

2. Relevancy

Evidence is relevant if it has a tendency to make more or less probable a fact of importance to the issue under consideration. FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration, it should be admitted; if not, it

should be excluded. Relevancy is a factor not only to oral testimony, but also documentary evidence.

Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to an exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues for hearing. If the hearing officer determines that the documents are not relevant and should be excluded, the offering party may request that they be placed in the rejected exhibits file. Section III, C, Rejected Exhibits. If voluminous documents are offered, the hearing officer should require the offering party to provide a full description and to designate with specificity the portions being relied on. Before ruling on admissibility, the hearing officer should request parties to analyze, preferably on the record, any documents offered; often, thereafter, there is no need to admit the documents. Additionally, the hearing officer should request that the parties submit a summary in lieu of voluminous documents. Section III, B, 6, Summaries.

3. Materiality

Materiality is related to relevance but is not identical. Materiality relates to the degree of importance of the evidence. If the evidence is relevant but of miniscule importance, it may be excluded.

4. Hearsay (FRE 801–807)

Hearsay is a statement (oral or written or nonverbal conduct) other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. This usually arises in the context of a witness testifying about what someone else told him (e.g., “Joe told me he never works in the warehouse”). If the testimony were being offered to prove the truth of what is asserted—that Joe never works in the warehouse—this would be hearsay. The witness has no direct knowledge of the fact and the declarant, Joe, a non-party, is not on the stand to be cross-examined about the matter. Similarly, a document may be excluded from evidence as hearsay if it is intended by the person as an assertion of truth of the matter asserted in the document.

The following are *not* hearsay:

- (1) Prior inconsistent statements of the witness made under oath and now being cross-examined;
- (2) Consistent prior statements offered to rebut assertions that the statement has been fabricated;
- (3) Statements which identify a person;
- (4) Admissions of a party or its agents (if made during and relating to the agent's employment) and admissions adopted by a party. For example:

“My supervisor told me that Joe never works in the warehouse.” This is an admission by an agent of a party and is not hearsay. Such testimony can be received to prove the truth of the matter asserted.

Most common exceptions to the hearsay rule that the hearing officer will encounter during a hearing are:

- (1) Commercial publications. FRE 803(17). For instance, Dun and Bradstreet reports and newspapers.
- (2) Public records. FRE 803 (8). For instance, Secretary of State documents, certificates of incorporation and court records. See Section III, B, 10, Official/Judicial Notice.
- (3) Business records and other records regularly kept (must present testimony by custodian or other qualified witness and establish that such records are regularly kept in the ordinary course of business and relate thereto). FRE 803 (6)

Note on Hearsay Evidence: Although there are many technical considerations about hearsay, it is important to remember that it may be received into evidence at an R case hearing, in the discretion of the hearing officer. However, hearsay will probably be accorded lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). The hearing officer should encourage parties to produce other witnesses or evidence that will be more probative of the point.

5. Leading Questions

A leading question is one in which the questioner suggests an answer to the witness by his question and merely receives agreement. In effect, the examiner is doing the testifying. If the proponent of a witness is asking leading questions in significant areas, the witness' responses will be of little assistance. If the hearing officer finds that the questioner is asking such questions as "do charge nurses direct the work of CNAs," make sure that on objection or on your own initiative, the questioner is cautioned not to use leading questions. If the record reflects answers to leading questions, it is likely that the testimony will lack specificity and the hearing officer must obtain specific examples on the record when a witness has answered such leading questions.

In most preelection circumstances, leading questions are acceptable in preliminary areas (e.g., "You are an employee of the Jones Co.?). However, try to avoid leading questions during direct examination in critical areas (e.g., "Isn't it correct that you have the authority to hire and fire?"). The value of the evidence is enhanced if the testimony provided is not an answer to a leading question. Leading questions on direct examination are permissible to refresh recollection of a witness who may have forgotten something (e.g., "Do you recall anything being said about a truck accident?"). During cross-examination, leading questions are permissible.

6. Common Objections

Here are some common objections raised in preelection hearings and some suggested responses by the hearing officer:

Objection to hearsay testimony:

- (a) Objection overruled. The testimony is not hearsay.
- (b) Objection overruled. The testimony falls within a hearsay exception (delineate the exception).
- (c) Objection overruled. This is not an adversarial proceeding where credibility is in issue and the reader of the record will accord whatever weight is appropriate to the testimony received.

Objection to documentary evidence as irrelevant:

- (a) Objection overruled. The document is relevant and the reader of the record will accord it whatever weight is appropriate.
- (b) Objection sustained. The document is irrelevant and may be placed in the rejected exhibit file.

Objections to leading questions or questions beyond scope of direct:

- (a) Objection overruled. The question is a preliminary or introductory question and thus a leading question is appropriate.
- (b) Objection sustained. Counsel is excessively leading the witness and it appears that counsel, not the witness, is testifying.
- (c) Objection overruled. This is not an adversarial proceeding and although the question goes beyond the scope of direct, I will allow the question in the interest of establishing a full and complete record.

B. Evidence Issues

1. Best Evidence

Where the contents of a document are in issue, the document is the best evidence available and should be produced. The hearing officer may allow oral testimony about the contents of the document, but should demand the document be produced and question the witness about the document. A copy of the original document is sufficient if there is no dispute about its authenticity or accuracy (i.e., a copy of a signed collective-bargaining agreement is sufficient). If a document is not available, secondary evidence should be admitted in lieu thereof.

2. Authentication (FRE 901 and 902)

If there is a question regarding the authenticity of a document, evidence should be obtained to verify that fact. The burden of proof for authenticating a document is slight. The person offering the document has that burden and usually establishes authenticity through a witness who can relate its origin (e.g., showing the letter to the witness, having

him/her identify it, establishing the basis for his/her knowledge about the letter). It is common practice to use a copy of the original when there is no dispute about the document's authenticity. This includes allowing the withdrawal of an original document so that a copy may be substituted in the record.

FRE 902 sets forth the type of documents which are self-authenticating. These include, but are not limited to, certified copies of domestic public documents and records, official publications, newspapers and periodicals.

3. Parole Evidence

Parole evidence is oral testimony of a witness offered to contradict or modify the terms of a written agreement. For instance, when the terms of a contract have been embodied in writing, like a collective bargaining agreement, evidence of contemporaneous or prior oral agreements is not admissible for the purpose of varying or contradicting the written contract. However, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining the correct interpretation of the agreement. *Don Lee Distributors*, 322 NLRB 470, 484–485 (1996).

4. Scope of Cross-examination Exceeds Direct Examination

Generally, in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. This has no application in R case hearings. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination.

5. Cumulative Testimony

Hearing officers should avoid permitting repetitious testimony on the record. If the hearing officer is satisfied that the record will not be enhanced by redundant evidence, it should be excluded. If the hearing officer finds that a party is eliciting testimony that is unduly repetitious, the hearing officer should ask for an offer of proof regarding the testimony. In such a case, the hearing officer may seek a stipulation that further witnesses would testify similarly. See Section III, B, 8, Offers of Proof. However, in a case involving close issues of fact, evidence that is corroborative and pertains to the issue in dispute is not repetitious testimony and should not be excluded. For example, where charge nurses' Section 2(11) status is in issue, testimony from various charge nurses regarding the scope of their duties would not be repetitious and should be admitted if each nurse works in a different area of the facility or on different shifts.

6. Summaries

Voluminous documents are frequently reduced to summary form for better understanding. On request, the opposing party is given the opportunity to examine the

underlying documentation on which the summary is based. FRE 1006. The examination may have to be done at periods of time outside normal hearing hours. The summary is typically received into evidence with the understanding that an objection will be entertained after examination of the underlying documents. In rare cases involving claims of privilege and when the parties agree to do so, the hearing officer may conduct an in camera inspection of the documents to confirm that the summary accurately reflects the underlying documents. If an in camera inspection is performed, the results should be noted on the record.

7. Opinion Evidence

Opinion evidence proffered by witnesses is usually admissible. Opinion testimony commonly deals with such matters as time, distance, speed, etc. These are subjects that an observant person is competent to render an opinion about.

8. Offers of Proof

An offer of proof is generally a statement made by counsel or a representative setting forth the testimony of a witness if the party called that witness to testify. An offer of proof may be made when the hearing officer has ruled that a party may not examine a witness or offer exhibits on a topic to which an objection has been sustained. The party adversely affected by that ruling may ask permission of the hearing officer to make an offer of proof to show the content of the excluded evidence. This enables the reviewer of the record to determine whether it was appropriate to exclude the evidence. Normally, the offer is made in narrative form by counsel, stating what the witness would testify to if permitted to answer a particular line of questioning. A question and answer offer of proof should generally not be allowed. On occasion, a party may wish to submit a written statement as an offer of proof. The written statement should be made part of the record as an exhibit.

No cross-examination follows the offer of proof. If the hearing officer determines, based on the proffer, that the testimony should be allowed, the hearing officer can reverse his/her earlier ruling on the objection and allow the party to elicit testimony in the area previously rejected by the hearing officer. However, if the hearing officer believes, based on the proffer, that his/her earlier ruling was correct, i.e., that the testimony was properly excluded to begin with, the hearing officer can receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

9. Proactive Use of Proffers

Offers of proof can be an effective tool for controlling and streamlining a hearing. Regional Office practices vary on the use of offers of proof and the circumstances under which their use is appropriate. When a hearing officer elicits offers of proof, he/she will have a better idea of the evidence to be presented and can exclude potentially redundant or unhelpful testimony.

10. Judicial Notice/Official Notice

Judicial notice allows a court to shortcut the taking of testimony regarding matters that are common knowledge (e.g., Washington, D.C. is the capital of the U. S.). Official notice allows an agency to recognize its own proceedings and decisions (e.g., relevant jurisdictional facts in another Board transcript). Matters arising in a prior case may or may not be dispositive of the current issue. For example, where the Board has asserted jurisdiction previously and a party asserts that the facts have changed, additional evidence may be required. The hearing officer may take official notice at the request of a party or on his/her own motion.

On occasion, a hearing officer will be asked to take either judicial or official notice of other agency's proceedings or a decision from another Regional Office. For instance, a party may seek to introduce State unemployment compensation proceedings, which the party contends may have an impact upon an employee's eligibility (i.e., an independent contractor finding by a State's agency). The Board admits into evidence and considers decisions in State unemployment compensation proceedings, but does not give the decisions controlling weight. *Cardiovascular Consultants of Nevada*, 323 NLRB 67, fn.2 (1997). If a party wishes to have official or judicial notice taken of any particular document, that party must produce a copy of the document.

11. Voir Dire Examination

When a party offers an exhibit, the other parties may question the witness at that time concerning the exhibit. For example: Attorney A: "Mr./Ms. hearing officer, I offer into evidence this letter which is marked for identification as Employer's Exhibit 6 and which the witness has just identified." Hearing Officer: "Mr./Ms. B, any objection?" Attorney B: "May I voir dire the witness about the letter first?" Hearing Officer: "You may."

This interruption in the offering party's examination is permitted in order to clear up any questions the opposing party has about the authenticity of the exhibit. Voir dire questioning about an exhibit should be limited to the admissibility of the exhibit. Voir dire examination should be limited to a few basic questions about the document being offered:

- who prepared the document?
- was the witness present when it was prepared/signed?
- is the document kept in the normal course of business?
- where is it kept?
- if the document is a summary, is the summary based on documents that are kept in the normal course of business and what is the summary based on?

Voir dire examination may also be used to question the competency or qualifications of the witness. See Section A, 1, Foundation. The questioner should not be allowed to question the witness in other areas until his/her normal turn to examine

arises. Thus, voir dire questioning should not turn into cross-examination of a witness and the hearing officer should intervene in those circumstances.

C. Rejected Exhibits

If the hearing officer decides not to accept exhibits because they are not relevant or because they are cumulative, the offering party may request that they be placed in the rejected exhibit file. This should be permitted, as it will preserve the documents upon review to the Board. This may come up in the context of an offer of proof when exhibits accompany testimony or statements of the party.

D. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of any other witnesses. In preelection R cases, sequestration of witnesses is not appropriate because the proceeding is non-adversarial in character and credibility questions are not resolved by the hearing officer. It is, however, a decision within the discretion of the hearing officer. Compare Section IX, F, 6, Sequestration of Witnesses, concerning sequestration in postelection hearings.

E. Appeals of the Hearing Officer's Evidentiary Rulings

Parties may appeal the hearing officer's rulings by seeking permission to file a special appeal to any adverse rulings. Section II, H, Appeals From Rulings.

IV. SUBSTANTIVE ISSUES

A. *Jurisdiction*

The Board's statutory jurisdiction extends to all conduct that may constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. (For examples of constitutional problems, see the discussion of Religious Schools in Section 13 and Indian Reservations in Section 14 below). In the exercise of administrative discretion, the Board has adopted standards for the assertion of jurisdiction based on the volume and the character of business done by the employer. When drafting stipulations on jurisdiction, the hearing officer should refer to the standards listed below and use the sample stipulation language provided.

1. Definition of "Retail" and "Nonretail"

For purposes of applying the jurisdictional standards, retail sales are considered as including sales to a purchaser who desires to satisfy his/her own personal wants or those of his/her family or friends. Nonretail sales constitute sales of goods or merchandise to trading establishments of all kinds, to institutions, to industrial, commercial and professional users and to government bodies. *Bussey-Williams Tire Co.*, 122 NLRB 1146 (1959).

2. Nonretail Standard

\$50,000 outflow or inflow, direct or indirect.

Direct outflow refers to goods shipped or services furnished by the employer outside the State.

Indirect outflow refers to sales of goods or services to users meeting any Board standard except indirect inflow or outflow.

Direct inflow refers to goods or services furnished directly to the employer from outside the State in which the employer is located.

Indirect inflow refers to the purchase of goods or services which originated outside the employer's State, but which it purchased from a seller within the State who received such goods or services directly from outside the State. Direct and indirect outflow or direct and indirect inflow may be combined; however, outflow and inflow may not be combined. *Siemons Mailing Service*, 122 NLRB 81 (1958).

3. Retail Standard

\$500,000 annual gross volume of business (include evidence of statutory jurisdiction; see below for discussion of statutory jurisdiction). *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

4. Statutory Jurisdiction

In all cases involving gross volume standards, some proof of statutory jurisdiction must be made. *Longshoremen ILWU Local 13 (Catalina Island Sightseeing)*, 124 NLRB 813 (1959). Thus, there must be evidence that the employer's activity in interstate commerce exceeds the de minimis level. *Somerset Manor Inc.*, 170 NLRB 1647 (1968) (\$1800 more than de minimis); *W. Carter Maxwell*, 241 NLRB 264 (1979) (\$6000 more than de minimis).

5. Enterprises Engaged in Both Retail and Nonretail Operations

In cases involving enterprises engaged in both retail and nonretail operations which constitute a single-integrated business, the Board will assert jurisdiction if the employer's operations meet either its retail or nonretail standards. *Man Products*, 128 NLRB 546 (1960).

6. Period Used for Computation

(a) Generally, any preceding yearly period proximate to the filing of the representation petition will be utilized in the computation. *Jos. McSweeney & Sons, Inc.*, 119 NLRB 1399 (1958).

(b) In asserting jurisdiction over employers operating for less than 1 year, the Board will project the period involved to obtain an annual figure. *Marston Corp.*, 120 NLRB 76 (1958) (4-1/2 months); *Plumbers Local 106 (Columbia-Southern Chemical)*, 110 NLRB 206 (1954) (2 months); *American Television*, 111 NLRB 164 (1955) (1 week).

7. Employer's Refusal to Give Commerce Facts

The Board will assert jurisdiction in any case in which the employer has refused, upon reasonable request by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional standards where the record, developed at a hearing duly noticed, scheduled and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the employer's operations satisfy the Board's discretionary jurisdictional standards. *Tropicana Products*, 122 NLRB 121 (1958). In order to establish a proper basis for utilization of the *Tropicana* rule, commerce information should be subpoenaed for the hearing whenever the employer has refused to furnish such information or has indicated that it will not voluntarily do so at the hearing. (See sample *Tropicana* subpoena language in Appendix D). If the employer refuses to comply with the *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the Employer is engaged in more than de minimis interstate commerce. Such secondary evidence may include evidence from employees regarding the employer's operations (e.g., shipping and receiving information, utility bills) Dun and Bradstreet reports and information secured from the employer's website.

8. Capital Expenditures

The Board will not assert jurisdiction over an employer's business on the basis of its nonrecurring capital expenditures alone. *Magic Mountain, Inc.*, 123 NLRB 1170 (1959).

9. Labor Organization

When a labor organization is acting as an employer vis-à-vis its own employees, the same jurisdictional standards are applied to the labor organization as to any other employer. *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1957).

10. Multiemployer Associations

All members of multiemployer associations who participate in or are bound by multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes. *Siemons Mailing Service*, supra.

11. Contracts with Governmental Entities

In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board announced that henceforth it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act . . ." in deciding whether the Board will exercise jurisdiction over private sector employers who work under contracts with federal, state, or local governments. This policy reversed the Board's prior practice of examining the relationship between the employer and the government entity to determine whether "the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." *National Transportation Service*, 240 NLRB 565 (1979); *Res-Care, Inc.*, 280 NLRB 670 (1986). In announcing the test in *Management Training*, the Board reversed *Res-Care*, a policy which had itself overruled the "intimate connection" test of *Rural Protection Co.*, 216 NLRB 584 (1975).

12. Sample Commerce Stipulations

Businesses Requiring Gross Volume Standard and Statutory Standard:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer in the conduct of its operations derived gross annual revenues in excess of (insert standard).¹ During the same period, the employer purchased and received (or sold

¹ Amusement and Gaming—\$500,000
Art museums, cultural centers & libraries—\$1,000,000
Blood bank—\$250,000
Building and Construction industry—retail or nonretail standards
Businesses in DC—plenary standard
Cemeteries—\$500,000
Colleges, universities, private schools—\$1,000,000

and shipped) goods, supplies and materials in excess of (insert standard) directly from (or to) points located outside the State of ____.

Direct outflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods valued in excess of \$50,000 directly to points located outside the State of ____.

Direct outflow—goods—projected:

The employer is engaged in (describe business operations). Based on a projection of its operations since about (date), at which time the employer commenced its operations, the employer will annually sell and ship from its (indicate location) facility goods valued in excess of \$50,000 directly to points located outside the State of ____.

Indirect outflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods and materials valued in excess of \$50,000 to (name enterprise/s) located within the State of _____. (Name enterprise/s) is/are engaged in (describe business operation) and (describe which standard, other than an indirect standard, this/these enterprise/s meet/s).

- Communications—\$100,000
- Cooperatives and condos—\$500,000
- Credit Union—retail or nonretail standard
- Day care centers—\$250,000
- Head Start—\$250,000
- Homemaker services—\$100,000
- Hospitals—\$250,000
- Hotel and Motels—\$500,000
- Instrumentalities Links, and Channels of Interstate Commerce—\$50,000
- Law firms and legal services—\$250,000
- National Defense—substantial impact
- Newspapers—\$200,000
- Nursing Homes—\$100,000
- Office buildings—\$100,000 of which \$25,000 from other entity engaged in commerce
- Private Clubs—\$500,000
- Private nonprofit educational institutions—\$1,000,000
- Private not for profit galleries—\$1,000,000
- Professional sports—no monetary standard necessary
- Public Utilities—\$250,000
- Radio and TV—\$100,000
- Residential Apartment Housing—\$500,000
- Retail—\$500,000
- Social service organizations—\$250,000, unless Board found lower standard
- Symphonies—\$1,000,000
- Taxicabs—\$500,000
- Territories—statutory
- Transit System—\$250,000
- Visiting nurse services—\$100,000

Direct and indirect outflow—goods—combine:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods and materials valued in excess of \$____ directly to points located outside the State of ____ and directly to (name enterprise/s) located within the State of _____. (Name enterprise/s) is/are engaged in (describe business operation) and (describe which standard, other than an indirect standard, this/these enterprise/s meet/s).

Direct outflow—services:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer performed services valued in excess of \$50,000 in States other than the State of _____.

Direct inflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of \$50,000 directly from points located outside the State of _____.

Direct inflow—goods—projected:

The employer is engaged in (describe business operations). Based on a projection of its operations since about (date) , at which time the employer commenced its operations, the employer will annually purchase and receive at its (indicate location) facility goods and materials valued in excess of \$50,000 directly from sources located outside the State of _____.

Indirect inflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of \$50,000 from other enterprises, including (identify other enterprises), located within the State of _____, each of which other enterprises had received those goods directly from points located outside the State of _____.

Direct and indirect inflow combined—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of \$____ directly from sources located outside the State of _____ and goods valued in excess of \$____ from other enterprises, including (identify other enterprises), located within the State of _____, each of which other enterprises had received those goods directly from points located outside the State of _____.

Direct inflow – services:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased services valued in excess of \$50,000 which were furnished to the employer at its (indicate location) facility directly from points outside the State of _____.

13. Enterprises Regarding Which Board Jurisdiction is an Issue

(a) Religious Schools

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1978), the Supreme Court found that the Board did not have jurisdiction over church-operated schools. The Board has interpreted *Catholic Bishop* to apply to the religious purpose of the school as the basis for exclusion of jurisdiction. Thus, the Board asserted jurisdiction in *University of Great Falls*, 331 NLRB 1663 (2000) on the basis that the school did not have a significant religious character. However, the DC Circuit denied enforcement; *University of Great Falls v. NLRB*, 278 F.3d 1335 (DC Cir. 2002). See also *St. Edmunds Elementary School*, 337 NLRB No. 189 (2002). Research the most recent Board cases on this issue prior to proceeding to hearing.

(b) Indian Reservations

The Board has held that Indian tribes and their self-directed enterprises located on tribal reservations are implicitly exempt as government entities within the meaning of the Act. *Fort Apache Timber Co.*, 226 NLRB 503 (1976). However, the Board has distinguished that and other cases and asserted jurisdiction where the tribal enterprise is located off the reservation. *Sac & Fox Industries*, 307 NLRB 241 (1992).

(c) Railway Labor Act Issues

Under Section 2(2) of the Act, the Board does not have jurisdiction over employers subject to the Railway Labor Act (RLA). The RLA covers common carriers such as railroads and airlines engaged in interstate or foreign commerce. When there is an arguable issue in a representation case as to whether the employer is a person subject to the Railway Labor Act, a hearing is held at the Regional Office level and the record is transmitted to the Executive Secretary. The Board may submit the record of the hearing to the National Mediation Board for a determination of this question. In *Federal Express Corp.*, 317 NLRB 1155 (1995), 323 NLRB 871 (1997), the Board referred the jurisdictional issue to the NMB and deferred to the NMB's determination that it had jurisdiction. To the contrary, the Board asserted jurisdiction in *United Parcel Service*, 318 NLRB 778 (1995), without referring the issue to the NMB, due to the primarily ground nature of the delivery service, as opposed to delivery by air. Relevant information needed to resolve this issue includes the following (see Memorandum OM 90-83):

a. Company Provides Transportation by Rail or Air

1. Is it a "Common Carrier"?
 - (a) Are the company's services "held out" to the public?
 - (1) Do they advertise, even if only to a small specialized market?

- (2) Do they provide transportation for hire?
 - (3) Does the company provide railroad or airline work for only one customer? If not, enumerate the customers.
 - (b) Does the company have one or more established places of business? If so, where?
- 2. If the company is a “Common Carrier,” is it also engaged in interstate or foreign commerce?
 - (a) Air Carriers
 - (1) Do they cross state lines or U.S. national borders in the course of providing either cargo or passenger service?
 - (2) Do they have interline or freight forwarding agreements with airlines? If so, with which airlines?
 - (3) Do they carry air cargo?
 - (4) Do they carry the U.S. mail?
 - (5) Do they have a contract to provide services for the U.S. Government?
 - (6) Do they have any substitute service agreements and, if so, with which airlines?
 - (7) Are they certified by the FAA? If so, what type of certificate do they hold and can it be submitted into evidence?
 - (b) Rail Carriers
 - (1) Are they a rail “carrier” pursuant to the National Surface Transportation Board jurisdiction (i.e., do they provide freight or passenger service by rail)?
 - (2) Does the company interact with other railroads, e.g., through the exchange of freight or passengers, or have rights of way over another railroad’s routes.
 - (3) Are its tracks used by other railroads?
 - (4) Does it provide freight service?
 - (5) Does the company make contributions to the Railroad Retirement Fund?

b. The Company is Not a Common Carrier by Air or Rail Engaged in Interstate or Foreign Commerce, but is:

- 1. Directly or indirectly owned or controlled by or under common control with a rail or air carrier engaged in interstate or foreign commerce.
 - (a) Ownership by an Air or Rail Carrier
 - (1) Is the subject company directly owned by an airline or railroad?
 - (2) Is the company indirectly owned by an airline or railroad?
 - (b) Factors Indicating Direct Control
 - (1) The airline or railroad for which the subject company performs services has the authority to:

- (a) Hire or fire employees.
- (b) Impose or effectively recommend discipline, discharge or screening of new hires.
- (c) Set wages and benefits.
- (d) Make assignments or transfers of personnel.
- (e) Directly supervise the employees' work.
- (f) Set staffing levels.

(c) Factors Indicating Indirect Control

- (1) Employees are trained by airline or railroad or follow airline or railroad's training procedures.
- (2) Employees are subject to the same hiring profile as a carrier.
- (3) Employees wear the airline or railroad carrier's uniforms.
- (4) Airline or railroad provides equipment or space to company.
- (5) Percentage of company's work which is for airline(s) or railroad(s).
- (6) Employees are held to same performance standards as similarly situated individuals at carrier.

2. Where the company is controlled by a common carrier and the company also performs services traditionally performed in connection with air or rail transportation, such as those listed below, address the issues set forth above in Section (b)1.

Airline Industry (this listing excludes the obvious jobs of pilot, mechanic, flight attendant, ramp service agent, customer service agent, office clerical employee).

- (a) Fuelers and refuelers.
- (b) Aircraft cleaners, ramp workers.
- (c) Skycaps, baggage runners, wheelchair attendants.
- (d) Security guards, security screeners.
- (e) Maintenance crew for airline ground equipment.
- (f) Bus drivers (transport of airline employees or passengers, usually on airport grounds).
- (g) Airline caterers.
- (h) Individuals responsible for pickup or delivery of air freight.

Railroad Industry (again this listing excludes the obvious categories such as locomotive engineers, firemen, carmen, clerks, conductors, trainmen, laborers, maintenance of way employees, signalmen, yardmasters).

- (a) Employees responsible for repair or maintenance of railcars.
- (b) Truckers, unless NSTB certified as a "motor carrier."
- (c) Intermodal loaders and unloaders.

B. Single Employer, Joint Employer, Alter Ego

1. Single Employer

The distinction between single and joint employer is often blurred. A “single employer” will be found to exist in circumstances when two nominally separate entities are in actuality a single-integrated enterprise. There are four principal factors examined by the Board in determining whether the various entities constitute a single-integrated enterprise. These factors deal with the extent to which there is:

- (a) Functional interrelation of operations.
- (b) Centralized control of labor relations.
- (c) Common management.
- (d) Common ownership or financial control.

Radio Union v. Broadcast Service of Mobile, 380 U.S. 255 (1965).

A finding that ostensibly separate entities constitute a single employer is not dispositive of the issue of whether employees of the various entities constitute a single appropriate unit for purposes of collective bargaining. The scope of such unit is determined primarily on the basis of community of interest among the various groups of employees involved including such factors as:

- (a) Bargaining history and the extent to which any exists.
- (b) A functional integration of operations.
- (c) Differences in the types of work and skills of employees.
- (d) A centralization of management and supervision, particularly as to labor relations and control of day-to-day operations.
- (e) Contact and interchange among the employees involved.

South Prairie Construction Co., 231 NLRB 76 (1977); *Edenwald Construction Co.*, 294 NLRB 297 (1989), and cases cited therein.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–500.

2. Joint Employer

In order to establish the existence of “joint employers,” it is not necessary to demonstrate that the various entities form a single-integrated enterprise. Rather, as described by the Third Circuit in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (1982), a finding that companies are “joint employers” assumes in the first instance that companies are what they appear to be—-independent legal entities that have merely chosen to jointly share or codetermine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). See also *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000).

In “joint employer” situations, the scope of the unit will be determined based on a community of interest analysis. Consent of the employers is no longer required to combine in a single unit employees jointly employed with employees singly employed. *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000) (reversing *Lee Hospital*, 300 NLRB 947 (1990)). If the petitioner seeks to represent a bargaining unit consisting of one employer only, the Board does not require a petitioner to name the joint employers or to litigate the existence of a joint employer relationship. *Professional Facilities Management, Inc.*, 332 NLRB 345 (2000); *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001). If this issue is raised, see Section III, H, Contingent Employees.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–600.

If a party to the proceeding asserts that the employer is a joint employer with an exempt entity, see Section IV, A, Jurisdiction.

3. Alter Ego

Two enterprises will be found to be alter egos where they “have substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership.” *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric*, 268 NLRB 1001, 1002 (1984). It is also relevant to consider “whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.” *Fugazy Continental Corp.*, 265 NLRB 1301 (1982). Although alter ego issues often arise in an unfair labor practice context, the Board is not precluded from making such a determination in connection with the resolution of a representational issue. *Elec-Comm, Inc.*, 298 NLRB 705, 706 fn.2 (1990); *All County Electric Co.*, 332 NLRB 863 (2000).

Note: Although the questions below have been separated for single and joint employer, a party may take the position at the hearing that the employers are either single or joint employers. In those situations, the hearing officer must make sure that both sets of questions are covered.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–700.

Single employer/alter ego

Relevant Questions:

1. Common ownership/management

- (a) Are the various entities separately incorporated or chartered?
- (b) Identify for each entity its respective officers, directors and stockholders, including the degree of ownership interest and any familial relationships.
- (c) Describe the managerial and supervisory hierarchy of each of the entities, the degree to which there is overlapping responsibility and authority among such individuals and any familial relationships.

(d) Describe the extent to which the owners, officers, directors, stockholders, managers and supervisors play an active role in the operation of the entities.

2. Functional Interrelation of Operations

(a) What were the circumstances surrounding the formation of the various entities, including their purpose.

(b) What is the nature of the business of each of the entities? Are there any similarities or identical business purposes?

(c) Are the operations of each business functionally interrelated or integrated with one another?

(d) Are there any common customers?

(e) Do any of the entities have customers other than those asserted to be related entities?

(f) Are the various entities held out to the public as or operate in a manner that the public would perceive them to be one and the same entity? For example, do employees of the entity wear any uniforms or other identifying insignia of the other or drive vehicles or use equipment which bear the other's identity?

(g) What are the business locations of the various ostensibly separate entities? Do they share any of the following:

- (1) Business location
- (2) Office staff and services
- (3) Telephone/fax/computers
- (4) Accounting/bookkeeping services
 - (a) bank accounts
 - (b) insurance
- (5) Legal services
- (6) Advertising, including internet websites
- (7) Sales force
- (8) Supplies and equipment
- (9) Supervision
- (10) Maintenance and janitorial services

(h) What is the nature and frequency of interchange and/or transfer of employees between entities?

(i) What is the nature and frequency of interchange and/or transfer of supervision between entities?

(j) What is the nature and extent of work contact among employees of the various entities? Are there any shared locker and other facilities; common training and instruction?

(k) What is the frequency of any exchange or borrowing of equipment? Is the related entity the primary or sole supplier of such equipment to the other entity? Are there other sources available for it to use?

(l) Compare the following among the various entities—similarities/differences in:

- (1) Wages
- (2) Overtime compensation
- (3) Holidays
- (4) Vacations

- (5) Pensions
- (6) Health, welfare and other insurance plans
- (7) Hours of employment
- (8) Work rules
- (9) Layoff/recall policies

3. Labor Relations

- (a) Who is involved in the formulation and effectuation of labor relations matters for the various entities? Is there any overlap of responsibility?
- (b) Is there a common labor relations policy? What is such policy and how is it disseminated to employees of the various entities? Is there a common handbook or other material setting forth employer policies?
- (c) Who is involved in the negotiation of any labor agreements and the discussion and resolution of any grievances arising under such agreements?
- (d) Is there any sharing among the various entities of responsibility for determining matters governing essential terms and conditions of employment?
- (e) What is the extent to which agents or principals of one entity control or meaningfully affect matters relating to the employment relationship in another entity in such areas as the hiring, firing, discipline, supervision and direction of employees.
- (f) Is there any prior bargaining history among any of the various entities?

4. Financial Control

- (a) How are financial arrangements maintained by the various entities? Are there separate or common:
 - (1) insurance policies
 - (2) bank accounts
 - (3) payroll
 - (4) tax statements
 - (5) Social Security filings and records
 - (6) withholding tax filings and records
 - (7) workmen's compensation filings and records
 - (8) unemployment compensation filings and records
- (b) Have there been any loans extended from one entity to another? At a fair market rate of interest? Was one entity started as a result of capital provided by another? Any repayment or time table for such? Any security for the loan? Were loan agreements signed?
- (c) Does one entity charge and obtain payment for any goods/services provided by it for another? Are the costs and terms the same as those extended to "arm's length" customers/competitors?
- (d) Is credit extended for such goods/services provided and at the same terms and under the same arrangements as those established with "arm's length" customers/competitors?
- (e) What is the amount of purchases and/or sales between the various entities? Is there an actual exchange of moneys or is it merely a paper transaction?
- (f) Who owns the various real property and equipment? Is rent paid by one entity

to another? At fair market rates?

(g) Are there any written/oral lease arrangements? What are the terms and conditions of such?

(h) Do any of the entities or their owners, officers, directors or stockholders serve as guarantors of loans/credit extended to any of the other entities by a third party source?

(i) How are each of the entities' bookkeeping, auditing, accounting, and other business records maintained and handled?

Joint Employer

Relevant Questions:

1. Describe the business of each entity.
2. Describe the relationship of the entities to each other.
3. What are the job duties and functions performed by the employees of the various entities?
4. Compare similarities. Are duties functionally interrelated?
5. Compare the following among the various entities - similarities/differences in:
 - (a) Wage rates
 - (b) Fringe benefits—both in types and amounts
 - (1) Working conditions
 - (2) Work rules
 - (c) Location of their work
 - (d) Supervision
 - (e) Schedule of hours
 - (f) Frequency and degree of contact
 - (g) Criteria for hiring
6. How are these terms and conditions of employment determined or controlled? Explore whether the two entities share responsibility for decisions concerning employees' wages, hours and other essential terms and conditions of employment, including decisions relative to:
 - (a) Hiring
 - (b) Firing
 - (c) Discipline
 - (d) Work schedules (including time off)
 - (e) Job duties and requirements
 - (f) Work rules

C. Successor Employer

In *NLRB v. Burns International Security Services*, 406 U. S. 272, 80 LRRM 2225 (1972), the Supreme Court resolved two major issues. First, it fixed the fundamental criteria for establishing if a new employer has an obligation to bargain with the representative of its predecessor's employees and second, it established that a successor's obligation to bargain does not bind it involuntarily to its predecessor's collective-bargaining agreement. These principles have certain applications in representation cases. For a discussion of contract bar rules as they relate to the assumption of a contract by a successor employer,

See *An Outline Of Law And Procedure In Representation Cases*, Section 9-224.

Relevant Questions:

1. The full and correct name of the predecessor employer and the alleged successor employer.
2. When did the alleged successor assume control of and begin operations? Dates of such? Was there a hiatus between the dates on which the predecessor ceased operations and the alleged successor resumed operations?
3. What were the circumstances under which former employees of the predecessor were offered employment by the alleged successor?
4. The type of business operations engaged in by the predecessor as well as by the alleged successor. Explore the similarities/dissimilarities between the two entities in terms of:
 - (a) Products produced
 - (b) Services performed
 - (c) Customers
 - (d) Equipment and machinery
 - (e) Business location(s)
 - (f) Classifications of employees
5. Are a majority of the alleged successor's employees in the involved bargaining unit former unit employees of the predecessor? Describe the bargaining unit.
6. Did the alleged successor take over only a portion of the predecessor's business, facilities and work force? If so, do the employees of that portion of the predecessor's operations constitute a separate appropriate unit?
7. Do the terms of the agreement of sale involve a sale of assets or of stock? Enter into the record a copy of any written sales agreement and take testimony as to its terms, including:
 - (a) The dates when the agreement was negotiated and signed

- (b) The effective date of transfer of ownership
- (c) The disposition of inventory, equipment and machinery, real property, customer orders and contacts, bills receivable and established goodwill

8. After the sale, did the predecessor entity continue to exist and be actively involved in the ongoing operations of the alleged successor enterprise? Did the predecessor terminate its legal existence or otherwise cease to have any relationship to the ongoing operations of the alleged successor?

9. Does the sales agreement refer to the existence of a collective-bargaining agreement and any rights or obligations on the part of the alleged successor either to reject or adopt same?

10. Did the alleged successor extend voluntary recognition to the union? If so, what were the circumstances, including whether, and to what extent, the alleged successor employed any of the predecessor's employees at that time.

11. Did the alleged successor by word and/or action expressly adopt the predecessor's collective-bargaining agreement or adhere to its terms, including paying contractual wages and benefits, making benefit fund contributions and/or deducting union dues? Specifics.

12. Did the alleged successor expressly refuse to adopt the predecessor's collective-bargaining agreement? If so, describe the refusal.

13. Did the successor maintain "substantial continuity of the employing industry"? Establish this by questions as to whether and to what extent:

- (a) The business continues in the same form
- (b) The successor operates out of the same location(s) as the predecessor
- (c) The same or substantially the same work force is employed by the alleged successor
- (d) The same jobs exist under the same working conditions
- (e) The same management and supervision have been retained
- (f) The same machinery, equipment and methods of production are used
- (g) The same products are manufactured or the same services are offered

14. Describe changes instituted by the alleged successor in such matters as:

- (a) Employees' working conditions
- (b) Wages and benefits
- (c) Working rules and employee policies
- (d) Other terms and conditions of employment

15. Did the alleged successor merge or combine the operations of the predecessor employer with other preexisting operations? If so, were the employees involved in such preexisting operations already represented by a labor organization other than that which previously represented employees of the predecessor?

16. How many employees were there in each group or unit prior to such merger or

combination?

17. Following such merger or combination, have the predecessor's former employees retained or lost their identity as a separate appropriate unit for purposes of collective bargaining? Explore whether and to what extent the two groups of employees have been integrated with one another in terms of:

- (a) Job duties and responsibilities
- (b) Supervision
- (c) Interaction and contact
- (d) Interchange
- (e) Common working conditions and facilities
- (f) Similarities in benefits and applicable policies and work rules

D. Status as a Labor Organization

Section 2(5) of the National Labor Relations Act states:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

See *An Outline Of Law And Procedure In Representation Cases*, Section 6–110.

The employee group need not have a formal structure, constitution, bylaws, charter, written agreement, officers nor need it collect dues or fees to be a labor organization. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Steiner-Liff Textile Products Co.*, 259 NLRB 1064 (1982). For additional information on what constitutes a labor organization, see *Electromation, Inc.*, 309 NLRB 990 (1992) and *E.I. du Pont & Co.*, 311 NLRB 893 (1993). See also GC Memorandum 93–4, Guideline Memorandum Concerning *Electromation, Inc.*

Relevant questions for standard labor organization issues:

1. Name of representative and official position with organization
2. Full and correct name of organization
3. Affiliation, if any.
4. Do employees participate in the organization, e.g. do they attend meetings or vote in internal union elections? In what manner and to what extent?
5. Does the organization exist, at least in part, for the purpose of dealing with employers concerning "conditions of work" or concerning other statutory subjects such as

grievances, labor disputes, wages, rates of pay or hours of employment. Ask the witness to give specific examples of such activity.

Relevant questions for specialized labor organization situations:

1. If a guard unit is involved, ask if the union admits to membership or is affiliated directly or indirectly with organizations which admit to membership employees other than guards (for this to be an issue, the employees other than the guards must be statutory employees). *Children's Hospital of Michigan*, 299 NLRB 430 (1990). See Section VI, C, Guards and Watchmen.
2. If an issue is raised that participation of supervisors in the union disqualifies the union from being certified, ask:
 - (a) whether a supervisor(s) employed by the employer is in a position of authority within the labor organization and, if so, identify that person's role in the affairs of the labor organization.
 - (b) in the instance of a supervisory nurse employed by a third-party employer and holding a position of authority, whether there is some demonstrated connection between the employer of the unit employees concerned and the employer or employers of those supervisors which might affect the bargaining agent's ability to single-mindedly represent the unit employees. *Sidney Farber Cancer Institute*, 247 NLRB 1 (1980); *Sierra Vista Hospital*, 241 NLRB 631 (1979).
 - (c) if supervisors are officers of the petitioning labor organization, what steps, if any, has that organization taken to insulate its bargaining activities from supervisory influence. *Highland Hospital*, 288 NLRB 750, 752 (1988).

E. History of Collective Bargaining

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective bargaining which is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Red Coats, Inc.*, 328 NLRB 205 (1999). The rationale for this policy is based on the statutory objective of stability in industrial relations. If any party contends that an existing contract constitutes a bar, develop facts as outlined in Section F, Bars to Conduct of Election.

See *An Outline of Law and Procedure in Representation Cases*, Sections 12–220 through 12–229.

Relevant Questions:

1. How long has there been a collective bargaining relationship?
2. Introduce in evidence existing collective-bargaining contracts or prior contracts if they affect the issues.

3. If no copies of the contracts are available, obtain testimony and documents that show the following:
 - (a) Type of agreement: oral, written, signed or unsigned.
 - (b) Correct names of parties to the contract.
 - (c) Execution date, effective date, terms, termination date.
 - (d) Provisions for automatic renewal, opening, termination.
 - (e) Terms of recognition provisions.
 - (f) Terms of any union-security provisions.
 - (g) Describe unit covered and give classifications of employees covered by unit.
 - (h) Description of contract's substantial terms and conditions.
 - (i) Differences between classifications of employees covered by the contract and those affected by petition.
 - (j) If contract contains express provision for ratification, details of when ratification was obtained and employer was notified.

4. Has notice to terminate or modify been given pursuant to Section 8(d) of the Act? If so, when; by whom to: employer, labor organization, FMCS and relevant state agency; in what manner?

5. Was there a prior unit determination through voluntary recognition or election agreement?

6. Was this unit subject to any prior Board determination (official notice may be taken)?
 - (a) Citation
 - (b) Nature of proceeding
 - (c) Disposition by the Board
 - (d) If parties object to introduction of any evidence from prior record, witnesses should be called. If witness testified in prior proceeding, that record may be used to refresh their memories or for purposes of impeachment.

7. Has the bargaining history been conducted on a basis that is contrary to established Board unit policy, which may cause the history to be disregarded?
 - (a) Members only contracts
 - (b) Bargaining history based upon sex
 - (c) Bargaining history based upon race
 - (d) Inclusion of employees by agreement, despite lack of community of interest

8. Is there any history of collective bargaining in similar units at other facilities of this employer or in the same industry? If so, get all details of the composition of the bargaining units in comparable facilities. (Note - this factor is not controlling in unit determinations but will be considered.)

F. Contract Bar

The major objective of the Board's contract bar doctrine is to achieve a reasonable balance between the frequently conflicting claims of industrial stability and freedom of employee choice. This doctrine is intended to afford the contracting parties

and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The burden of proving that a contract is a bar is on the party asserting the doctrine. There are many facets to the Board's contract bar doctrine. In order to constitute a bar, a contract must be written, signed by all parties, cover substantial terms, cover the petitioned-for unit, be of definite duration and not exceed 3 years. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

See *An Outline of Law and Procedure in Representation Cases*, Sections 9–100 through 9–1000.

Relevant Questions:

General contract bar principles:

1. Introduce into evidence contract asserted as bar.
2. Have parties state their contentions regarding why the contract is or is not a bar.
3. Timeliness of petition or rival claim.
 - (a) Date contract was executed by both parties.
 - (b) Date and manner in which notice to terminate or modify was given pursuant to Section 8(d) of the Act.
 - (c) Termination date.
 - (d) Effective date.
 - (e) Was the contract executed at a time when there was a rival claim, i.e., when another union was claiming representative status or organizing? Explain and give facts.
 - (f) Was the contract executed when an incumbent union continued to claim representative status?
 - (g) Was the contract executed at a time when a nonincumbent union had refrained from filing a petition in reliance on the employer's conduct indicating that recognition had been granted or that a contract would be obtained without an election? *Greenpoint Sleep Products*, 128 NLRB 548 (1960).
 - (h) If the contract was executed on the same date that the petition was filed, had the employer or the incumbent union been informed at the time of execution that a petition had been filed?
 - (i) If it is contended that the contract does not represent the parties' actual agreement because of subsequent changes in its provisions, were the changes substantial and material or were they merely refinements of contractual language?
 - (j) Agreement or evidence indicating that automatic renewal has been forestalled.
 - (k) If a party contends that the contract has not been enforced, obtain evidence as to how it has been administered. Obtain evidence that contract has been administered. Obtain examples (e.g., dues deducted, pension and health insurance remittances, wage increases, sick and annual leave granted in accordance with the

contract).

4. Adequacy of contract.

- (a) Is the contract written and signed or initialed by all parties?
- (b) Does the contract contain substantial terms and conditions of employment? Specify.
- (c) Does the contract contain an express provision requiring ratification? Has ratification been obtained? Date and manner.
- (d) Was the employer notified that the contract had been ratified? Date and manner. Introduce copies of any written notification of ratification.

5. Duration of contract.

- (a) Does the contract have a fixed term? What is the term of the contract? Is the current contract an extension of the prior contract?
- (b) Did the contract get extended? If so, when? Was a new contract signed prior to the expiration of the prior contract? If so, when? What were the effective dates of the prior contract? Introduce copies of all pertinent contracts. If there is a premature extension of an earlier contract, inquire into the effective dates of both contracts so that the appropriate open period can be calculated.

6. Union security and checkoff provisions.

- (a) Introduce the contract provisions in question.
- (b) Extrinsic evidence as to the legality of the clause should not be received.

Special Situations:

1. Merger, Schism or Defunctness—change in contractual representative, internal union conflicts or when a labor organization ceases to function.

- (a) If these issues are raised in a contract bar context, obtain evidence as set forth in Merger or Affiliation (Section H), Schism in Labor Organization, (Section I), or Defunctness of Labor Organization, (Section J), *infra*.

2. Expanding Units

A contract does not bar an election if executed before any employees have been hired or prior to a substantial increase in personnel. When the question of a substantial increase in personnel is in issue, a contract will bar an election only if at least 30-percent of the complement employed at the time of the hearing had been employed at the time the contract was executed and at least 50-percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. *General Extrusion, Inc.*, 121 NLRB 1165 (1958).

See An Outline of Law and Procedure in Representation Cases, Section 9–212.

- (a) Was the contract executed before any employees had been hired?
- (b) What percentage of the present work force was employed at the time the contract was executed?
- (c) What percentage of the present job classifications existed at the time the

contract was executed? Even if the job classifications were not formally defined until some later time, were the work or job functions of such classifications in existence and being performed by unit employees at the time of the hearing?

(d) Ascertain the date upon which the parties agreed to apply the contract (i.e., retroactively, prospectively or upon execution).

3. Plant Shutdown, Merger, Relocation

A change in the nature of the unit can affect whether the contract continues to be a bar. Examples of such a change include plant shutdown, merger and relocation. In *General Extrusion Company, Inc.*, 121 NLRB 1165 (1958), the Board set forth the standard to be applied in each of these situations. With respect to a plant shutdown for an indefinite period of time, where employees have no reasonable expectation of reemployment, a contract does not serve as a bar. *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989). With respect to a merger of operations, the contract does not continue to be a bar if the merger results in a new operation with major personnel changes. *Kroger Co.*, 155 NLRB 546, 548–49 (1965). With respect to a full relocation (i.e., where an employer relocates the entire bargaining unit to a new facility), the contract continues to be a bar if the operations at the new facility are substantially the same as those at the old facility and if transferees from the old facility constitute at least 40-percent of the new facility's employee complement. *Rock Bottom Stores*, 312 NLRB 400, 402 (1993).

See *An Outline of Law and Procedure in Representation Cases*, Sections 9–221 through 9–223.

- (a) Describe the locations of all operations and their geographic proximity.
- (b) Describe in detail the old operations.
- (c) Describe in detail the new operations.
- (d) Is the operation an entirely new one or a continuation of one or more of the old operations without substantial integration?
- (e) What was the number of employees at the old operation?
- (f) What is the number of employees at the new operation?
- (g) Does the business transaction involve one employer or two or more employers? If so, describe the entities and the transactions involved, including any agreements related to the transaction.
- (h) Was a new plant constructed or did one operation simply move to the location of the other? Was there a hiatus in operations?
- (i) Is the same operation being resumed in the same or a new location?
- (j) If there was a shutdown, how long was it?
- (k) At the time of the closing, was a date fixed for reopening? When did the business reopen?
- (l) What percentage or number of prior employees was recalled or transferred at the time of reopening?
- (m) What percentage or how many of the present work force are new employees?
- (n) Have the character of jobs and the functions of employees changed in the new operation?
- (o) Details of changes in personnel that accompanied the change? (Obtain personnel facts before and after the change which will throw light on whether it is

“an entirely new operation with major personnel changes.”)

- (p) Is one or more of the incumbent unions seeking to represent the employees at the new operations?
- (q) Were employees at the old operations represented and covered by a collective-bargaining agreement? Obtain contracts.
- (r) If there is a purchaser, has it bound itself to assume the existing contract? Is the assumption expressed in writing? At the time of the assumption of the contract, did the employer employ at least 30-percent of those employed on the date of the hearing?
- (s) Are there unrepresented employees? How many unrepresented employees are there in relation to the represented employees?
- (t) Has the existing contract been amended to reflect the change in operations?
- (u) Have management and supervisory personnel remained the same?
- (v) On what date was the transfer process substantially completed?
- (w) Where there is a merger of different groups of employees based a on change in the employer's operations, ask community of interest questions in Section V, A, Community of Interest.

4. Construction Industry

Section 8(f) of the Act provides that, in the construction industry, it is not unlawful for an employer to enter into an agreement covering construction employees, even though the union has not established majority status. An 8(f) agreement is not a bar to a petition. *John Deklewa & Sons*, 282 NLRB 1375 (1987). In the construction industry, a contract will constitute a bar if the union has achieved 9(a) status by contract language (*Central Illinois Construction*, 335 NLRB 717 (2001)) or by voluntary recognition (*Reichenbach Ceiling & Partition Co.*, 337 NLRB No 17 (2001)). The burden of proving the existence of a 9(a) relationship rests with the party asserting it. *John Deklewa & Sons*, supra, fn. 41.

See An Outline of Law and Procedure in Representation Cases, Section 9–1000.

- (a) Describe the employer's operations.
- (b) Is the employer engaged primarily in the building and construction industry?
- (c) Place the contract in the record. Obtain parties' positions re: 8(f) or 9(a) contract status.
- (d) Are the employees who are covered by the agreement engaged in the building and construction industry?
- (e) If a party asserts 9(a) status:
 - (1) Has the union been certified by the Board as the representative of the unit employees?
 - (2) Did the union request recognition as the majority or Section 9(a) representative of the unit employees? Specifics.
 - (3) Did the employer voluntarily recognize the union? On what basis? Specifics.
 - (4) Was the employer's recognition based on the union's having shown or offered to show evidence of its majority support?

G. Recognition Bar²

When an employer has lawfully recognized a union, the parties are accorded an opportunity to bargain and a petition is barred for a “reasonable period of time” following the recognition. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Despite the existence of active and simultaneous organizing campaigns, an employer’s voluntary recognition of a union bars the processing of a subsequent petition unless the petitioner demonstrates that it had a 30-percent showing of interest at the time of recognition. *Smith’s Food & Drug*, 320 NLRB 844 (1996). The determination of whether the 30-percent showing existed at the time of recognition is an administrative matter not subject to litigation. *Smith’s Food & Drug*, supra, at 847, fn.5. If this determination was not made prior to the hearing, the hearing officer should conduct an administrative investigation of the showing of interest by inspecting in camera the number of cards secured and their dates. The hearing officer should state on the record his/her findings in the administrative investigation, i.e., whether the union has an adequate showing of interest.

In the construction industry, voluntary recognition as a 9(a) representative must be based on a contemporaneous showing of majority support or an employer’s acknowledgement of such majority support. Any challenge to the validity of a grant of 9(a) recognition based upon lack of majority status must be made within 6 months after the grant of recognition. *Reichenbach Ceiling*, 337 NLRB No. 17 (2001); *Casale Industries*, 311 NLRB 951 (1993).

See *An Outline of Law and Procedure in Representation Cases*, Section 10–500.

Relevant Questions:

Recognition:

1. When was recognition extended? If there is a written agreement, secure a copy. If more than 6 months have passed since the grant of recognition, no litigation should be permitted regarding the validity of the recognition.
2. On what basis was recognition extended?
3. Was the recognition based on a majority showing? Conduct an administrative investigation of the showing of interest, inspect in camera the number secured and the dates of the signed cards. If this has not been handled prior to the hearing, the hearing officer should state on the record his/her findings in the administrative investigation.
4. Did the employer extend recognition at a time when another union was organizing?

² In *MV Transportation*, 337 NLRB No. 129 (2002), the Board overruled *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), and determined that there is no longer a successor bar when a successor employer is obligated to or recognizes the union that previously represented the unit employees.

Has the rival union secured a showing of interest from employees in the petitioned-for unit? If so, conduct an administrative investigation of the showing of interest, inspect in camera the number of cards secured and their dates. If this determination was not made prior to the hearing, the hearing officer should state on the record his/her findings in the administrative investigation.

Reasonable Period of Time:

1. Are parties bargaining for an initial contract?
2. Who asked to bargain and when did they ask to bargain? Include telephonic and written correspondence between the parties relating to the request to bargain and the proposals of the parties.
3. When did the bargaining between the employer and the recognized union commence?
4. How many bargaining sessions have there been? Dates of the sessions? How long the bargaining sessions lasted?
5. Topics covered during bargaining—include proposals by the parties, counter proposals, agreements reached on issues and what issues remain.
6. What are the parties' positions as to whether impasse has been reached? If a claim of impasse is made, what is the basis for that claim?

H Merger or Affiliation

In considering the validity of a merger or affiliation between two unions or a union's affiliation with another labor organization, the Board considers whether the bargaining unit members were accorded due process and whether there has been a fundamental change in the identity of the selected representative which disrupted the continuity of representation. Where a merger or affiliation fails to satisfy the Board's due process requirements, a question concerning representation exists. The key inquiry in determining whether unit members were afforded due process is whether the members received adequate notice and opportunity to discuss the merger or affiliation, question the proposed course of action and vote on the matter by secret ballot. *Mike Basil Chevrolet, Inc.*, 331 NLRB 1044 (2000). In determining the issue of continuity of representation, the Board looks to the totality of the circumstances to determine whether there is a change in the identity of the representative as a result of the merger or affiliation. *Western Commercial Transport*, 288 NLRB 214 (1988).

See *An Outline of Law and Procedure in Representation Cases*, Sections 7–240 and 11–100.

Relevant Questions:

1. What entities were merged or affiliated? Size of units and locations of units merged or affiliated.
2. What changes resulted from the merger or affiliation? Were there changes in structure? Identity? Number of representatives? In the manner of unit member participation in the day to day issues arising at the workplace? Changes in stewards and/or officers or local officials? Bargaining representatives? Shop committees or negotiating committee members? Contract ratification procedures? Strike votes? Constitution? By-laws? Initiation fees? Dues? What changes were made in the unit employees' ability to have input regarding labor relations matters in their unit?
3. Were unit members given notice of the merger or affiliation? How? When? In what manner?
4. Was a meeting conducted? When? Where? How was notice of the meeting provided to the unit members?
5. How many unit members attended the meeting?
6. Were unit members given an opportunity to discuss the merger or affiliation at the meeting?
7. Was a vote conducted? In what manner? What was the outcome?
8. What additional changes were made as a result of the merger or affiliation?

I. Schism in Labor Organization

In *Hershey Chocolate Corp.*, 121 NLRB 901 (1958), the Board held that three conditions must be present in order to find that a schism exists:

1. There must be a basic intraunion conflict affecting the contracting representative, i.e., a conflict over policy at the highest level of an international union, whether it is affiliated with a federation or within a federation, which results in a disruption of existing intraunion relationships.
2. The employees in the unit seek to change their representatives for reasons related to the basic intraunion conflict and have had an opportunity to exercise their judgment on the merits of the controversy at an open meeting, called with due notice to the members in the unit for the purpose of taking disaffiliation action for reasons related to the basic intraunion conflict.
3. The action of the employees in the unit seeking to change their representatives took place within a reasonable time after the occurrence of the basic intraunion conflict.

See *An Outline of Law and Procedure in Representation Cases*, Sections 9–410 through 9–413.

Relevant Questions:

1. What is the nature of the basic intraunion conflict causing schism? When did the conflict begin?
2. Did the conflict include policy at the highest level of the union? Or is it merely the result of disaffection among members of a local with action taken by an international? *Georgia Kaolin Co.*, 287 NLRB 485 (1987).
3. Was disaffiliation action taken at a meeting? Was it for reasons related to the policy conflict?
4. If a special meeting, who called the meeting?
5. Method of notification to members? Usual method?
6. Was notice given to all members? Was purpose of meeting made clear?
7. Location, time, and date of meeting? If not usual place or time, why?
8. Who presided? Number present? Number usually present?
9. Nature of vote and results.
10. Was disaffiliation action by local or overall group? Details.
11. Was the local union an amalgamated local or was it limited to the employer's employees?
12. Has the local union been suspended or expelled? Details.
13. If an amalgamated local, does the local group have autonomy?
14. Is the current action related to a suspension by the international? Details.
15. Has the contracting union continued in existence? Held meetings, collected dues, negotiated contracts, incurred obligations, paid per capita tax to the international, dispensed funds, handled grievances?
16. Does the employer still recognize the incumbent union?
17. Is the alleged schism coextensive with the bargaining unit?

18. Was the international notified of the intent and subsequent action to disaffiliate?
19. Did the disaffiliating union seek a charter from another international union? When, who, how handled?
20. Copies of minutes of meetings, contracts, disaffiliation resolution and pertinent correspondence.
21. How has the schism affected dealings with the employer in representing employees?
22. Who is the certified bargaining representative: the local, the international, or both?

J. Defunctness of Labor Organization

In *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958), the Board stated that a representative is deemed defunct if it "is unable or unwilling to represent the employees," but made it clear that "mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees."

See An Outline of Law and Procedure in Representation Cases, Section 9-420.

Relevant Questions:

1. Identify the allegedly defunct union.
2. Is the current contract in existence? If so, obtain copy.
3. Identify the union that is party to the contract: the local, the international or both? Is any other union a party to the contract?
4. Is the contract being enforced? In what manner? By whom? Concerning union-security requirements?
5. Details of any notice to terminate the contract and reply.
6. Has the employer unilaterally changed working conditions, wages, hours or benefits? Details. Extent of changes.
7. Are employees paying dues? Checkoff? If not, when did payments stop? If so, number paying?
8. Are grievances being processed? By whom? Manner? Describe.
9. Have employees withdrawn membership? Details.

10. Is the incumbent union unable or unwilling to represent the employees? Reason? Is this condition temporary or permanent? Since what date? Facts.

11. Have employees formed or become members of another union? Details.

12. If so, what action was taken regarding employees' withdrawal from the incumbent union and becoming members of the new organization?

K. Accretions to Existing Units

An accretion is an attempt to add a classification to the unit or exclude a classification from the unit in the absence of an election. The issue is normally raised in a unit clarification petition (UC). The issue can arise (1) where there is a newly created classification or (2) where an existing classification has undergone recent substantial changes in duties and responsibilities so as to create a doubt as to whether those individuals continue to fall within the category—included or excluded—that they occupied in the past. *Union Electric*, 217 NLRB 666 (1975). Where a new classification performs the same basic functions historically performed by the bargaining unit, a community of interest analysis may not be required.

The hearing officer must obtain evidence regarding the type of work performed by the employees involved as compared to the work performed by the unit. *Premcor, Inc.* 333 NLRB 1365 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001).

See *An Outline of Law and Procedure in Representation Cases*, Sections 11–200, 11–220 and 12–500.

Where the issues involve a new facility/operations, merged operations or a transfer of employees from one facility to another, see the questions set forth in Section F, 9.

Relevant Questions:

1. What is the name of the classification in issue? What are the skills, duties and responsibilities of employee(s) in that classification? What are the skills, duties and responsibilities of other unit employees?

2. What is the nature of the employer's business? Why was this classification created and how does this classification fit into the employer's organizational structure?

3. When was the classification created and how many employees are in the classification? When was the classification staffed?

4. What are the number and types of other classifications? How many employees are employed in these classifications?

5. Who represents employees in the employer's other job classifications? Get the details of the history of bargaining. Introduce contracts.

6. Have there been any contract negotiations between the employer and the union at this facility since creation of this classification? If yes, when was the bargaining? Was there any discussion of this classification during the negotiations? What was the result of those negotiations?

7. Who hired the disputed employees? Under what circumstances?

8. If employees were transferred into this classification from existing classifications, how and why was this done? How have their duties changed?

Except in situations governed by *Premcor* (involving a newly created position performing the same basic functions historically performed by the bargaining unit), it is necessary to conduct a community of interest inquiry. See Section V, A, Community of Interest.

V. UNIT ISSUES

The hearing officer must keep in mind the distinction between issues involving *unit scope* and those involving *unit composition*. The *scope* of the unit pertains to issues such as whether the unit should be limited to one facility rather than multi-facility or employer-wide or to one employer as distinguished from multiemployer. The *composition* of the unit relates to matters such as the inclusion or exclusion of disputed individuals or disputed employee classifications or categories or to unit placement in general. Issues relating to the scope of the unit are discussed below in Section B, while issues relating to the composition of the unit are discussed in Section C.

Note that unit scope and composition issues do not usually arise in decertification proceedings, where the unit for election purposes is the recognized or contractual unit. *Campbell Soup Co.*, 111 NLRB 234 (1955). For additional discussion of this principle, see *An Outline of Law and Procedure in Representation Cases*, Section 7–320.

Absent a relevant bargaining history, it is *essential* to examine scope and composition matters in the context of the unit in which a union seeks to be represented. Thus, there is nothing in the Act that requires the unit for bargaining be the *only*, *ultimate*, or *most* appropriate unit; rather, the Act requires only that it be *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). If the unit sought by the petitioner is an appropriate unit, an alternative appropriate unit will not be imposed. *Dezcon*, 295 NLRB 109 (1989). If the petitioned-for unit is *not* appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *An Outline of Law and Procedure in Representation Cases*, Section 12–100 et seq.

A. *Community of Interest*

In considering both unit scope and unit composition issues, the major determinant revolves around a community of interest inquiry. In general, employees with common interests may appropriately be included in a single unit. Parties seldom litigate the unit placement or inclusion of employees whose community of interest is identical to that of other unit employees. Rather, the issue usually arises in one of two situations: (1) when a party contends that an employee or group of employees possesses a community of interest so close with that of other employees that the disputed employee(s) must be included in the unit; or (2) when a party contends that an employee or group of employees possesses a community of interest so disparate from that of other employees that the disputed employees cannot be included in a single unit. The same community of interest factors are examined in making these distinct inquiries. A petitioning union's desire as to the unit is relevant but it cannot be a dispositive consideration. (Section 9(c)(5) of the Act). Thus, a petitioned-for unit *including* a particular classification may be found to be *an* appropriate unit, while a petitioned-for unit *excluding* that same classification may also be found to be *an* appropriate unit. *Overnite Transportation*, 322 NLRB 723 (1996) (petitioned-for units of drivers and mechanics are found appropriate in

some cases, while petitioned-for units of drivers excluding mechanics are found appropriate in other cases, notwithstanding similar facts).

Many considerations enter into an examination of community of interest. In general, all of the incidents of the employment relationship are relevant to a community of interest inquiry.

1. Stipulations on Unit Issues

Stipulations entered into by the parties and made a part of the record which are aimed at excluding certain groups or categories of employees should be supported by a statement of sufficient facts in order to justify their approval by the Regional Director.

2. Presumptively Appropriate Units

Unit presumptions apply only where the presumptively appropriate unit is that which is petitioned-for; if a petitioner seeks a different unit, the presumptions have no application. *Capital Coors Co.*, 309 NLRB 322 (1992); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986). When the unit sought is presumptively appropriate, the burden is on the party opposing that unit to show that the unit is inappropriate. *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999). Conversely, when the unit sought is *not* presumptively appropriate, the burden is on the petitioner to present at least some evidence establishing the appropriateness of the unit, even where the employer takes no position as to the unit. *Allen Health Care Services*, 332 NLRB 1308 (2000).

Presumptively appropriate units are those specifically authorized in Section 9(b) of the Act, including:

- (a) an overall (wall-to-wall) unit of all of the employer's employees, excluding only statutory and policy exclusions;
- (b) a unit of all professional employees employed by the employer (or, conversely, a unit of all non-professional employees of the employer);
- (c) a unit of all guards employed by the employer; and,
- (d) a single facility or plant where an employer operates multiple facilities or plants.

Community of Interest Questions

The following are general community of interest questions a hearing officer should ask when unit issues arise. This section is referenced in many other sections of the manual where the manual instructs the hearing officer to ask community of interest questions.

1. Describe the employer's organizational and administrative framework, including its departmental or divisional groupings and how they interact or interconnect with each other. Explore such evidence with a view of establishing whether there is a functional integration of the employer's operation revolving around the goal of producing its

products or providing services. If possible, obtain for the record the employer's organizational chart.

2. Describe the physical layout of the employer's operations, including distances between facilities. For example, if the employer's maintenance employees work in a separate building, how and to what extent does this factor affect their contact and interchange with separately housed production employees?

3. Describe the employer's management and supervisory hierarchy, including whether and to what extent and at what level(s) there is any common supervision over the groups of employees involved in the proposed bargaining unit.

4. How many employees are employed at the facility? Which classifications do the parties seek to include and how many are in each classification? Which classifications do the parties seek to exclude and how many employees are in each excluded classification? If possible, secure the number of employees in each classification at the facility.

5. If any category of employees was excluded, would this result in employees being deprived of the opportunity for representation because they would not constitute a separate appropriate unit?

6. If any category of employees was excluded, ask the parties their positions as to the unit in which the excluded employees could obtain representation. Advise the parties to take a position about this issue, either at the hearing or in their briefs.

7. Compare the wages, hours and other terms and conditions of employment of any categories of employees whose unit placement is in dispute with those of the other categories of employees in the proposed bargaining unit, including in the following areas:

- (a) Work duties, including the degree of common or interrelated duties and location(s).
- (b) The nature of their supervision.
- (c) Extent of common supervision.
- (d) Work skills.
- (e) The type(s) of equipment operated/utilized by the employee.
- (f) The type(s) of products manufactured; similarities, differences.
- (g) Education, training, and experience.
- (h) Work schedules.
- (i) Compensation, including the method of compensation for both regular and overtime work (e.g., salaried or hourly) and the salary or wage rates.
- (j) Methods used to record their time (e.g., time clocks).
- (k) Benefits, including any distinctions based on categories or groupings of the employees involved.
- (l) The availability of the employer's facilities for their use.
- (m) Whether there is any progression or promotional advancement from one position to another. Obtain evidence of specific examples.
- (n) Degree of interchange and contact; describe the frequency and the type(s) of

interaction and contact (telephone, electronic, face-to-face, etc.). Obtain evidence of specific examples.

(o) Whether there is any substitution of one group of employees for another and the frequency of such. Obtain evidence of specific examples.

(p) Extent and frequency of interchange (transfers) from one position to another, both employees and supervisors, promotional opportunities from one group to another, permanent or temporary? If temporary, describe supervision, work performed and other terms and conditions of employment. Obtain evidence of specific examples.

(q) The nature and extent of similar or dissimilar working conditions.

(r) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.

(s) Any common seniority list(s).

(t) Work clothes, uniforms, insignia and badges.

(u) Have these employees been represented previously? If so, in what unit(s)? When?

B. Unit Scope

1. Multifacility Units

It is well established that a single-facility unit is presumptively appropriate for collective bargaining. However, a petitioner can alternatively seek a multifacility unit. Caution: a "single facility" can include more than a single building; e.g., a medical campus (*Child's Hospital*, 307 NLRB 90 (1992)) or a satellite facility. Where a multifacility unit is sought by a labor organization, the single-facility presumption does not apply. Hence, the presumption need not be overcome. *Capital Coors Co.*, 309 NLRB 322 (1992).

If a union petitions for a single facility and the employer seeks to rebut the presumption, the Board evaluates the following factors:

- (a) central control over daily operations and labor relations, including the extent of local autonomy;
- (b) similarity of skills, functions and working conditions;
- (c) degree of employee interchange;
- (d) distance between locations; and
- (e) bargaining history, if any.

New Britain Transportation Co., 330 NLRB 397 (1999).

If the union petitions for a multifacility unit, the Board evaluates the following factors:

- (a) employees' skills and duties;
- (b) terms and conditions of employment;
- (c) employee interchange;
- (d) supervision;
- (e) geographic proximity;

- (f) centralized control of management and supervision;
- (g) functional integration; and
- (h) bargaining history.

Alamo-Rent- a Car, 330 NLRB 897 (2000).

Also see *An Outline of Law and Procedure in Representation Cases*, Chapter 13.

Extensive evidence is not normally necessary when *all* of the employer's facilities are sought in a combined unit, for an employer-wide unit is a presumptively appropriate unit. When less than an employer-wide grouping is sought, ask the list of relevant questions below.

Relevant Questions:

1. Ask the following questions about the employer's organizational and supervisory structure (e.g., does the unit sought constitute a recognized administrative grouping?):
 - (a) What is the supervisory hierarchy of this location?
 - (b) To whom do these supervisors report?
 - (c) What employee functions are supervised locally, what centrally? Are interviewing, hiring, discharging, promoting, transferring, laying off and recalling done centrally or locally?
 - (d) What is the authority of local supervision? Are decisions of local supervisors subject to review?
 - (e) Is there any general overall supervision? If so, what is its character?
2. The extent of functional and product integration among the employer's locations:
 - (a) How are purchases made for each facility?
 - (b) What records are kept centrally? What locally? (Inquire about clerical, payroll, accounting and personnel records).
 - (c) Is the interviewing, hiring, discharging, promoting, transferring, laying off and recalling done locally or centrally? Obtain evidence of specific examples.
 - (d) Who determines rates of pay for this facility? From which office or facility are employees paid?
 - (e) What operations does each facility perform? How are these operations integrated?
 - (f) Is the product or service the same at each facility and what is the product or service mix at each facility?
 - (g) Is there similarity in the nature of the work performed, skills used and job classifications at each facility? Obtain evidence of specific examples.
 - (h) Do any of the location's product go to other facilities of the employer? If so, how much and what?
3. The extent of centralized control over working conditions and labor relations policies:
 - (a) Who is in charge of labor relations? Overall and on a day-to-day-basis?
 - (b) Who sets labor relations policy, including terms and conditions of employment, for the location involved? Where is this person located? If not at the

facility involved, describe the frequency and nature of the individual's contacts with the facility.

(c) Are the same labor relations policies maintained at all locations?

(d) How is this enforced? Obtain evidence of specific examples.

(e) Who establishes policies concerning interviewing, hiring, discharging, promoting, transferring, laying off, recalling, etc.?

(f) Compare working conditions, wages, hours, privileges and benefits at facilities involved. Obtain evidence of specific examples.

(g) Compare opportunities for advancement and training programs for employees at the facilities.

4. Specific evidence regarding the extent of interchange or transfer of employees among facilities:

(a) How frequently does each occur? Obtain evidence of specific examples.

(b) What is the duration of the interchange or transfer? Obtain evidence of specific examples.

(c) If the interchange or transfer is temporary, how are supervision and terms and conditions of employment affected?

(d) Which and how many employees have been involved in each?

(e) What locations or departments have been involved?

(f) If job openings exist at a facility, are employees of that facility or other facilities given priority for bidding? Is there a common seniority list?

(g) Are there bumping rights or other transferable rights (e.g., seniority) between facilities? Obtain evidence of specific examples.

5. Describe the extent of employee contact among facilities. Describe the nature and frequency of this contact. Give specific examples. How frequently do employees of one facility have contact with employees at another facility? What is the nature of the contact (in person, by telephone, electronic, etc.)? What is the duration of the contact?

6. Is the unit a geographically cohesive unit?

(a) How far apart geographically are the locations?

(b) Is the unit coextensive with a recognized geographical boundary (e.g., a state, county, metropolitan area, etc.)?

7. Applicable bargaining history:

(a) Are any of the unit employees currently represented? Have any of the unit employees been represented previously?

(b) If so, in what unit(s)? When?

(c) Was the recognition based on a Board certification or a voluntary recognition? If by certification, was it via Stipulated Election Agreement or Decision and Direction of Election? Put the unit description and documents on the record, to the extent available.

8. Does a union seek to represent the employees in a broader unit?

9. Differences, if any, in the skills and functions of employees at the different locations, including:

- (a) Work duties, including the degree of common or interrelated duties and location(s).
- (b) The nature of their supervision.
- (c) Extent of common supervision.
- (d) Work skills.
- (e) The type(s) of equipment operated/utilized by the employees.
- (f) The type(s) of products manufactured; similarities.
- (g) Education, training and experience.
- (h) Work schedules.
- (i) Compensation, including the mode of compensation for both regular and overtime work.
- (j) Benefits, including any distinctions based on categories or groupings of the employees involved.
- (k) The availability of the employer's facilities for their use (e.g., break room or locker room).
- (l) Whether there is any progression or promotional advancement from one position to another. Obtain evidence of specific examples.
- (m) Degree of interchange and contact; describe the frequency and the type(s) of interaction and contact (telephone, electronic, face-to-face, etc.). Obtain evidence of specific examples.
- (n) Whether there is any substitution of one group of employees for another and the frequency of such. Obtain evidence of specific examples.
- (o) Extent and frequency of interchange (transfers) from one position to another; permanent or temporary? If temporary, describe supervision, work performed and other terms and conditions of employment. Obtain evidence of specific examples.
- (p) The nature and extent of similar or dissimilar working conditions.
- (q) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.
- (r) Any common seniority list(s).

- (s) Have these employees been represented previously? If so, in what unit(s)? When?

2. Multiemployer Units

The Board has held as a general proposition that a multiemployer unit, unlike other types of bargaining units, is consensual in nature. The essential element warranting the establishment of multiemployer units is clear evidence that the employer unequivocally intends to be bound in collective bargaining by group rather than individual action. *W.L. Miller Co.*, 284 NLRB 1180, 1185 (1987); *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978); *Weyerhaeuser Co.*, 166 NLRB 299 (1967). However, a brief history of multiemployer bargaining may be insufficient to rebut the presumption in favor of single employer units. See *West Lawrence Care Center*, 305 NLRB 212, 217 (1991). Withdrawal from a multiemployer association (either by the union or by an employer) is permitted only when adequate written notice is given prior to the date set by the contract for modification or to the agreed upon date set for the commencement of multiemployer negotiations. *Retail Associates*, 120 NLRB 388, 395

(1958). Once the negotiations have begun, absent mutual consent or unusual circumstances, the Board will not permit withdrawal from multiemployer bargaining.

Note: A petition concerning a unit of a single employer's employees will not be dismissed on the ground that it is not coextensive with the multiemployer unit if a petition is filed after the employer's timely withdrawal. *Arrow Uniform Rental*, 300 NLRB 246 (1990). Moreover, an employer whose several locations were part of a multiemployer unit, but who timely withdrew from the multiemployer group, will not be bound by its prior bargaining history on a multilocation basis in circumstances where the several locations would not have constituted an appropriate unit in the first instance. *Albertson's, Inc.*, 273 NLRB 286 (1984), supplementing *Albertson's, Inc.*, 270 NLRB 132 (1984).

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board held that in cases involving employers governed by Section 8(f) of the Act, it would no longer automatically merge into a multiemployer unit the employees of a single employer who joins a multiemployer association for the purposes of collective bargaining. Rather, in processing petitions filed during the life of an 8(f) agreement, the appropriate unit normally will be the single employer's employees covered by the agreement. The Board specifically noted in footnote 42 of *Deklewa* that employees of a single employer would no longer be precluded from expressing their representational desires simply because their employer has joined a multiemployer association. See also *Stack Electric*, 290 NLRB 575 (1988). In *Comtel Systems Technology*, 305 NLRB 287, 291 (1991), the Board held that the merger of 9(a) and 8(f) bargaining units into a multiemployer unit does not convert the 8(f) relationship into a 9(a) relationship.

Also see *An Outline of Law and Procedure in Representation Cases*, Chapter 14.

Note: Multiemployer bargaining stands in contrast with situations involving contingent employees supplied by a supplier employer. See *Sturgis* discussion in Section VII, H, Contingent Employees.

Relevant Questions:

1. Is the employer a member of a multiemployer association that exists for the purposes of representing members in collective bargaining? Introduce into evidence any constitution/bylaws, as well as other relevant documentation, pertaining to the purposes of the association.
2. Develop in the record the details surrounding the employer's joining the multiemployer association.
3. Is the employer "an employer engaged primarily in building and construction industry" as defined under Section 8(f) of the Act? Develop particulars in the record. If any party contends that the employer is not engaged in the construction industry, see

comments in Section VII, B, Construction Industry Formula.

4. Were there any Board-conducted elections or voluntary grants of recognition to a union premised on its demonstration of majority support in either a particular single-employer unit or in a multiemployer association's unit? Develop particulars in the record.
5. In the absence of any demonstration of majority support, describe the circumstances surrounding the voluntary grant of recognition.
6. In cases not involving building and construction industry employers, develop the history of multiemployer bargaining.
7. With respect to a merger of single-employer units into a single multiemployer association unit, develop in the record the facts necessary to determine whether there was an unequivocal intention to be bound by group bargaining. Be as precise as possible, including developing all relevant dates and circumstances.
8. How was the union put on notice concerning the employers' intent to engage in group bargaining? Develop for the record the parties' actions supporting or belying the conclusion that there was an unequivocal intention to be bound by group bargaining. By the union's actions, did it consent to such a relationship?
9. Is there a designated representative or committee established to represent the group? How are the representatives selected? Do all members of the association participate in negotiations?
10. By whom is the agreement executed? Is a single contract document executed by a representative on behalf of all association members; or is a single contract signed by each of the association members?
11. In circumstances in which there are individually executed agreements, has the union been informed that these agreements would be binding on all association members? Develop the particulars for the record.
12. To what extent, if at all, have employers in the group refused to accept the agreement negotiated by the group? What was the outcome? Develop the particulars in the record.
13. Does the contractual recognition clause describe the unit as being a multiemployer unit?
14. Is there any history of strikes/lockouts? Were such actions taken simultaneously against/by all members of the multiemployer group?
15. Does any employer claim to have left the multiemployer group or rescinded its delegation of bargaining authority to the association? Develop for the record the

particulars involved in the rescission of such delegation of authority. For example:

- (a) In what manner was rescission accomplished?
- (b) Did the rescission occur prior to the established date for the commencement of negotiations for a new agreement and before the date on which such negotiations actually began?
- (c) Were all parties, including the union, notified of the rescission? If so, how and when?
- (d) Are there any contractual requirements or requirements established by virtue of constitution/bylaw provisions? Were they met?

16. Did the other parties expressly consent or acquiesce in the withdrawal from multiemployer bargaining? If so, how and when? Develop for the record the particulars of the parties' actions and reactions.

17. As in all cases where the unit is in dispute, ensure that the record reflects information dealing with the particular job classifications, the numbers of employees in each such classification for each employer and the numbers of employees in the asserted multiemployer unit.

C. Unit Composition

The following categories may not be included in bargaining units determined by the Board:

- (1) Confidential employees.
- (2) Statutory supervisors.
- (3) Independent contractors.
- (4) Agricultural laborers.
- (5) Domestic servants of any family or person at his home.
- (6) An individual employed by his parent or spouse.
- (7) An individual employed by an employer subject to the Railway Labor Act.
- (8) An individual employed by a person who is not an employer as defined in Section 2(2) of the Act.
- (9) Temporary and casual employees. (But see Section VII, H, Contingent Employees, and (F) Temporary Employees).

The following categories of employees typically are excluded from a unit including other employees, but may be represented in a separate unit:

- (1) Office clerical employees (see Section VIII, F, Clerical Employees).
- (2) Professional employees, unless the union seeking to organize the employees seeks a combined unit of professional and nonprofessional employees and the professional employees choose to be represented in a combined unit after being afforded a self-determination (*Sonotone*) election (see Section VIII, A, Professional Employees).
- (3) Guards (see Section VI, C, Guards).

Questions as to whether employees in any particular classification should be included in a petitioned-for unit are determined by applying the community of interest

test. (see Section V, A, 2, for community of interest questions). Whether or not the petitioned-for unit seeks to exclude employees in a particular classification, any excluded employees must have an opportunity to be represented. Since it is Board policy not to create a residual unit, any excluded employees must either constitute or be able to be part of an appropriate unit. Part of the hearing officer's responsibility is to consider the unit placement of *all* employees of the employer. Thus, in cases where the petitioned-for unit does not include all of the employer's nonprofessional employees (except for categories excluded by statute or Board policy), it is incumbent on the hearing officer to ensure that the record includes a full description of all excluded classifications, sufficient to allow the Regional Director and the Board to determine their unit placement.

When a classification's inclusion in or exclusion from the unit is an issue for the hearing, cover the questions in Section V, A, Community of Interest.

D. Residual Units

A residual unit is a grouping of employees that does not itself constitute a separate appropriate unit. Groups of employees omitted from established bargaining units constitute a residual unit appropriate for an election, provided the unit includes all the unrepresented employees of the type covered by the petition.

See *An Outline of Law and Procedure in Representation Cases*, Section 12-400.

Relevant Questions:

1. Do one or more established bargaining units exist? Is the incumbent representative(s) for those established units a participant in this proceeding? What is its position?
2. Does the proposed residual unit include all the unrepresented employees of the type sought by the petition?
3. Are there any unrepresented employees at the facility or facilities in question who are not included in the proposed residual unit? If so, describe in detail. What is the basis for their exclusion?
4. Is there more than one person in the proposed residual unit?
5. Would denying fringe or residual employees representation in a separate unit preclude their opportunity to vote on being represented?
6. If the established unit is a multiemployer one, is the proposed residual unit also premised on a multiemployer basis?

E. Board Rule on Health Care Units

In 1989, the Board set out the appropriate units for acute care hospitals in a

rulemaking procedure, reported at 284 NLRB 1515 et seq. The Rule (Section 103.30) applies only to initial organizing in RM and RC situations; it does not apply to RD petitions. The Rule provides that except in extraordinary circumstances, the following units and only these units are appropriate in an acute care hospital:

- (1) All registered nurses
- (2) All physicians (including residents and interns—*Boston Medical Center Corp.*, 330 NLRB 152 (1999))
- (3) All professionals except for registered nurses and physicians
- (4) All technical employees
- (5) All skilled maintenance employees
- (6) All business office clerical employees
- (7) All guards
- (8) All other nonprofessional employees

GC Memorandum 91-3, dated May 9, 1991, contains guidelines concerning the application of the Health Care Rule and the issues which must be determined prior to hearing. Hearing officers should carefully review this memorandum prior to the hearing and bring it to the hearing.

GC Memorandum 91-4, dated June 5, 1991, provides a discussion of Health Care Unit Placement Issues, including case law citations as to specific placement issues. See Appendix C for a copy. Also see *An Outline of Law and Procedure in Representation Cases* for unit and placement issues involving health care institutions (Sections: 15-170, Health Care Institutions; 1-315, Jurisdiction; 15-146, Health Care Institution Drivers; 16-300, Skilled Maintenance; 17-511, Health Care Supervisory Issues; and 19-510, Technical Employees-Health Care).

Various sections in this manual also contain relevant questions concerning professional employees (Section VIII, A), technical employees (Section VIII, E), guards (Section VI, C) and supervisory issues (Section VI, E).

1. Existence of an Acute Care Hospital

Pursuant to the Board's Rule, an "acute-care hospital" is either:

- (a) a short-term care hospital in which the average length of stay is less than 30 days *or*
- (b) a short-term hospital in which over 50-percent of all patients are admitted to units where the average length of stay is less than 30 days (the average length of stay is determined by reference to the most recent 12-month period preceding receipt of a representation petition for which data are readily available).

Facilities that are primarily nursing homes, psychiatric hospitals or rehabilitation hospitals are excluded from the definition of acute care hospital. See 284 NLRB 1597.

If it is necessary to develop a record as to whether the facility is an acute care hospital, the hearing officer should formulate questions based on the above definition.

If there is disagreement as to whether the health care facility is an acute care hospital and the employer will not produce records sufficient for the Board to determine these facts, the hearing officer should issue a subpoena. (This should be discussed with your supervisor prior to the hearing.) If after the issuance of a subpoena, an employer does not produce records sufficient to determine the facts, the Board may presume the employer is an acute care hospital. Final Rule, 284 NLRB at 1591–1592.

2. Scope Issues

Except in “extraordinary circumstances,” the above-described units are the appropriate units in an acute care hospital. The following are not considered to be “extraordinary circumstances” and deviation from the rule is not appropriate:

- (a) Diversity of the industry, such as the sizes of various institutions, the variety of services offered, including the range of outpatient services and differing staffing patterns.
- (b) Increased functional integration of and a higher degree of work contacts between employees as a result of the advent of the multi-competent worker, increased use of “team” care and cross-training of employees.
- (c) Impact of nationwide hospital “chains.”
- (d) Recent changes within traditional employee groupings and professions, e.g., increase in specialization of RNs.
- (e) Effects of various governmental and private cost containment measures.
- (f) Single institutions occupying more than one contiguous building.

Examples of extraordinary circumstances where the Rule might not apply are described below. Final Rule, 284 NLRB 1573–1574. If a party argues that extraordinary circumstances exist requiring units that do not conform with the Rule, the party should make an offer of proof on the record. To keep the record short, offers of proof relating to extraordinary circumstances should not normally be presented through witnesses. The offers may be oral or written and should consist of a statement that, “if allowed to testify, the witness would state” The following are some examples of extraordinary circumstances where the rule might not apply:

- (a) Is this a unit of five or fewer employees? If so, develop a record on the appropriateness of this unit, since it is considered to be an extraordinary circumstance and the Rule is inapplicable.
- (b) Consolidation of two or more of the above-listed units (absent a statutory restriction, e.g., guards and nonguards in the same unit); such a combined unit may be found appropriate. In some circumstances, evidence as to the appropriateness of the combination may be required. Hearing officers should research Board law and consult with their supervisors in case of uncertainty.
- (c) Residual units in the health care industry raise other issues. For a discussion of residual units under the Rule, see *St. Mary’s Duluth Clinic Health System*, 332 NLRB 1419 (2000) (non-incumbent union may petition for separate residual unit of all unrepresented employees where there is a nonconforming unit); *Kaiser Foundation Health Plan*, 333 NLRB 557 (2001); *St. John’s Hospital*, 307 NLRB 767 (1992).

3. Issues Which May be Litigated Notwithstanding Board Rule

- (a) The placement of employee classifications within the appropriate units, e.g., whether laboratory technicians are technical or professional employees. (See GC Memo 91-4 for placement issues.)
- (b) Supervisory and managerial status of certain classifications.
- (c) Contract bar issues.
- (d) Labor organization status.
- (e) Eligibility issues (e.g., relatives of management, part-time employees).
- (f) Single facility appropriateness. [**Note:** In *Manor Healthcare Corp.*, 285 NLRB 224 (1987), the Board announced that it would apply the single facility presumption to health care facilities. The presumption, however, can be “rebutted by a showing that the approval of a single-facility unit will threaten the kinds of disruptions to continuity of patient care that Congress sought to prevent when it expressed concern about proliferation of units.” (See *Mercywood Health Building*, 287 NLRB 1114 (1988), for an application of this standard. Compare *West Jersey Health System*, 293 NLRB 749 (1989)). Under the Board’s Rules on health care bargaining units, this issue is left to adjudication. 284 NLRB 1527, 1532 (1987). See also *Child’s Hospital*, 307 NLRB 90 (1992) (hospital campus consisting of multiple buildings found to be a single facility).]

F. Craft Units/Construction Units

Issues concerning craft units may arise in two distinct situations: (1) when the petition seeks initial establishment of a craft unit; and (2) when the petition seeks to sever a craft group from an existing unit historically represented by a different union.

See *An Outline of Law and Procedure in Representation Cases*, Chapter 16.

Relevant Questions:

1. Does the proposed unit consist of a distinct and homogeneous group of journeymen craftsmen performing the functions of their craft?
2. What is the craft group sought?
3. What work is done by the craft employees?
4. Does their work require full use of craft skills?
5. Is any noncraft work done?
6. Do other employees do any of the alleged craft work?
7. What qualifications does the employer require for employment in the craft positions?
8. Have members of the proposed unit participated in an established apprenticeship

program?

9. Have members of the proposed unit been certified as journeymen craftsmen or been licensed or certified in any other manner?
10. Has a formal apprenticeship program been established by the employer?
11. Does the employer maintain any other training programs for employees in the proposed unit?
12. Are they required to pass a test?
13. What is the rate of employee turnover in the work force of the proposed unit?
14. What is the history of collective bargaining of the employees sought to be represented?
 - (a) Were the employees represented in the past and, if so, in what type of unit were they included?
 - (b) How long were they represented in this manner?
 - (c) Who represented them?
15. Have the employees in the proposed unit established and maintained their separate identity?
 - (a) Do they have different wage rates, mode of payment, fringe benefits or hours of work?
 - (b) Do they have the same working conditions as other employees?
 - (c) Do they have separate immediate supervision?
 - (d) Does their immediate supervisor belong to some craft?
 - (e) Do different degrees or standards for supervision exist?
 - (f) Are their work assignments similar to those of each other, yet different from those of other employees?
 - (g) Is there any interchange or overlapping of job duties with other employees?
 - (h) Are they required to wear different uniforms, use different equipment or handle different products?
 - (i) Do they have a separate seniority list or promotion system?
 - (j) What is their relationship with customers compared to that of other employees?
 - (k) What is their position in the company's organizational scheme? Do they make up a separate department?
 - (l) During slack periods of work can the employees "bump" other employees or be "bumped" by other employees?
16. What is the history and pattern of collective bargaining in the industry involved?
 - (a) Has a similar unit previously been separately represented in the same industry?
 - (b) Has bargaining in such units been unsuccessful?
 - (c) Is such unit representation prevalent in the industry or are other such units looked on as unique situations?
 - (d) Has the industry enjoyed a stable bargaining situation under the pattern of

- representation it has followed?
- (e) What is the bargaining history at the employer's other plants?
 - (f) What is the bargaining practice in the area?
17. What is the degree of integration of the employer's production processes?
- (a) To what extent does the production process depend on the performance of the employees in the proposed unit?
 - (b) How large is the plant?
 - (c) What is the size of the proposed unit?
 - (d) Do the employees work separately or among other groups of employees? To what extent do the employees have contact with other employees at facilities provided by the employer and/or by being mobile in the plant?
 - (e) How frequent is the interchange or transfer between employees of the proposed unit and other employees?
 - (f) How frequent is the interchange of equipment?
18. When the petitioner is seeking to sever a craft group from an existing larger unit, what is the history of collective bargaining in the existing unit?
- (a) What has been the length of the bargaining history in the existing unit?
 - (b) Have there been successive collective-bargaining agreements between the employer and the incumbent union throughout this period?
 - (c) Has there been a stable bargaining relationship?
 - (d) Have there been any strikes or other interruptions to the stability of the bargaining relationship? When and for what duration?
19. When the petitioner is seeking to sever a craft group from an existing larger unit, have the petitioned-for craft employees participated substantially in maintaining the existing pattern of representation?
- (a) How long have the craft employees been included in the existing unit?
 - (b) Have they joined the incumbent union and participated in its affairs?
 - (c) Have craft employees held positions as officers of the incumbent union?
 - (d) Have they served as stewards or in other similar positions?
 - (e) Have they been represented on the incumbent union's negotiating committees?
 - (f) Did the proposed unit have a chance to vote in a self-determination election?
 - (g) Have there been past efforts by the craft employees to obtain separate representation?
 - (h) Have the petitioned-for employees been members of a craft union? For how long?
 - (i) Have the petitioned-for craft employees acted as a separate group in dealing with the employer or the incumbent union?
20. When the petitioner is seeking to sever a craft group from an existing larger unit, have the petitioned-for craft employees been adequately represented by the incumbent union?
- (a) Have the petitioned-for employees received periodic improvements in wages and benefits during the time they have been included in the existing unit?
 - (b) Has the incumbent union processed grievances on behalf of the petitioned-for employees?

- (c) Does the incumbent union have a structure within its organization, such as a skilled trades department, for dealing with the special interests of employees of the type sought by the petition?
21. When the petitioner is seeking to sever a craft group from an existing larger unit, is the production process functionally dependent on the work of the craft employees?
- (a) Would an interruption in production occur if the petitioned-for employees ceased their work?
- (b) Does the employer contract out any of the craft work (thereby limiting the extent to which the production process is functionally dependent on the work of the craft employees)?
22. What are the qualifications of the union seeking severance, if such is the case?
- (a) Is the union newly formed?
- (b) What is the union's experience in representing employees like those in the proposed unit?
- (c) What is the union's experience in the industry involved?
- (d) Is the union considered a "traditional union" for the situation presented?
- (e) Is the union particularly qualified to deal with the special problems of the skilled employees involved?

G. Departmental Units

The hearing officer should review case law regarding departmental units in certain industries (e.g., meat departments in grocery stores; maintenance departments in hotels, universities and health care institutions; departmental units in the newspaper industry; selling and nonselling departments in the retail industry; and service and warehouse departments in the retail industry).

See *An Outline of Law and Procedure in Representation Cases*, Chapters 15 and 16.

Relevant Questions:

1. Name or designation given the department by the employer.
2. List all the classifications within the department and the number of employees in each classification.
3. Are all the employees in the group or department included in the proposed unit? If not, explain any exclusions.
4. Describe the functions or job duties of the group? Are these job functions and duties distinct from those of employees in other departments? If so, how?
5. Are employees in this group required to or do they in fact have any special skills or training?

6. Are employees in the group identified with trades or occupations distinct from those of other employees? Describe any duplication of skills or trades in other groups.
7. Who supervises the group? Are they separately supervised from other employees? To whom does that supervisor report and for what purpose?
8. Describe the relationship or flow of work between this group and other groups. Be specific.
9. Is the work performed by this group duplicated in other groups or departments? Explain.
10. Is there any interchange of employees in this group with employees in other groups or departments? If so, determine the reason for the interchange, the employees involved and the frequency of occurrence.
11. Describe any interchange or common use of tools and equipment and where these tools/equipment are located.
12. Describe the area where the employees work and if they are sent into other areas, identify these areas and the frequency of their being sent to these other areas.
13. Describe the prior bargaining history for the group, (e.g., have they been separately represented?)
14. Do employees in the proposed department share common fringe benefits, locker room, lunchroom?
15. How do wages of employees in the group compare with those of employees in other departments?
16. Do employees in this group wear uniforms? What about employees in other groups?

H. Expanding Units

In expanding unit cases, the test is whether the present complement is substantial and representative of the complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications. *MGM Studios of New York*, 336 NLRB No. 129 (2001). In addition, the Board examines whether the expansion was the result of a fundamental change in the nature of the employer's business. *Id.* In *Endicott Johnson de Puerto Rico*, 172 NLRB 1676 (1968), the Board stated that the yardsticks enunciated in *General Extrusion Co.*, 121 NLRB 1165 (1958) are applicable only to contract bar issues and were not intended to govern the propriety of granting an election in cases involving an expanding unit. Nevertheless, in general, the Board finds an existing complement of employees to be "substantial and representative"

when approximately 30-percent of the eventual employee complement is employed in approximately 50-percent of the anticipated job classifications. *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000). In making this determination, the Board does not consider expansion that is too remote in time to be material. *Gerlach Meat Co.*, 192 NLRB 559 (1971).

See *An Outline of Law and Procedure in Representation Cases*, Section 10–600.

Relevant Questions:

1. Construction or operational changes:

- (a) How definite are the employer's plans to expand its operations? Are the plans merely speculative?
- (b) Are the projected changes within the control of the employer or a third party?
- (c) Did the employer already begin the construction or the operational changes? If so, when? Have prior delays occurred?
- (d) Will the size of the facility be expanded? Will additional facilities be added? When?
- (e) Describe in detail the operational changes being made, showing anticipated completion for each future 30-day or other period.
- (f) When will the final phase be completed?
- (g) What is the percentage of completion at this time?
- (h) Will all or part of the new operations be integrated with the old operations?
- (i) Will the changes result in a fundamental change in the employer's business operations?

2. Equipment:

- (a) Will the expansion of operations require the installation of new equipment?
- (b) Describe present machine installations.
- (c) Describe the machines to be installed.
- (d) Has any new equipment already been purchased?
- (e) Will the equipment be installed according to the construction phase?

3. Production:

- (a) Is the plant in production now? Describe.
- (b) What product is produced?
- (c) Will production increase on the installation of the new equipment?
- (d) Will a new product or products be produced? Will new services be provided?
- (e) Will the old product continue to be produced?
- (f) Describe fully any difference between the products now in production and the new product to be produced, i.e., method of production, skills involved.

4. Employees:

- (a) How many employees are presently employed in the unit?
- (b) What are the classifications of the present employees and the number of employees in each classification?
- (c) Describe the duties, qualifications and skills necessary for employment in the

present classifications?

(d) How many new classifications will be established as a result of the operational changes? What are they? Have any of the new classifications already been added? If so, which and how many? When will the rest of the new classifications be added?

(e) Describe the duties, qualifications, and skills necessary for employment in the new classifications. Will the duties, skills, and qualifications be significantly different from those required for the present classifications? What are the specific differences?

(f) Have new employees already been hired? Have prospective employees been interviewed? How many employees are expected to be hired? When will they come on?

(g) Will the new employees receive the same fringe benefits, such as vacations and holidays, as those employees presently employed? If not, what will their fringe benefits be?

(h) Will the new employees work substantially the same hours and receive the same rates of pay as those employees presently employed? If not, what will their hours and wages be?

(i) Will the new employees work under the same general supervision as present employees? If not, explain. Is there a projected increase in supervisory personnel?

(j) Will there be any interchange between the present employees and those expected to be hired? Explain fully.

(k) Will the new employees work in an area physically separated from the present employees?

I. Contracting Units

The Board has extended its expanding unit guidelines to cases where the unit is contracting; accordingly, with modification, the same questions will apply to both expanding and contracting units. *MGM Studios of New York*, 336 NLRB No. 129 (2001). In contracting unit cases, the test is whether a substantial and representative complement of employees will remain employed in a substantial and representative number of classifications. Thus, in general, the Board finds an existing complement of employees to be "substantial and representative" when approximately 30-percent of the present complement of employees and 50-percent of the present job classifications will remain after the contraction. In addition, the Board examines whether the contraction was the result of a fundamental change in the nature of the employer's business. *Douglas Motors Corp.*, 128 NLRB 307 (1960).

See *An Outline of Law and Procedure in Representation Cases*, Section 10-700.

Ask questions covered in Section H, Expanding Units.

VI. UNIT EXCLUSIONS

A. *Independent Contractors*

Section 2(3) of the Act excludes from the definition of “employee” an individual having the status of an independent contractor. In *Roadway Package System*, 326 NLRB 842 (1998) and *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board adopted the common law test of agency to determine whether an employee is an independent contractor. The common law test is set forth in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The inquiry is generally fact-intensive; the factors to be considered in determining employment status include: (1) whether the work performed is an essential part of the company’s regular business; (2) whether the person is engaged in an occupation or business that is distinct from the company’s regular business; (3) the length of time for which the person is employed or contracted; (4) the skill required in the particular occupation; (5) whether the company provides the tools and instrumentalities necessary to perform the work; (6) the method of payment; and (7) the extent to which the company controls the details of the work. All factors regarding the parties’ relationship must be considered, not just those involving the right to control.

See *An Outline of Law and Procedure in Representation Cases*, Section 17–400.

Relevant Questions:

1. In what occupation is the individual employed?
2. What are the duties performed and describe the skills required.
3. How was the relationship between the individual and the employer established? Have the parties entered into a contract? Oral or written contract? If written, obtain a copy for the record.
4. Is the individual free to reject work for the employer without breaking the terms of their agreement?
5. Is this individual’s work part of the normal business of the employer, i.e., does the employer regularly use this individual as part of the business operation? Is the individual employed for a particular length of time? Is the individual’s work continuous and regular? Is the individual’s work based on a particular “project” that is limited in duration?
6. What is the individual’s method of payment (e.g., hourly rate, by the job, salary, percentage of sales, percentage of load)? Compare method of payment with that of the employer’s employees.
7. Is the individual on the company payroll? Under what designation?

8. Who determines the amount and method of payment? Is it negotiated between the employer and the individual? Is it predetermined by the employer? Is there anything the individual can do to vary the amount of payment? If so, what?
9. Does the employer deduct FICA or withholding taxes on behalf of the individual?
10. Who controls the day-to-day work of this individual in the following areas; (compare with the employer's employees):
 - (a) Who supervises the individual? What is the nature of the supervision? Obtain details.
 - (b) Does the individual have to report to employer officials on a daily basis? How does this communication take place?
 - (c) Are these individuals subject to disciplinary action? If yes, what kinds of disciplinary action, e.g., warnings, suspensions, discharge? What types of infractions warrant such disciplinary action?
 - (d) Does the employer mandate the number of hours worked per day or per week? Can the individual establish his/her own schedule?
 - (e) Does the employer require that the work be performed in a specific fashion? If the individual is a driver, are drivers required to run predetermined routes or can they vary from a route schedule?
 - (f) Is the relationship between the individual and the employer covered by any of the employer's rules and/or policies? If so, introduce rules/policy in the record. Are any of these policies required by State or Federal regulations? Identify which policies are government-regulated and by which government agency. Obtain a copy of the government regulations.
 - (g) Does the individual have to wear a company uniform? If yes, who provides it? Is the individual required to pay for the uniform?
11. Does the individual have an opportunity to affect his/her income by cultivating business or customers?
12. Does the individual purchase or own the equipment used in the work or is it provided to the individual? If the individual purchases or owns the equipment, has the employer loaned the individual money to purchase the equipment? Is the employer the seller of the equipment? What are the terms of the loan? Does the equipment used in performing the work bear any logo? Who carries the insurance on the property and equipment owned or used by these individuals?
13. Does the individual hire others to perform work for the employer? If others are hired to perform work, who hires, fires, supervises and pays them? How many are hired and what is their rate of pay and classification?
14. Compare the individual's fringe benefits with those of the employer's employees, e.g., vacation time, holiday pay, sick leave, unemployment compensation benefits, worker's compensation benefits.

15. Does the individual use all or part of the employer's facilities?
16. Who pays any license fees or taxes?
17. Does the individual depend on this work for regular income? What are the individual's other sources of income?
18. Is the individual free to contact and perform work for or sell goods of another employer using his employees or equipment? Is the individual subjected to any penalty, monetary or otherwise, if work is performed for any other employer?
19. Is the individual free to sell or transfer his job, lease or service area? Are there any penalties if the individual transfers, sells or leases the job or service area to another individual? If so, describe the nature of the penalties.
20. Can this individual extend credit to customers without the employer's permission? Is there a limit on the extension of credit?
21. What records are these individuals required to keep, who prepares them and where are the records maintained? Which records, if any, are required by government regulations?

B. Agricultural Employees

Section 2(3) of the Act excludes from the definition of employee any employee who is an agricultural laborer. The Board relies on Section 3(f) of the "Fair Labor Standards Act of 1938" (29 U.S.C. 201 et seq.) to define agricultural employees:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Board's lead case applying this definition is *Camsco Produce Co.*, 297 NLRB 905 (1990).

Whether an employee is an exempt agricultural laborer is determined either by the work he performs or by the work performed by his employer. The fact that the employer performs some phases of direct farming work falling within the primary definition of agriculture does not necessarily mean that it is a farmer within the meaning of Section 3(f). Further, employees who regularly perform any nonagricultural work are covered by the Act with respect to that portion of the work which is nonagricultural.

The burden of proving that individuals are exempt as agricultural laborers rests on the party asserting the exemption. *Agrigeneral L.P.*, 325 NLRB 972 (1998). The question of employee status is decided not on an employer wide basis, but on a classification by classification analysis.

See *An Outline of Law and Procedure in Representation Cases*, Section 17–100.

Relevant Questions:

1. Describe the employer's operations, including any related operations of the employer.
 - (a) Is the employer a farmer?
 - (b) Does the employer perform farming work on land owned, leased and controlled by it and devoted to its own use?
 - (c) Does the employer own and bear the risk of loss of the commodities while they are raised or produced?
 - (d) Is the work performed on the same farm on which the commodities are raised or produced?
 - (e) Does the employer control the method and means by which the commodities are raised or produced?
 - (f) What type of product results from the operation?
 - (g) Is the raw or natural state of the commodity changed and a value added?
 - (h) Does the operation entail only the preparation of the product for market?
 - (i) Does the employer have an extensive commercial operation with a substantial investment in processing equipment?
2. What is the relation of the work in question to the actual farming work? Is the work performed as an incident to or in conjunction with the actual farming operations?
3. Describe the employees' duties. Secure specific details.
 - (a) Is the employee involved in "cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."
 - (b) What is the location of the employees' work?
4. Do the employees also perform any nonagricultural work?
 - (a) Describe such work.
 - (b) Do they perform nonagricultural work on a regular basis?
 - (c) How often do they perform nonagricultural work?
 - (d) What percentage of their working time is spent performing such work?
 - (e) Is there interchange with employees who perform no agricultural tasks? Frequency and reason.
5. Does the work in question involve handling, on a regular basis, any amount of

commodities not raised or produced by the employer? If so:

- (a) Who raised or produced such commodities?
- (b) What is the amount of such commodities?
- (c) How frequently are such commodities handled?

C. Guards and Watchmen

Section 9(b)(3) of the Act defines a guard as “any individual employed...to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer’s premises.” *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996). Section 9(b)(3) of the statute has 2 elements: (1) it prohibits the Board from finding appropriate any bargaining unit that includes both guards and nonguards; and (2) it prohibits certification of a union representing a unit of guards if the union admits nonguards to membership or is directly or indirectly affiliated with a union that admits nonguards. Thus, a petitioned-for unit of guards must include only guards and the union seeking certification must admit only guards to membership. If possible, secure a stipulation from the parties that the labor organization(s) involved admits only guards to membership.

Employees who perform some guard-like duties that are “incidental” to their other duties are not guards under Section 9(b)(3). *Wolverine Dispatch, Inc.*, 321 NLRB 796, 798 (1996); *55 Liberty Owners Corp.*, 318 NLRB 308 (1995).

A union that receives direct or indirect assistance from a nonguard union can be disqualified from representing a unit of guards. This concept is sometimes referred to as “fronting.” The Board requires “clear and definitive evidence” to establish a union’s disqualification based on its affiliation with nonguard unions. *Wackenhut v .NLRB*, 178 F.3d 543 (D.C. Cir. 1999); *Lee Adjustment Center*, 325 NLRB 375, 376 (1998). Indirect affiliation between a guard union and a nonguard union is established when the “extent” and “duration” of the dependence indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action. Where a union has received assistance from a nonguard union only in the formative stages of organizing, and no further assistance exists beyond the formative stages, the Board has found the union certifiable under 9(b)(3). *Wackenhut*, supra; *Lee Adjustment*, supra; and *Bally’s Park Place*, 257 NLRB 777 (1981).

See *An Outline of Law and Procedure in Representation Cases*, Sections 18–200–240.

Relevant Questions:

Status of Employees as Guards:

1. Describe, in detail, the duties of the employees and the employer’s operations.
2. Do the employees carry weapons, clubs or other security-type devices? What kinds?

3. Do the employees wear uniforms, identification badges and/or name tags? Do such identify them as being security or guard personnel?
4. Are the employees' uniforms/badges different from those worn by admitted guard employees?
5. Are they given any specialized training or instruction? What are the particulars of such instruction? Obtain a written copy of the instructions.
6. Where are the employees physically situated, e.g., in a security booth, at a reception area or in front of closed circuit televisions or computer monitors?
7. What are the employer's instructions on actions to be taken if employees witness suspicious activity on the premises? What are they expected to do in the event that there is a threat to the security of the premises or property? Are they instructed/expected to use physical force or are they instructed/expected to leave such action to other persons and/or to the local police authorities? If instructions are in writing, obtain them for the record.
8. Do the employees enforce any rules regarding the employer's property, employees or other persons? Secure the employer's rules regarding the safeguard of the employer's property or the conduct of employees or other persons while on the property. How do the employees respond if they observe an infraction of the rules, e.g., is the infraction reported, to whom is it reported, what is done when a rule is violated?
9. Do the employees perform any other work for the employer? How often do they perform these other tasks versus the alleged guard duties?
10. Do the employees make periodic rounds of the premises? How often? Do they complete reports of their rounds? Obtain copies of the reports. Do they use a two-way radio or other means to maintain contact with a central location or with each other?
11. Do the employees monitor the entrance and exit of persons at the premises? Do they issue visitor passes and/or require persons to sign in to gain access to the premises? Do they inspect items being carried by persons entering or exiting the premises? Are they involved in the "frisking" of persons entering the facility? Are they involved in "sweeps" or "shake-downs" of the facility?
12. Do the employees activate/deactivate security devices at the employer's or at customers' premises? In the event that a security system is activated, what are they expected/required to do?
13. Do the employees have keys or other means to provide them access to secured or restricted access areas? For what purpose do they have such access?
14. Are the employees required to fill out incident reports? Secure copies of incident reports, if any. What happens to the incident reports after they are completed?

15. Are the employees required to be bonded?
16. Are the employees deputized?
17. Does the employer's insurance require that it employ guards?
18. Are the employees fingerprinted and/or photographed at the time of hire?
19. Is any security check or police check of their background performed at the time of hire?
20. Are the employees expected to play a role in performing security functions in the event of a strike? Are there any written plans or instructions which reflect their role in the event of a strike? Have they ever played such a role during the course of a strike? If so, obtain a copy of the instructions for the record.
21. By whom are the employees supervised? Compare such supervision with that of other admitted guard and nonguard employees.
22. Are there differences in the employees' terms and conditions of employment as compared to those of other employees or admitted guards? If so, describe.
23. Do the employees substitute for other admitted guard employees? When and how often?

Section 9(b)(3) Status of Labor Organization:

Where there is an issue as to whether a labor organization is certifiable under Section 9(b)(3) because it admits to membership one or more classifications of non-guards, ask the following:

1. Obtain classifications that are admitted to membership. If possible, obtain a stipulation as to whether these classifications are Section 9(b)(3) guards.
2. If the classifications are employed by another employer, identify the employing entity and whether it is an employer as defined in Section 2(3).
3. If there is an issue as to whether the employees employed by another employer are guards, ask:
 - (a) When and how were the employees in question admitted to membership? By stipulated election agreement, directed election, voluntary recognition?
 - (b) Secure an offer of proof as to how the party would establish that the employees admitted to membership are not guards under 9(b)(3). Contact Regional management for guidance, particularly if those employees are questionable, or "close-call" guards. *Rapid Armored Corp.*, 323 NLRB 709, 710-

711 (1997).

Claims of Affiliation with Nonguard Union:

Where a party claims that a guard union is directly or indirectly affiliated with a nonguard union, ask the following questions:

1. What kind of assistance did the petitioner (or other intervening labor organization) receive from the other union? Obtain details.
2. Was the assistance limited to an initial contact or meeting?
3. Were any financial aid or legal services provided? Were such in the form of a loan or a donation?
4. Was there assistance in securing card signers, lending an office for meetings, etc.?
5. When did the assistance commence? Has the assistance ended? If so, when did it end?
6. Does the assisting labor organization admit nonguards to membership? If possible, secure stipulation.
7. Is there any overlap between the guard union's officers and the nonguard union's officers? If so, explain in full.

D. Confidential Employees

Confidential employees are those who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or regularly substitute for employees having such duties. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981); *Associated Day Care Services*, 269 NLRB 178 (1984); *B.F. Goodrich Co.*, 115 NLRB 722 (1956). This is known as the "labor nexus" test. Mere access to confidential labor relations material is not sufficient to confer confidential status. *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981). Employees who have access to confidential financial or business information or personnel records are not considered confidential employees. *Fairfax Family Fund*, 195 NLRB 306, 307 (1972); *Brodart, Inc.* 257 NLRB 380, 384, fn.10 (1981).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–100.

Relevant Questions:

1. What are the duties of the employee? Get specific details.

2. What are the duties of the employee's supervisor? Does the employee's supervisor handle the employer's labor relations, e.g., bargaining or handling grievances, with respect to employees of the entire plant, department or other group?
3. What is the nature of the confidential material handled? Get details of the type of material at issue, e.g., documentation relating to the employer's proposals during bargaining, minutes of meetings where bargaining strategy is discussed, grievance investigation reports, employer's policy on grievances, etc.
4. How does the employee come into contact with the confidential material?
 - (a) Is the employee present during management meetings regarding labor relations, e.g., preparation for bargaining sessions or discussion of grievances? If so, how often is the employee present (all the time or isolated incident)? Develop details of employee's responsibilities during meetings.
 - (b) Does the employee assist in preparation of the confidential material? If so, describe how.
 - (c) Where is the confidential material maintained and how does the employee have access to it?
5. Does this employee substitute for a confidential employee? If so, how often?
6. Do other employees also have access to the alleged confidential material? If so, who? Develop details including the nature of the access to the material.
7. Does employee have access to labor relations policy data regarding the entire plant, one department or other group?
8. Does the employee have access to confidential material prior to the time that material is available to any labor organization or to other employees?

E. Supervisors

Section 2(11) of the Act states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The traditional test for determining supervisory status used for *all* employees, including health care professionals, is:

- (1) whether the employee has the authority to engage in any one of the twelve criteria listed in Section 2(11) of the Act;
- (2) whether the exercise of such authority requires the use of independent judgment; and

(3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573–574 (1994).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if the authority has not yet been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001), 167 LRRM 2164. Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). Mere inferences or conclusionary statements without detailed, specific evidence are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

With regard to assignment and direction and the requirement of independent judgment, Board law is not settled. In *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001), 167 LRRM 2164, the Court rejected the Board's interpretation of "independent judgment" in finding that registered nurses do not use "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. In discussing the tension in the Act between the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees."

See *An Outline of Law and Procedure in Representation Cases*, Chapter 17.

Relevant Questions:

General Questions:

1. Describe the duties of the individual in question. What is his or her correct title? How and where does this individual fall in the employer's organizational and operational structure?

2. For what is the individual held responsible by the employer? Describe in detail.
3. Where does the individual fit in the employer's supervisory hierarchy?
4. Is the individual the highest ranking individual present at any time or on any shift?
5. Which classifications report to the individual?
6. Compare the individual's duties with those of persons working immediately over and under him or her. To whom does the individual report?

7. How many disputed individuals are there compared to the number of employees in each of the other classifications in the unit?

HIRE

1. Is the individual involved in hiring?
2. Describe the hiring process and the individual's role in that process.
3. Does the individual interview job applicants?
4. Is any other supervisor or member of management present at such interviews? If not, do other supervisors or managers interview the applicant thereafter?
5. Does the individual have the authority to make the final decision regarding hiring? Give specific examples.
6. Does the individual assess the applicant's technical ability to perform the work by tests or other means? If so, describe the process.
7. Does the individual make recommendations whether the applicants should be hired?
8. What happens to that recommendation? Is the recommendation accepted? Give specific examples.

TRANSFER

1. Is the individual involved in transfers?
2. Who makes the decision to transfer employees?
3. Under what circumstances are transfers made?
4. Are there procedural guidelines for transferring employees?

5. Are the transfers at issue the result of preexisting staffing criteria or guidelines?
6. Are the transfers voluntary or involuntary?
7. Are the transfers permanent or temporary?
8. If the person in question makes a decision, what factors are considered in making the decision to transfer? (Skills, seniority, employee preference, operating needs, etc.)
9. Does the transfer affect the wages or working conditions of the transferred employee?
10. Does the individual have the authority to make the final decision regarding transfer?
11. Does the individual make recommendations whether the transfer should take place?
12. What happens to that recommendation? Is the recommendation accepted?
13. What is the process of review of the recommendation? Does any other supervisor or member of management consider the transfer request? Get specific examples and names of individuals transferred.

SUSPEND/DISCIPLINE

1. Does the individual suspend or discipline employees?
2. Does the individual issue oral or written warnings to employees?
3. Under what circumstances are warnings issued? Under what circumstances are employees suspended? Is a progressive discipline system involved?
4. Who signs written warnings or suspension notices? Describe the process followed in issuance of a warning/suspension?
5. Does a superior review the warning or the suspension? Specifically, what does the superior do when reviewing the warning or suspension? Does the superior investigate the underlying events that gave rise to the warning/suspension? Based on the review, does the superior affirm or reject the recommendation?
6. Do such warning notices affect employees' jobs?
7. Do warnings and/or suspensions serve as a basis for more serious disciplinary action under a system of progressive discipline?
8. Do suspensions affect employees' wages, e.g., are there paid or unpaid suspensions?

9. Are warnings or suspensions taken into account for evaluation purposes?
10. Are warnings or suspensions placed into employee personnel files?
11. Describe the circumstances under which employees are suspended. Is it automatic for certain kinds of misconduct? Describe that conduct.
12. Does the individual have the authority to make the final decisions regarding warnings or suspensions?
13. Does the individual make recommendations whether warnings or suspensions should take place?
14. What happens to those recommendations? Are those recommendations accepted?

LAYOFF/RECALL

1. Does the individual layoff or recall employees?
2. Is he/she involved in the decision to layoff or recall employees?
3. Is he/she involved in selecting employees for layoff or recall?
4. What system is utilized to determine which employees are laid off or recalled, e.g., by department, seniority, performance, skills.
5. Does the individual have the authority to make the final decision regarding layoff or recall?
6. Does the individual make a recommendation whether the layoff or recall should take place?
7. What happens to that recommendation? Is the recommendation accepted?
8. What is the process of review of the recommendation? Does any other supervisor or member of management consider the layoff or recall? Get specific examples and names of individuals laid off or recalled in the past.

PROMOTE/REWARD (INCLUDING EVALUATIONS, OVERTIME ASSIGNMENTS, TIME OFF, WAGE INCREASES)

1. Does the individual promote or reward employees, including granting time off, overtime, wage increases, bonuses or evaluations?
2. Are there established guidelines governing the promotion of employees? If written, obtain them.

3. Describe the circumstances under which the individual has promoted other employees? Give specific examples.
4. Does the individual have the authority to grant time off to employees, including sick leave and vacation time?
5. In what circumstances does the individual have the authority to grant time off, including vacation and sick leave? Has that authority been exercised? Give specific examples. Describe the procedures utilized and the standards applied when granting time off?
6. Does the individual have the authority to grant or authorize overtime to employees? In what circumstances does the individual have the authority to authorize overtime? Has that authority been exercised? Give specific examples. Describe the procedures utilized and the standards applied when authorizing overtime? If written, obtain them.
7. Does the individual have discretion to determine to whom the overtime is assigned?
8. Is there an established procedure for assignment of overtime? Are overtime assignments based on seniority or rotating lists? If written, obtain them.
9. Are overtime assignments voluntary? Does an employee have the right to reject overtime assignments?
10. Are there established guidelines governing wage increases or bonuses granted to employees? If written, produce the documents.
11. How are wage increases or bonuses determined? Are they automatic, based on merit, years of service, evaluations, productivity?
12. Does the individual prepare written evaluations? If so, how? Describe the nature of such evaluations.
13. Describe the employer's evaluation process/system. If there is a form, obtain it for the record. Describe how the individual evaluates other employees and describe what is done with the evaluation after it is completed. Give specific examples.
14. When preparing evaluations, do they include recommendations for specific personnel actions? If so, what kind of personnel action?
15. Do evaluations affect employees' job status, wage increases, promotions or disciplinary action? Give specific examples.
16. How much weight does the employer place on these evaluations?

17. Do higher-level managers obtain information from other sources for evaluation purposes?
18. Does the individual make recommendations regarding the evaluations?
19. What happens to that recommendation? Is the recommendation accepted?
20. What is the process of review of the recommendation? Does any other supervisor or member of management consider the evaluation? Get specific examples and names of individuals evaluated.

ADJUST GRIEVANCES

1. If the individual handles grievances, describe methods used and extent of involvement. If there is a written grievance procedure, attempt to obtain a copy for the record, if available.
2. Do employees typically come to this individual to resolve problems?
3. What types of grievances is he/she authorized to resolve without higher authority?
4. Give specific examples.

DISCHARGE

1. Is the individual involved in discharging employees?
2. Are there established guidelines or policies that result in the discharge of employees?
3. Describe the discharge process and the individual's role in that process.
4. Does the individual have the authority to make the final decision regarding discharge? Give specific examples.
5. Does the individual make recommendations whether employees should be discharged?
6. What happens to that recommendation? Is the recommendation accepted?
7. What is the process of review of the recommendation? Does any other supervisor or member of management look into the basis for the discharge? Get specific names of individuals discharged.

ASSIGNMENT AND RESPONSIBLE DIRECTION

1. Is the individual involved in the assignment or direction of work? Who and which classifications report to the individual?

2. How is the individual involved in assignments? Are the assignments made in collaboration with others?
3. Does the individual make the decisions; if so, on what factors are those decisions based (skills, availability, seniority, operational needs, etc.)? Does the individual have discretion to determine which among several employees should be assigned to an individual task?
4. What is the nature and duration of the assignments given by the individual?
5. Are there established guidelines relating to these assignments?
6. In the event there is a change in work requirements, can the individual decide how to reassign employees without consulting anyone else? What factors does the individual consider in doing so?
7. Does the individual prioritize work?
8. Does the individual direct employees' work? Describe and give examples of the type of orders or instructions given and the tasks involved. Once a task is assigned, does the employee need any guidance?
9. Does the individual inspect the work of employees? For what purpose?
10. Is the individual responsible for the training of other employees?
11. Is the individual held accountable for the performance of the work? If so, how?

SECONDARY INDICIA

Indicia other than those enumerated in Section 2(11) are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

See An Outline of Law and Procedure in Representation Cases, Section 17-507

Relevant Questions:

1. Does the individual attend supervisory meetings? Regularly? If not, how frequently? What is the reason for such attendance? What is the extent of his or her participation?
2. Does the individual receive any benefits not granted to other employees? If so, describe.

3. Compare with those of other employees and admitted supervisors the individual's rate of pay, manner of pay, overtime, vacations, insurance, pensions, bonus, use of facilities, incentive plans, parking areas, type of clothing worn while working, use of timeclock, restrooms, cafeteria, payment for time lost. Describe any special privileges or compensation given the individual by virtue of the position.
4. Is the individual designated on the payroll as a supervisor?
5. Is the individual regarded as a supervisor by other employees and admitted supervisors?
6. What is the ratio of supervisory to nonsupervisory employees?
7. Where is the individual's work location? Does he or she work in an office or at a desk?
8. Does the individual keep time records for employees?
9. Obtain job descriptions.

SUBSTITUTION & INTERMITTENT

The test for determining the status of individuals who intermittently substitute for statutory supervisors is whether the part-time supervisors spend a "regular and substantial" portion of their working time performing supervisory tasks or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products Inc.*, 330 NLRB 1359 (2000). The sporadic assumption of supervisory duties when the statutory supervisor is on vacation or sick leave is not sufficient to establish supervisory status. *Jakel Motors*, 288 NLRB 730 (1988). Rotation in and out of supervisory positions, as in the construction industry, may be indicative that the individual is an employee and not a statutory supervisor. *General Dynamics Corp.*, 213 NLRB 851 (1974).

Relevant Questions:

1. If the individual in question is an employee who substitutes in a supervisory position, does he or she spend a regular and substantial portion of his or her time doing so? On the other hand, does the individual only sporadically assume supervisory duties during times such as annual vacation periods, rather than on a routine and regular basis?
2. If the individual substitutes for conceded supervisors, what authority does the individual possess during those periods? Specific examples should be provided as to the exercise of this authority.
3. Is the individual the highest ranking individual present at any time or on any shift? If so, does the individual have authority to make final decisions or must he/she check with

other officials? If the individual makes recommendations, what further action is taken and by whom? Give examples.

4. Do employees work permanently or temporarily under the individual? If temporarily, describe the circumstances surrounding their assignment to work under him/her, including the frequency, type of work performed, duration and the extent of his/her authority and responsibility.

F. Managerial Employees

The Board has defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer’s established policy.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Also see *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

See An Outline of Law and Procedure in Representation Cases, Section 19–200.

Relevant Questions:

General

1. What is the employee’s job title and position?
2. What are the duties and responsibilities of the position?
3. To whom does he/she report? What is the extent of supervision of his/her work?
4. How is the employee compensated? Are there any differences in amount and/or kind of benefits paid to other employees?
5. Where is the employee’s work location?
6. Is the employee’s position considered to be an “executive” position?
7. Is he/she held out as being a representative of management? Does he/she consider himself/herself as such?

Policymaking

1. Is the employee involved in the formulation and effectuation of management policies? Give specific examples of formulation or effectuation of management policies.
2. Does the employee have discretion in the performance of his/her job, independent of the employer’s established policies? Give specific examples of such discretion.

3. What types of decisions is the employee called on to make? Give specific examples.
4. Are such decisions subject to approval by others in management?
5. What and whom do such decisions affect?
6. Does he/she attend/participate in meetings conducted to formulate and effectuate management policies?
7. Is the employee involved in labor relations matters, including the formulation or effectuation of policies? Does any other manager review the formulation or effectuation of that policy?
8. Does the employee have access to knowledge, data or records pertaining to labor relations? Identify specific records involved and the circumstances of that access.

Financial

1. Does the employee have the authority to pledge the employer's credit?
2. Does the employee have discretion or use independent judgment in committing the employer's credit? Are such purchases subject to review?
3. Are such purchases of a routine or non-routine nature?
4. Are there established or expressed dollar limitations placed on such purchasing authority?

Production/Scheduling

1. Does the employee have any responsibility for establishing production or other schedules?
2. How is that scheduling arranged or established? Is it reviewed by other managers?
3. What factors are used or considered by the employee to determine the schedule or distribution of work? Is this function routine, i.e., does the employee follow preestablished guidelines, or does it involve the use of independent judgment? If guidelines exist, obtain a copy for the record.
4. Does the employee participate in decisions regarding production changes or additions to or reductions in the size of the work force?
5. Is the employee involved in establishing or coordinating production or other business activities?

Training

1. Is the employee involved in training of employees or supervisors? If so, how?
2. Does such involvement include responsibility for developing training courses or manuals or for formulating or approving the content of such?

Editorial Policies

1. Is the employee involved in formulating or deciding editorial policies or content? If so, how?

Stock Ownership

1. Are the employees shareholders who collectively hold a majority of the stock in the employer's business?
2. In circumstances where the employee-shareholders do not hold a majority interest in the employer, are they nonetheless in a position to exert influence on management policy? E.g., do the employee shareholders select one or more members of the board of directors?

Note: In situations involving an Employee Stock Ownership Plan (ESOP), a contention may arise that all employees are managerial. In that instance, the hearing officer should ensure that the record fully reflects the extent to which employee-stockholders are involved in operational, personnel, entrepreneurial or other decisions; any limitations on such involvement; the exact nature of the decision-making process; and the exact types of decisions in which employees have participated.

G. Management Trainees

Determining the unit inclusion and/or placement of management trainees involves examining both the disputed individuals' supervisory or managerial status *and* their community of interest with unit employees. Management trainees generally are treated the same as other individuals who are in line for elevation to supervisory positions. Where a party seeks to exclude a management trainee on the basis that he or she is a supervisor, the hearing officer should refer to the supervisory status questions set forth in Section V, A, Community of Interest. Where a party seeks to exclude a management trainee on the basis that he or she lacks a sufficient community of interest with unit employees, the hearing officer should refer to the community of interest questions set forth in Section V, A, Community of Interest and ask the questions below. For cases demonstrating application of these factors, see *Nationsway Transport Service*, 316 NLRB 4 (1995), citing *Curtis Industries*, 218 NLRB 1447, 1452 (1975).

See *An Outline of Law and Procedure in Representation Cases*, Section 17-506.

Relevant Questions:

1. Was the trainee hired based on his or her possession of relevant education or experience?
2. Is the trainee's continued employment dependent upon his or her entrance into management, such that if not accepted, the individual must leave the employ of the employer?
3. Does the employer maintain a planned management trainee program? Describe.
4. Is there a distinction of wages and working conditions between management trainees and the employees with whom they work? Describe in detail.

H. Relatives of Management

The statutory definition of an employee in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse." In *Scandia*, 167 NLRB 623 (1967), the Board announced a policy of excluding from bargaining units the children and spouses of individuals who have substantial stock interests in closely held corporations. Clearly, the child of a sole shareholder is excluded. *Bridgeton Transit*, 123 NLRB 1196 (1959). Children of majority shareholders are also excluded. *Cerni Motor Sales*, 201 NLRB 918 (1973).

When the ownership is less than 50-percent, the Board applies a different test for determining eligibility. In *NLRB v. Action Automotive*, 469 U.S. 490 (1985), the Supreme Court affirmed the Board's practice of excluding from a bargaining unit close relatives of the owners of a closely held corporation, even in the absence of special job related benefits. The Court also endorsed the Board's policy requiring that eligibility of relatives in a non-closely held corporation depends on whether or not the employee enjoys "special status."

Thus, although the standard for inclusion in the bargaining unit is community of interest, in cases of relatives of corporate shareholders, the inquiry as to community of interest is expanded to include consideration of the amount of stock owned by the relative shareholders, whether the employee is a dependent of the stockholder and similar considerations. The individual in question may also be excluded if his or her job duties reflect a special relationship. The special status test is also applied to determine the eligibility of relatives of nonowner managers. *Cumberland Farms*, 272 NLRB 336, fn.2 (1984); *Allen Services Co.*, 314 NLRB 1060 (1994).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–300.

Relevant Questions:

1. Is the individual employed by a parent, spouse or child in a sole proprietorship or partnership?
2. Is the individual employed by a corporation in which a member or members of his/her family own stock? If so, what percentage of stock in the corporation does the family member(s) own?
3. If the individual is employed by a corporation wherein his/her family owns more than 50-percent of the stock, ask the following:
 - (a) How many shares are outstanding in the corporation? How many shares are owned by family members?
 - (b) What is the relationship of the individual to the family member or members who own stock in the corporation?
 - (c) If the individual is not an immediate family member (e.g., father, mother, son, daughter, brother, sister, spouse), ask the special status questions set forth below starting at question 4.
4. If the individual is employed in a corporation in which family members own 50-percent or less of the stock, ask the following:
 - (a) What is the percentage of stock ownership?
 - (b) What is the relationship to the family member/owner?
 - (c) Does the individual live at home with the owner/manager?
 - (d) Does the individual receive financial support (e.g., payment of tuition, free room and board) from the owner? If so, specify.
 - (e) What are the person's duties and location of work?
 - (f) What are the rates of pay, hours, supervision?
 - (g) Are there benefits or privileges they receive that are not given to other employees?
 - (h) Is there special consideration given by virtue of relationship?
 - (i) Give examples, if any, of instances where relationship has affected the employment status of the individual.
5. If the individual is employed by an employer in which a family member is a nonowner but is in a management position, ask the following:
 - (a) What is the relationship to the manager?
 - (b) What is the manager's title? Position in the corporate hierarchy?
 - (c) What authority does the manager have?
 - (d) What opportunity is there for the manager to influence the individual's working conditions, wages, hours?
 - (e) Is special consideration given by virtue of the individual's relationship to the manager?
 - (f) Does the individual live at home with the manager? Does the manager provide any financial support to the individual? If so, specify.

VII. EMPLOYEE STATUS

A. *Seasonal Employees*

Regular seasonal employees are those who have a reasonable expectation of re-employment in the foreseeable future. If they have a reasonable expectation of recall and perform unit work, they are included in the bargaining unit. Factors to be considered include: whether the employer draws from the same labor force each season; whether former employees are given preference in rehiring; whether there are similar duties, working conditions and supervision for seasonal and permanent employees; and whether seasonal employees can become permanent employees. See *Maine Apple Growers, Inc.*, 254 NLRB 501 (1981).

Note: There is a difference between a seasonal employer and a cyclical one. If the employer, despite hiring some employees seasonally, is engaged in virtually year round production operations and the number of employees in the year round complement is relatively substantial, the employer's operation may be deemed cyclical and not seasonal. *Baugh Chemical Co.*, 150 NLRB 1034 (1965).

See *An Outline of Law and Procedure in Representation Cases*, Section 20–300.

Relevant Questions:

1. What classifications constitute the employer's permanent work force? Number of employees in each classification?
2. What classifications constitute the employer's seasonal peak work force? Number of employees in each classification?
3. When does the seasonal period begin, peak and end?
4. How many employees are added during the seasonal period? At various stages during the peak season?
5. Does the employer keep records of seasonal employees? Describe the kind of records used and how they are used.
6. Does the employer draw seasonal employees from the same labor force year after year? For instance, does the employer maintain a list of employees who worked in prior seasons and call employees from this list? Or, does the employer advertise to the general public each season?
7. Does the employer draw its seasonal employees from the same geographical area each year?
8. From what other sources does the employer obtain seasonal employees?

9. Is the labor force composed primarily of former employees? If so, how many employees are re-employed every season? Seek payroll records, over a number of seasons, to confirm the numbers and reduce lengthy testimony.
10. What percentage of seasonal employees return year after year?
11. What is the employer's policy regarding recall or hiring of seasonal employees? Are they given preference?
12. What notice is given to seasonal employees upon their hire? Are they told that they are hired only for the particular season or for a limited duration?
13. When the season is over, what have the employees been told about their prospects for future employment? Are any documents given to employees in this regard?
14. Have seasonal employees become permanent employees? If so, under what circumstances, how many and how often?
15. Ask questions on community of interest located in Section V, A, Community of Interest; compare terms and conditions of employment of permanent and seasonal employees.

B. Part Time, On-Call/Per Diem and Casual Employees

In determining unit placement and eligibility issues, the status of employees and their tenure are major considerations. Unit placement involves whether an employee or the classification shares a community of interest with others in the proposed unit. See Section V, A, Community of Interest. Eligibility involves, among other factors, the specific nature of employment, such as the frequency and regularity of work.

Regular part-time employees are included in a unit with full-time employees whenever part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing community of interest with the remainder of the unit. *Fleming Foods*, 313 NLRB 948 (1994). The test for determining whether an employee is a regular part-time employee involves an analysis of such factors as the regularity and continuity of employment, length of employment, degree of similarity of work duties performed by such employee in relation to those performed by bargaining unit employees, similarity of wages and benefits and other factors establishing whether such employee enjoys a community of interest with bargaining unit employees. *Pat's Blue Ribbons*, 286 NLRB 918 (1987). Regularity of work does not necessarily mean a fixed schedule; rather, this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that work is on a sporadic basis. Generally, infrequent employment can lead to a casual status finding. Where an

employee is found to be an irregular part-time employee, the Board has excluded those employees as casual employees. *Royal Hearth Restaurant*, 153 NLRB 1331, 1333 (1965). However, an employee's option to turn down work and the fact that an employee does not necessarily call in every day does not preclude a finding of regular part-time status. *Mercury Distribution Carriers*, 312 NLRB 840 (1993).

On-call employees may or may not be considered regular part-time employees, depending on the specific nature of their employment. When they are employed sporadically, with no established pattern of continued employment, they are excluded from the unit, as are irregular part-time employees. But, where on-call employees have a substantial working history, with a substantial probability of employment and regular hiring, and meet any other criteria established by the parties, they are considered regular part-time employees.

See *An Outline of Law and Procedure in Representation Cases* Section, 20–100.

The suggested questions below cover part-time status, on-call/per-diem employees or those asserted to be casual employees:

Similarity of Duties/Community of Interest Questions:

First, establish that the disputed employees perform unit work similar to the work performed by the employees who are undisputedly included in the unit. If possible, the hearing officer should explore a stipulation that the disputed employees perform the same or similar work as other employees and receive similar wages and benefits. This way, the only remaining issue concerns the regularity of their employment. If it becomes necessary to call witnesses regarding community of interest issues, see Section V, A, Community of Interest, for suggested questions.

Regularity of Work:

Explore how often the employee(s) work for the employer over a specific period of time. Whenever appropriate, and certainly in lieu of lengthy testimony, the hearing officer should seek payroll records that may shortcut testimony from witnesses. If payroll records are available, they should be identified clearly on the record and submitted as evidence. The hearing officer should make sure that the records cover a sufficient period to establish the pattern of employment. If witnesses need to be called, here are some suggested questions regarding the regularity of work:

Relevant Questions:

1. How does the employee receive work opportunities?
2. How many hours does the employee in question work for the employer on a daily, weekly, monthly or other basis?

3. How many hours did he/she average per week during each of the two calendar quarters immediately prior to the hearing?
4. How long has the employee worked for the employer under this type of schedule or arrangement?
5. Is the employee employed elsewhere on a full-time basis?
6. Is the employee regularly scheduled to work a specific amount of time?
7. Is the employee free to reject work when it is offered?

**Eligibility Formulas Covering
Part-time, Per Diem and On-Call Employees:**

Even though regular part-time employees or per diem/on-call employees may be included in a unit, where these employees have varying hours of work, eligibility formulas have been devised to determine employees' eligibility to vote based on the hours worked during a particular period. Various standards, such as hours worked per day or week or days worked per calendar period, have been applied in different industries to determine whether part-time, per diem or on call employees are eligible to vote. Where there is a wide disparity in the number of hours worked by these employees, the Board has fashioned appropriate standards to assure an equitable formula. Parties may agree that part-time, per-diem or on-call employees should be included in the unit, but dispute which formula should be utilized in determining voting eligibility. Where the parties litigate the inclusion of part-time, per diem or on-call employees, the hearing officer should also ask the parties their positions regarding eligibility formulas. The hearing officer should encourage the parties to use a Board-approved formula appropriate for the circumstances of the case. If the parties stipulate to a different formula from one normally used by the Board, the record must contain an adequate basis upon which the Regional Director can determine the appropriateness of the proposed formula.

Davison-Paxon: The Frequently Used Standard

The most common eligibility formula for determining the eligibility of irregular part-time employees is the formula found in *Davison-Paxon*, 185 NLRB 21, 24 (1970), under which employees who average 4 hours per week for the calendar quarter preceding the election eligibility date are eligible to vote.

Health Care Industry Formula:

In the health care industry, the most commonly used standard is also the *Davison-Paxon* formula. *Sisters of Mercy*, 298 NLRB 483 (1990); *Beverly Manor Nursing Home*, 310 NLRB 538 (1993). The *Davison-Paxon* formula also has been applied to the home-health care industry. *People Care*, 311 NLRB 1075 (1993); *Five Hospital Elderly Program*, 323 NLRB 441 (1997). However, in a case where the facts showed a wide

disparity in the number of hours worked, the Board fashioned a different formula. *Marquette*, 218 NLRB 713 (1975) (on-call nurses who worked a minimum of 120 hours in either of the two quarters preceding the election eligible to vote).

The Construction Industry Formula:

Unlike all other industries, a special eligibility formula applies to all cases in the construction industry, unless the parties specifically stipulate to use the standard Board formula. In *Steiny & Co.*, 308 NLRB 1323 (1992), the Board returned to the voting eligibility formula established in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in *Daniel II*, 167 NLRB 1078 (1967), as being applicable to all elections conducted among employees of construction industry employers. Thus, the *Daniel* formula provides that, in addition to those employees who would be eligible to vote under standard Board criteria for eligibility, other employees will be eligible if:

(1) they have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election: or,

(2) if they have had some employment in the 12 months preceding the eligibility date for the election and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date.

Excluded from the *Daniel* formula are employees who have been terminated for cause or who have quit voluntarily prior to the completion of the last job on which they were employed. The *Daniel* formula does not apply to employers who clearly operate on a seasonal basis. *Steiny*, 308 NLRB 1323 (1992), at fn.16.

If the hearing officer is faced with the issue of whether the employer is an employer engaged in the building and construction industry, he/she should elicit specific testimony as to the employer's operations. An employer that is primarily engaged in construction of new work, additions, alterations, reconstruction, installations and repairs is considered to be an employer engaged in the construction industry. *South Jersey Regional Council of Carpenters, Local 623 (Atlantic Exposition Services, Inc.)*, 335 NLRB 586 (2001).

C. Probationary Employees and Trainees

Probationary employees who share the same duties and basic terms and conditions of employment with permanent employees and have an expectation of permanent employment upon the completion of their probationary period are eligible to vote. Employees attending training programs are eligible to vote, if they are performing unit work. *CWM, Inc.*, 306 NLRB 495 (1992); *Dynacorp/Dynair Services, Inc.*, 320 NLRB 120 (1995).

See *An Outline of Law and Procedure in Representation Cases*, Section 23–111.

Relevant Questions:

1. Describe the details of the training program or probationary period and its duration, purpose and content. Is the program or period subject to extension? How often does that occur? For how long may they be extended?
2. In what job or classification are individuals working?
3. What will be the assignment of the individuals on completion of the training or probationary period?
4. With which other employees do the individuals work?
5. Do individuals perform the same or similar duties as other unit employees?
6. How are individuals hired? Same or different from other employees?
7. What happens if an individual fails to complete training?
8. Percentage of these individuals who become permanent employees?
9. Do they attend meetings with other employees? What type of meetings? How often?
10. If disciplinary problems arise, how are these individuals treated? How does this compare with unit employees?
11. Ask community of interest questions located in Section V, A, Community of Interest and compare probationary employees or trainees with other unit employees.

D. Laid Off Employees

Temporarily laid-off employees are eligible to vote. Evidence is required to determine whether the laid-off employees have a "reasonable expectation" of being recalled to work in the foreseeable future. Objective factors that existed on or before the eligibility date must be considered, including the circumstances of the layoff, the employer's prior experiences with layoffs, the employer's future plans and what employees were told about the layoffs. There must be a reasonable expectation of recall on both the eligibility date and the date of the election. *Osrarn Sylvania, Inc.*, 325 NLRB 758 (1998); *Apex Paper Box Co.*, 302 NLRB 67 (1991).

See *An Outline of Law and Procedure in Representation Cases*, Section 23–115.

Relevant Questions:

1. Hiring date, classification, department, shift, supervisor, rate of pay, seniority.
2. Duties of the employee.

3. Layoff date; by whom; reason given (details); temporary; written or oral?
4. Others laid off at the same time? Number, classification, department, shift, reason?
5. At the time of the layoff, what was said about recall? Subsequent conversations about recall?
6. Any memoranda issued by the employer regarding future employment needs, business lost or new business expected?
7. Has the employee been laid off before? When, why, how long?
8. Has the employer had layoffs before? When, how often? What is the employer's policy and past practice regarding recall of laid-off employees? What criteria did the employer use to determine who would be laid off and who would be recalled? How would these criteria be applied to the employees in issue herein?
9. Did the employer maintain a recall list? If so, obtain and put in evidence.
10. Have other employees been recalled? Who? When? Department, classification, shift, reason?
11. During the layoff period, was the employee continued on the payroll? Were insurance, seniority or other benefits continued?
12. Is the reason for the layoff of a temporary nature? Obtain details regarding the reason for layoff.
13. Will additional employees be needed? If so, when, number, classification, department, shift?

E. Discharged Employees, Alleged Discriminatees and Strikers

Discharged Employees or Alleged Discriminatees:

An employee is assumed to have been discharged for cause unless there is a pending grievance (*Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1365 (1962)) or unfair labor practice charge (*Dura Steel Co.*, 111 NLRB 590, 592 (1955)) alleging the contrary. During the course of a hearing, the hearing officer will not permit evidence to be presented in support of a pending charge or grievance. The **only** question is whether there is such a charge or grievance pending. If there is a pending charge or grievance, the alleged discriminatee may vote subject to challenge. *Curtis Industries, Inc.*, 310 NLRB 1212, 1213 (1993).

See *An Outline of Law and Procedure in Representation Cases*, Section 23–113.

Strikers:

Strikers are presumed to be economic strikers. *Bright Foods Inc.*, 126 NLRB 553, 554 (1960). If a charge has been filed alleging that the strike is an unfair labor practice strike, the hearing officer will not permit evidence to be presented in support of that charge. Economic strikers are eligible to vote if they have not been permanently replaced unless the opposing party establishes, by objective evidence, that the economic strikers have abandoned their interest in their struck positions. *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962). This is an issue that may be fully litigated during the representation hearing.

Where the employer asserts that strikers have been permanently replaced and the petitioner contests such assertion, the hearing officer must inquire as to whether there is litigation pending regarding that issue. Permanently replaced strikers involved in pending litigation regarding their status shall vote subject to challenge. *Curtis Industries*, 310 NLRB 1212 (1993). If there is no pending litigation, strikers may be challenged during the election and their eligibility may be resolved postelection if those challenges are determinative. Replaced economic strikers are eligible to vote if the strike commenced less than 12 months prior to the election. *Tractor Supply Co.*, 235 NLRB 269 (1978). If the strike has been ongoing more than 12 months and the strikers have been replaced, they are generally not eligible to vote. Employees who are engaged in an economic strike and have not been permanently replaced are eligible to vote even if the strike has been ongoing more than 12 months. Permanent replacements are eligible to vote.

See *An Outline of Law and Procedure in Representation Cases*, Section 23–120.

Relevant Questions Pertaining to Strikers:

1. In general, what is the basis for the assertion that the employee(s) have abandoned their interest in their jobs?
2. Does the striker have a new job? Compare wages and benefits at new job vis-a-vis the struck work.
3. Is it a permanent or temporary position?
4. Did the striker move? When and under what circumstances? Was the move related to seeking other employment? Temporary or permanent?
5. Were any statements made by the striker regarding returning to the struck work, the move or whether the new job was temporary or permanent?

Permanent Replacements:

1. Describe the struck work and the positions held by the strikers and the replacements.

2. When did the strike begin?
3. When were replacements hired?
4. How did the employer solicit applicants? Obtain copies of any written advertisements.
5. What were the replacements told about their anticipated duration of employment, either at the time of hire or at any other time? Obtain specifics.
6. What were the replacements told about the strike?
7. What do the replacements understand regarding the permanent or temporary nature of their employment?
8. Did the employer have any conversations with strikers about their employment and whether they would be recalled after the strike? Obtain specific details.
9. Do the employer's personnel records indicate the duration or nature of employment of replacements or strikers?
10. Have there been other strikes at the employer's facility? When? What was the employer's past practice regarding replacements and strikers during prior strikes?

F. Temporary Employees

Temporary employees are generally those without sufficient interests to be included in the unit. However, some employees who are classified as "temporary" may be eligible for inclusion in the unit. The test for determining the eligibility of individuals designated as temporary employees is whether they have uncertain tenure—the "date certain" test. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *MGM Studios of New York Inc.*, 336 NLRB No. 129 (2001). On the other hand, if employees are employed for one job only or for a set duration or have no substantial expectancy of continued employment and have been notified of this fact, then such employees are excluded as temporaries. *E.F. Drew*, 133 NLRB 155 (1961). This issue may also arise in the postelection challenge context; in those cases, hearing officers should be careful to inquire about the employees' status as of the eligibility date and not their status as of the election date or thereafter. *Apex Paper Box*, 302 NLRB 67 (1991).

See *An Outline of Law and Procedure in Representation Cases*, Section 20–200.

Relevant Questions:

1. Was the individual hired for a particular job or for a defined or limited duration? Was

he/she told by the employer the nature or duration of his/her employment?

2. Has the employee been retained in the past following the completion of a particular project for which he/she was hired? Have other temporary employees been retained past their projects' completion dates?
3. Do the employer's personnel records indicate the duration or nature of employment?
4. Does the employer have a history of recalling a substantial number of the same employees, even though they are described as temporary?
5. Even if employees were hired as temporary employees and with the understanding that their employment may be terminated at any time, did these employees remain in continuous service even after one year?
6. Has the employer continued to employ temporary employees beyond the original term? If so, for how long? What is the likelihood that their employment will end in the future?
7. Did the employee achieve permanent status prior to the eligibility date?
8. How is permanent status established?
9. Do these employees fill in for other employees? Who do they fill in for, on what basis, frequency?
10. Ask questions on community of interest located in Section V, A, Community of Interest, and compare temporary employees with other unit employees.

G. Dual Function Employees

Dual function employees are those who perform more than one function for the same employer. Dual function employees who spend part of their work time performing bargaining unit work may share a sufficient community of interest with the unit to be eligible to vote, even though they do not spend a majority of their time performing unit work. The same community of interest tests are applied to dual function employees as are applied to regular part-time employees. *Berea Publishing*, 140 NLRB 516, 519 (1963). Generally, dual function employees are included in the unit and are eligible to vote if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's terms and conditions of employment. *Ansted Center*, 326 NLRB 1208 (1998).

The dual function issue may arise in situations where employees have non-unit supervisory responsibilities. The Board has held that determinations of supervisory status are made based on a complete examination of all the factors present to determine the nature of the individual's alliance with management. *Rite Aid Corp.*, 325 NLRB 717

(1998). Thus, where a party raises an issue that a particular employee performs unit work but also performs work as a supervisor, the hearing officer must delve into the 2(11) issues and obtain testimony in this regard.

Note: In *Otasco, Inc.*, 278 NLRB 376 (1986), the Board held that contract bar principles preclude the inclusion of a dual function employees in a unit if they are already included in another unit covered by a contract. In *Benson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), the court held that dual function employees were not entitled to vote in two separate units because it would require those employees to join two different unions to maintain their employment. Similarly, in *Nu-Life Spotless, Inc.*, 215 NLRB 357, 358 (1974), the Board held that in cases where elections are to be conducted in two units and some employees perform work in both units, those employees will be placed in the one unit in which their greater community of interest lies.

See *An Outline of Law and Procedure in Representation Cases*, Section 20–500.

Relevant Questions:

1. Does the employee perform non-unit work, as well as bargaining unit work?
2. Specify precisely the bargaining unit worked performed.
3. How much time does the employee spend performing bargaining unit as opposed to non-unit work? Are there payroll records or other documents that would show the number of hours worked in each area? If so, seek to have them introduced into evidence.
4. Who supervises the employee when he or she performs bargaining unit work? Same supervisor as other unit employees?
5. Where is employee physically located when performing bargaining unit work? Situated with other unit employees?
6. Wage rates when performing unit work? Similar to others in the unit?
7. Benefits provided when performing unit work? Similar to others in the unit?
8. Is the dual function employee included in a different bargaining unit of the same employer? If so, is there a current collective-bargaining agreement that already covers the dual function employee in that unit?
9. Is the dual function employee being sought in more than one unit simultaneously? If so, ask community of interest questions in Section V, A, Community of Interest, and compare their community of interest with that of employees in each of the other units in which the dual function employee works.

H. Contingent Employees

In *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), a divided Board overruled *Lee Hospital*, 300 NLRB 947 (1990) and held that a unit combining the user's solely-employed employees and the supplier's employees jointly-employed by the user and the supplier does not constitute a multiemployer unit and thus does not require the consent of the user and the supplier. The proper analysis to be applied in determining the appropriateness of a unit of user and supplier employees is a community of interest analysis. If an examination of all the factors establishes that the jointly-employed employees share a mutuality of interests in wages, hours and working conditions with the user's employees, then a single unit combining both sets of employees may be appropriate. *Interstate Warehousing of Ohio*, 333 NLRB 682 (2001). There is no inquiry into community of interest issues unless there is a joint-employer relationship between the user and supplier of the employees in issue.

A unit of the user's employees, excluding the jointly-supplied supplier's employees, may also be appropriate. *Holiday Inn City Center*, 332 NLRB 1246 (2000). However, where the jointly-employed supplier's employees share such a strong community of interest with the user's solely-employed employees, their inclusion is required, despite the union's desire to exclude them. *Outokumpu Copper Franklin*, 334 NLRB 263 (2001); *Engineered Storage Products Co.*, 334 NLRB 1063 (2001).

A union is not required to seek to bargain with both the user and the supplier; if the union names only the user in the petition, litigation of the possible joint employer relationship between the user and the supplier is not required. *Professional Facilities Management*, 332 NLRB 345 (2000).

See *An Outline of Law and Procedure in Representation Cases*, Section 14–600.

Relevant Questions:

1. If the parties do not stipulate to joint-employer status, the hearing officer must establish that the user and the supplier are joint employers. Refer to the questions on joint employer in Section IV, B, Single or Joint Employer. In particular, explore whether the two entities share responsibility for decisions concerning employees' wages, hours and other essential terms and conditions of employment, including decisions related to:
 - (a) Hiring
 - (b) Firing
 - (c) Discipline
 - (d) Work Schedules
 - (e) Job duties and requirements
 - (f) Work rules
2. What are the job duties and functions performed by the user employees and the supplier employees?
3. Compare their similarities. Are their duties functionally interrelated?

4. Compare the two types of employees in terms of:

- (a) Wage rates
- (b) Fringe benefits—both in types and amounts
- (c) Working conditions
- (d) Location of their work
- (e) Supervision
- (f) Schedule of hours
- (g) Frequency and degree of contact
- (h) Criteria for hiring

Note: Ask questions on community of interest and compare the terms and conditions of employment of the user and supplier employees. See Section V, A, Community of Interest, for community of interest questions.

5. How are the above terms and conditions of employment determined or controlled? By which employer?

I. Undocumented Workers

The Supreme Court has determined that undocumented workers are employees under the Act, notwithstanding their immigration status. *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). As employees, they are entitled to vote in NLRB elections. *County Window Cleaning Co.*, 328 NLRB 190, fn.2 (1999); GC Memorandum 02-06. Accordingly, if a party raises the issue of an employee's immigration status at a representation case hearing, the hearing officer should not permit evidence to be adduced, but rather should allow the party to present a brief offer of proof. The offer of proof will provide the Board with the context to consider the relevance of the employee's immigration status, if it chooses to do so.

VIII. CLASSIFICATIONS OF EMPLOYEES

A. *Professional Employees*

Section 2(12) of the Act defines a professional employee as any employee engaged in work:

- (1) predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work;
- (2) involving the consistent exercise of discretion and judgment in its performance;
- (3) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual study in an institution of higher learning or a hospital.

Note that the statute defines a professional employee in terms of the work the employee performs; individual qualifications are not controlling (e.g., a medical doctor working as truck driver is not a professional employee).

See *An Outline of Law and Procedure in Representation Cases*, Section 18–100 et. seq., 21–400.

Relevant Questions:

1. Describe the employer's business.
2. What is the job classification of these employees? How many employees are in this classification?
3. What are the education, training and experience requirements?
4. What type of schooling did these employees receive? How long? Courses? Degree?
5. Do they possess a state license or membership in a professional association? If so, describe. Is that required for the job?
6. Describe their duties.
7. Describe, in detail any work performed by the employee which is intellectual and varied in character. How often does the employee perform this work?
8. Describe, in detail, any work performed by the employee which involves the exercise of discretion and judgment. If so, how often?
9. Is their work of such a character that the output produced or result accomplished cannot be standardized in relation to a given period of time? Explain.

10. Is there any special knowledge required to perform the job? Explain.
11. Describe the nature of their supervision.
12. Are they working under the close supervision of a professional employee as part of a requirement of becoming professional employees? If so, who?
13. Ask community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment of professional employees with other unit employees.

B. Truckdrivers

The unit placement of truckdrivers is decided primarily on community of interest considerations. Petitioned for separate units of truckdrivers have been found appropriate, as have petitioned for units combining truckdrivers and other employees. *Overnite Transportation*, 322 NLRB 743 (1996); *Transportation*, 325 NLRB 612 (1998). Unit determinations depend on the following factors:

- (1) the unit petitioned for;
- (2) whether the truckdrivers and the plant employees have related or diverse duties, the mode of compensation, hours, supervision and other conditions of employment; and
- (3) whether they are engaged in the same or related production processes or operations or spend a substantial portion of their time in such production or adjunct activities.

Local drivers and over-the-road drivers may constitute separate appropriate units, when requested, if it is shown that they are clearly defined homogeneous and functionally distinct groups with separate interests which can be effectively represented separately for bargaining purposes.

See *An Outline of Law and Procedure in Representation Cases*, Sections 15–140 through 144.

Relevant Questions:

1. Describe the employer's operations.
2. How many individuals are employed as drivers?
3. How many are employed as local or city drivers, how many as over-the-road drivers?
4. Describe their respective duties in detail. If the drivers spend only part of their time driving, determine the percentage of time spent driving and the percentage of time that they are engaged in other duties. What other duties do they perform? What other employees perform the same duties? Do these duties include selling the employer's

products? If so, see Section D, Driver-Salesmen.

5. If the drivers spend part of their time in local and part of their time in over-the-road driving, what percentage of their time is spent in each type of driving?
6. Is special training or licensing required for the various driver positions?
7. Do the drivers wear uniforms? Are other employees required to wear uniforms? Compare.
8. How much of their time is spent on the employer's premises? What contact, if any, do they have with other employees? How frequent and of what duration is this contact?
9. What hours do they work? Do they punch a timeclock? How does this differ from other employees?
10. Who performs the maintenance service on the trucks they drive? What contact, if any, do they have with those individuals?
11. Do they load and unload their trucks? Are they given assistance? If so, by whom?
12. Can drivers bid on production and maintenance positions; can other employees bid on driver positions?
13. Compared to other employee, are the drivers engaged in the same or a related production process or operation? To what extent? Describe fully.
14. Do the drivers attend employer meetings? Where? With what group(s) of employees? How frequently?
15. What is the history of collective bargaining among the drivers and the other employees with whom they work?

Note: Where a party contends that drivers should be included with other classifications (e.g., mechanics, production and maintenance employees, warehousemen, shipping and receiving employees, etc.) refer to Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

C. Warehouse Employees

In non-retail situations or in combined retail and wholesale operations, the appropriateness of petitioned-for warehouse units is determined by application of a community of interest analysis. *Esco Corp*, 298 NLRB 837 (1990); *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999).

In the retail industry, separate units of warehouse employees are appropriate only where: (1) the warehouse operation is geographically separated from the retail operations; (2) there is separate supervision of employees engaged in the warehousing function; and (3) there is no substantial integration between the warehouse employees and those engaged in other functions. *A. Harris Co.*, 116 NLRB 1628 (1957).

See *An Outline of Law and Procedure in Representation Cases*, Section 15–270.

Relevant Questions:

1. Is this a retail, wholesale or combination retail/wholesale operation?
2. Where is the warehouse operation located? Where is the remainder of the employer's operations located?
3. Who supervises the warehouse operation? Who supervises the remainder of the employer's operations?
4. How many warehouse employees are there? How are they classified?
5. What are the duties of the warehouse employees?
6. How many other classifications of employees are there; how many employees are there in each other classification?
7. Compare with the duties of other employees.
8. Is there employee interchange? Degree of interchange? Frequency? Duration?
9. What skills are required of the warehouse employees? Compare with other employees.
10. What are the job functions of the warehouse employees? Compare with other classifications of employees.
11. Is there any bargaining history involving warehouse employees? When? In what unit? In a recognized or certified unit?

Note: Where a party contends that warehouse employees should be included in a unit with any other classifications, ask community of interest questions located in Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

D. Driver-Salesmen

Depending on their particular circumstances, driver-salesmen are included in production and maintenance units, in units with other drivers and in units with salesmen. Driver-salesmen have also been found to constitute a separate appropriate unit. The Board looks to community-of-interest considerations and whether their delivery duties are “an incident of their sales activities,” or whether their function is closely related to the production process. Employees who sell their employer’s products and deliver them “as an incident of [their] sales activity” have interests more closely aligned with salesmen than to drivers, production and maintenance or warehouse employees. *Plaza Provision Co.*, 134 NLRB 910, 911–912 (1961).

See An Outline of Law and Procedure in Representation Cases, Section 15–145.

Relevant Questions:

1. Describe the employer’s operations and describe the driver-salesmen’s place in the organizational structure.
2. How many individuals are employed as driver-salesmen?
3. Describe their duties in detail. What type of vehicles do they drive?
4. What percentage of their time is spent in delivering and stocking product? What percentage in sales activities?
5. Do the driver-salesmen have contracts of employment? Obtain a copy of the contract.
6. Does the employer employ other drivers? How many? How do their job duties compare to those of driver-salesmen?
7. By whom are the driver-salesmen supervised? Who supervises the other employees?
8. Does the employer employ any sales employees? How many? How do their job duties compare to those of driver-salesmen?
9. How are driver-salesmen paid? Compare to other drivers, sales force and production and maintenance employees.
10. Are there any special training or other job qualifications required for the driver-salesmen position?
11. Is there any history of collective bargaining at the facility in a driver, driver-salesmen or salesmen unit? Was it a recognized or a certified unit?

Note: Where a party contends that driver-salesmen should be included with any other classifications, refer to community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

Note: Where a party contends that driver-salesmen are independent contractors, refer to questions on independent contractor status, Section VI, A, Independent Contractor.

E. Technical Employees

Technical employees are defined as employees who do not meet the strict requirements of the term “professional employees” as defined in the Act but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of special training usually acquired in colleges, technical schools or through special courses. *Livingston College*, 290 NLRB 304, 306 fn.16 (1988). Unit placement of technical employees is based on all the factors relevant to a community of interest finding. *Virginia Manufacturing Co.*, 311 NLRB 992, 993 (1993); *Folger Coffee*, 250 NLRB 1 (1980).

See *An Outline of Law and Procedure in Representation Cases*, Sections 19–500 (technical employees) and 19–510 (for health care technical employees).

Relevant Questions:

1. What type of industry?
2. Where are the employees located within the employer's facility? Is this area a separately situated or controlled area?
3. To what department are technical employees assigned? With whom do they work?
4. Compare similarities between the skills and job functions of technical employees and rank-and-file employees.
5. Compare similarities between the skills and job functions of technical employees and professional employees.
6. What education, training or experience is required for the technical employees? Are they required to have any licenses or special certifications? How does this compare to professional employees? Do they actually possess the required education, training or experience?
7. What special tools or instruments do they use in the performance of their job duties?
8. Explore examples of the exercise of independent judgment.

9. Do they have any inspection responsibilities for the work of rank and file employees? If so, what recommendations do they make and how effective are their recommendations?
10. Do they prepare any technical reports, data or handbooks?
11. What reports do they keep of their work?
12. Who evaluates their reports? To whom are they directed and for what purpose?
13. Who is their supervisor? What is the nature of their supervision?
14. Compare their supervision with that of rank-and-file and professional employees. Is their supervisor a professional?
15. What contact do they have with rank-and-file employees? With professional employees?
16. Is there any interchange with other employees? If so what is the nature, duration, and frequency of the interchange?
17. What is the bargaining history with respect to technical employees?
18. Does any union seek to represent technical employees separately?
19. Ask community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment of technical employees with unit employees and professional employees.

F. Clerical Employees

Office clerical and plant clerical employees are generally not joined in a single unit unless the parties agree to their inclusion in a single unit. Plant clerical employees are normally included in a unit of production and maintenance employees. The designation of employees as either office clerical or plant clerical employees is based upon community of interest concepts and the distinction is not always clear. *Hamilton Halter Co.*, 270 NLRB 331 (1984). Historically, workers who perform clerical duties in close association with the production process and production employees have been included in production and maintenance units as “plant clericals,” even though they may utilize secretarial skills or are classified as clerks. *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994). Clerical employees with duties related to general office operations do not share a community of interest with production employees and thus are not included in a production and maintenance unit. *Container Research Co.*, 188 NLRB 586, 587 (1971).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–410.

Relevant Questions:

1. How are they classified? How many employees are there in each classification in issue?
2. To which department are they assigned?
3. By whom are they supervised?
4. Describe duties, machines operated, reports prepared, records kept.
5. What is their location in the plant?
6. Describe the relationship between their duties and production functions.
7. Do they have any direct contact with customers? Describe their duties and functions in this regard.
8. Describe working contacts with production, warehouse and/or office employees.
9. Does the employer have a computerized information processing system? Establish the classifications of employees that make entries into and obtain information from this system.
10. Describe and show frequency of interchange with production, warehouse and/or office employees.
11. Establish the percentage of office or plant clerical and other duties.
12. Compare their use of facilities with production and/or office employees.
13. Describe any similarity of working conditions with production, warehouse and/or office employees.
14. Who establishes their pay? In which department are they classified for payroll purposes?
15. Method of compensation—hourly, salary, bonus, incentive, piece rate.
16. Method of recording time—do they use a time clock? Is it the same time clock used by the production and/or office employees?
17. Compare employee benefits received with those received by production and/or office employees.

18. Compare their hours of work and lunch breaks with those of production and/or office employees.
19. Do they dress in a manner similar to the production employees or to the office employees?
20. What background, education and training are required for performance of their duties? Compare with those of production, warehouse or office employees.
21. What types of skills do they utilize in performing their jobs?
22. What is the progression schedule from and to the classifications in question?
23. Is there a history of collective bargaining in a unit including office clerical employees? Is there any history of collective bargaining in a unit including plant clerical employees? Has this group of employees ever been represented in another bargaining unit? When? Was this a certified or recognized unit?
24. Ask questions on community of interest located in Section V, A, Community of Interest, and compare terms and conditions of employment of the clerical employees in dispute with other classifications in the unit.

G. Faculty Units in Colleges and Universities

When faculty are found to have managerial status, employee status has been denied. The party seeking to exclude employees as managerial has the burden of establishing that exclusion is appropriate.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that the employer's college faculty were managerial employees excluded from the coverage of the Act. The court in *Yeshiva* noted that managerial employees "must exercise discretion within or even independently of established employer policy and must be aligned with management" and must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy."

The appropriate inquiry under the *Yeshiva* decision is to determine the authority of the faculty with respect to hiring, promotion and tenure and their authority in setting university policy, including standards for admission, retention and graduation. Since the Board's decision in *Yeshiva*, some faculty units have been found appropriate. See, e.g., *University of Great Falls*, 325 NLRB 83 (1997).

Part Time Faculty:

Part-time faculty members have been found to be significantly different from full-

time faculty and have been excluded from units of full-time faculty. *New York University*, 205 NLRB 4 (1973).

Graduate Students:

In *New York University*, 332 NLRB No. 111 (2000), the Board found that graduate students who are paid for teaching functions are employees. However, graduate students do not share a community of interest with regular faculty and constitute a separate unit. *Adelphi University*, 195 NLRB 639, 640 (1972).

See *An Outline of Law and Procedure in Representation Cases*, Section 15–261.

Relevant Questions:

1. What is the governing structure and administrative hierarchy of the college?
2. Are there defined areas of responsibility and authority vested at various levels from the faculty through the board of trustees?
3. Are the responsibilities of the faculty set forth in writing, in the college's bylaws or in any books or other publications? If so, obtain and put in evidence.
4. Are there any reports issued by any accrediting body, which recite the role of the faculty in governance of the college? If so, obtain and put in evidence.
5. To what extent is the college faculty (full and/or part-time) involved in the decision-making process (individually, ad hoc committees or standing committees) in such areas as:
 - (a) Curriculum
 - (b) Course schedules
 - (c) Course content
 - (d) Course credit hours
 - (e) New degree programs
 - (f) Degree requirements
 - (g) Teaching methods
 - (h) Grading policies
 - (i) Classroom conduct
 - (j) Matriculation standards, policies and requirements
 - (k) Admission standards, policies and requirements
 - (l) Retention standards, policies and requirements
 - (m) Graduation standards, policies and requirements
 - (n) Size of the student body
 - (o) Tuition and fees
 - (p) Distribution of financial aid
 - (q) Scholarship standards and recipients
 - (r) Matters relating to retention, suspension, probation and expulsion of students

- (s) Location of a school
- (t) Teaching loads
- (u) Student absence policies
- (v) Enrollment levels
- (w) Faculty hiring
- (x) Faculty tenure and promotions
- (y) Sabbaticals
- (z) Faculty terminations
- (aa) Contract renewals for probationary faculty
- (bb) Faculty reappointments
- (cc) Tenure
- (dd) Faculty evaluations
- (ee) Filling of administrative positions
- (ff) Hiring of academic deans and other administrative officials
- (gg) Appointment of department or division chairpersons
- (hh) Significant faculty benefit terms, e.g., pension and health insurance coverage
- (ii) Budgetary matters
- (jj) Long-term planning

6. Specify any standing committees and the following:

- (a) their composition
- (b) areas of responsibility
- (c) extent of authority
- (d) exercise of authority (specific examples)
- (e) effectiveness of committee recommendations (specific examples where recommendations were followed or not)

7. How are faculty selected to participate in such committees? Appointed by the administration? Elected by their peers?

8. Are the committees comprised of administrators and others in addition to faculty? What is the composition of the committee (identity of those on the committee, numbers of faculty and number of administrators and others on the committee)?

9. What is the frequency with which they meet? What are the results of these meetings, e.g., issuance of reports, recommendations of further action?

10. Is there a faculty-wide vote or review of their decisions/recommendations?

11. Are their decisions/recommendations subject to veto by the administration, including academic deans and the board of trustees? Obtain examples.

12. Is such veto power exercised? Obtain examples.

13. Has the administration taken action in any of the aforementioned areas without faculty input or approval? Obtain examples.

For graduate students and research assistants:

When issues arise regarding graduate students and research assistants, secure evidence by department relating to all aspects of their employment, including but not limited to the following:

1. Whether their teaching duties are required for their degree;
2. How often they teach and the anticipated duration of their employment; and
3. Source of their funding.

H. Quality Control/Production Control Employees

Based on traditional community of interest standards, quality control employees are generally included in a production and maintenance unit when the petitioning union seeks to include them. *Lundy Packing Co.*, 314 NLRB 1042 (1994), enf. denied 68 F.3d 1577 (4th Cir. 1995). In some circumstances, the Board has found appropriate a petitioned-for production and maintenance unit *excluding* quality control employees. *Lundy Packing Co.*, supra; *Penn Color*, 249 NLRB 1117 (1980); *Beatrice Foods*, 222 NLRB 883 (1976).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–600.

Relevant Questions:

1. Describe the duties of the employee(s) in question.
2. Does the employer have any educational requirements for individuals seeking to hold such positions?
3. Does the employee possess any specialized technical training?
4. Where does the employee physically perform his/her duties? Compare the amount of time spent working on the production floor with that spent elsewhere (e.g., in an office or laboratory).
5. Describe the types and frequency of contacts with other unit and non-unit employees.
6. Who supervises these employees? Who supervises the other unit employees?
7. Identify rates of pay compared to other employees.
8. Does the employee use any testing equipment or conduct any technical analysis?
9. Does the employee have the authority to reject defective products or to stop a

production line to correct a problem?

10. Does the employee perform time or motion studies of other employees?

11. What does the employee do with the data or information gathered as a result of such studies?

12. Does the employee have any involvement in determining or making changes in production processes or techniques or in establishing/changing rates of pay or quotas for jobs? What is the extent of the employee's involvement?

13. Is the employee involved in the scheduling of work? How does the employee do the scheduling? Is such scheduling in accordance with any established formula or procedures for the completion of production?

14. Does the employee have the authority to rearrange or alter schedules in order to meet deadlines or customer demands?

15. Does the employee have any authority to determine or authorize overtime work or to effectively recommend such in order to meet a production or shipping deadline?

16. Ask questions on community of interest located in Section V, A, Community of Interest, and compare the terms and conditions of employment of quality control employees with other unit employees and non-unit employees.

Note: If any party asserts the employee in question is a technical or professional employee, ask questions in Section VII, E, Technical Employees, or Section VIII, A, Professional Employees. If any party asserts that the employee(s) is supervisory, ask questions in Section VI, E, Supervisors.

IX. POSTELECTION

A. *Role of Hearing Officer*

The role of the hearing officer in a postelection challenges and/or objections hearing differs from the role of the preelection hearing officer because in a postelection hearing, the hearing officer makes credibility resolutions, findings, conclusions and recommendations. In other respects, however, the roles are similar. The postelection hearing officer conducts the hearing, opens, adjourns and closes the hearing and maintains order while the hearing is in session. The hearing officer listens to and passes on the admissibility of oral testimony and arguments concerning documentary evidence offered. It is to the hearing officer's advantage that a complete record is made because it forms the basis for the Hearing Officer's Report.

The parameters of the hearing on objections/challenges is the Regional Director's Supplemental Decision or Report on Objections/Challenges or Notice of Hearing, which sets forth the objectionable conduct asserted and/or the challenges in issue. The hearing officer must limit the hearing to the matters that the Regional Director has set for hearing. The hearing officer has the authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. *Iowa Lamb Corp*, 275 NLRB 185 (1985); *Precision Products Group*, 319 NLRB 640 (1995); *FleetBoston Pavillion*, 333 NLRB 655 (2001).

The hearing officer does not have access to the Region's investigatory file, nor direct or indirect knowledge of its contents; he/she is only furnished with the Supplemental Decision or Report on Objections/Challenges or Notice of Hearing in advance. Therefore, although the hearing officer should make sure that the record contains all relevant and competent evidence, his/her effort will be without the benefit of the material elicited in any prehearing investigation.

The hearing officer is not an advocate of any position but must be impartial in his/her rulings and conduct both on and off the record. The hearing officer may actively participate during the hearing by asking questions of witnesses. However, the hearing officer should keep in mind that, in a postelection case, the parties have their respective burdens of proof. If necessary, the hearing officer may cross-examine, call and question witnesses and call for and introduce appropriate documents. Under some circumstances, the hearing officer's pursuit of the development of a full record may lead to an appearance of undue assistance to one party or another. The hearing officer should exercise self-restraint, should give the parties an opportunity to develop points and should refrain from needlessly taking over. The hearing officer, while exercising restraint, should also be cognizant that his/her primary responsibility is to see that the record is clear and contains all relevant and competent evidence concerning matters raised at the hearing.

Finally, it is the duty of the hearing officer, on consideration of the record, to make credibility resolutions when necessary, as well as to make findings, conclusions and

recommendations that are fully explained and supported by the facts and analysis contained in his/her report. The content of a hearing officer's report is set forth more fully below in Section L. Pursuant to the General Counsel's guidelines, a Hearing Officer's Report on Objections, Challenges or both should be given priority attention. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11360.1 and 11390.1.

B. Burdens of Proof

1. Objections

In an objections case, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election.

2. Challenges

Generally, the party seeking to challenge a voter's eligibility bears the burden of proving the voter is ineligible to vote. Thus, where a party challenges a voter on Section 2(11) grounds or on other exclusionary grounds (confidential employee status, managerial employee or an employee that should be excluded from the unit), the challenging party bears the burden of proof. It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

(a) Challenges Based on Statutory or Policy Exclusions

As to challenges based upon the purported supervisory status of employees, the burden is on the party who seeks to exclude the employee. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). Additionally, any party challenging voters on the ground that the voter is a manager, confidential employee or independent contractor bears the burden of proof.

(b) Challenges Based on Unit Placement

Certain challenges are based upon the wording of the unit description in the stipulation or Decision and Direction of Election. The Board has held that an agreement for an election is a binding contract and the parties are bound by the "clear and

unambiguous” terms of the agreement. *Caesar’s Tahoe*, 337 NLRB No. 170 (2002); *Laidlaw Transit, Inc.* 322 NLRB 895 (1997). The hearing officer should not permit extrinsic evidence in these circumstances. *Id.* However, certain challenges may require an interpretation of the intent of the parties in entering into the unit stipulation. *Gala Food Processing, Inc.*, 310 NLRB 1193 (1993). In this regard, where the unit stipulation is unclear, the Board examines the parties’ intent. *NLRB v. Barker Steel Co., Inc.*, 800 F.2d 284, 286 (1st Cir. 1986). In doing so, it may be necessary to resort to extrinsic evidence. *Local Union 1395, International Brotherhood of Electrical Workers, v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). Where the parties’ intent remains unclear, community-of-interest principles apply.

(c) Not-On-List (NOL) Challenges

In order to be eligible to vote, the employee must be employed in the unit set forth in the stipulated election agreement or Decision and Direction of Election, employed on the payroll period cutoff date and employed on the day of the election. *Plymouth Towing Company, Inc.*, 178 NLRB 651 (1969). An NOL challenge may be easily resolved with payroll or other personnel records that the hearing officer may view prior to opening the record. The hearing officer must ascertain the reason that the voter was left off the eligibility list. If the employer provides no basis for having left the employee off the list or maintains that the voter is not eligible to vote, but nonetheless refuses to provide payroll records or other determinative evidence, the hearing officer should call witnesses or subpoena the information to resolve the challenge.

(d) Notification to Parties of Burdens of Proof

Prior to the hearing, the hearing officer should specify whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

C. Procedural Matters

1. Motions

(a) Adjournments or Postponements

It is the General Counsel’s policy that postelection hearings are to be conducted

on consecutive days wherever possible. Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should be issued as expeditiously as possible and the hearing scheduled at the earliest practical date with notification that it will be held on consecutive days until completed.

If a party requests a postponement at some point during the hearing, authority to grant such a request rests with the hearing officer. However, since the parties were advised prior to the hearing of the matter's urgency and that it would continue on consecutive days until completion, such a request should rarely be granted and only under the most compelling circumstances. When possible, the hearing should proceed on those issues where progress is possible. In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

If an adjournment or postponement is granted, it should be to a specific date, with the proviso that the hearing will continue on consecutive days thereafter until completed. The hearing officer should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption.

(b) Motions to Strike Testimony

Parties may submit a motion to strike testimony during a hearing. FRE Section 611(a) provides authority for striking direct-examination testimony where the witness was non-responsive on cross-examination. Motions to strike also may be based on incompetent testimony or answers to questions that are opinions rather than facts.

2. Subpoenas

The hearing officer should provide subpoenas to any party making a written request after the opening of the hearing. Subpoenas are available to the parties, subject to the standards set out in Section 102.66(c), Rules and Regulations. Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry. *Perdue Farms*, 323 NLRB 345, 348 (1997) (the information needs to be only 'reasonably relevant').

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph or by leaving a copy at the principal office or place of business of the person required to be served. See Section 102.113(c) and (e), Rules and Regulations. *Best Western City View Motor Inn*, 327 NLRB 468 (1999) (the attorney's affirmation of service is sufficient, without the postal return receipt card). The date of service is the day that the subpoena is deposited in the mail or with a private delivery service that will provide a record showing the date it was tendered to the delivery service or is delivered in person. See Section 102.112, Rules and Regulations.

(a) Petitions to Revoke

Pursuant to Section 102.66(c), Rules and Regulations, parties may seek to revoke subpoenas, either in whole or in part. Petitions to revoke should be in writing and filed within 5 working days after the date of service of the subpoena (also called the “5 day rule”). The date of service for the purposes of computing the time for filing a petition to revoke shall be the date the subpoena is *received*. See Section 102.112, Rules and Regulations. However, there are times when petitions to revoke are submitted orally to the hearing officer or the petition to revoke may not be timely filed. Even if the petition to revoke does not explicitly comply with the Rules and Regulations, the hearing officer should rule on the substance of the petition to revoke.

To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 working days. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995). This rule applies to both subpoenas ad testificandum and duces tecum.

The hearing officer must rule on petitions to revoke which are filed after the hearing opens. If the petition to revoke is submitted to the Regional Director prior to the opening of the hearing, the Regional Director may refer the petition to the hearing officer for ruling. At the commencement of the hearing, the hearing officer may immediately be faced with a petition to revoke and may be asked for a ruling without the benefit of testimony. The hearing officer may defer ruling until later in the proceeding when it becomes more apparent whether the subpoenaed information is necessary.

Some of the most common reasons for revocation of subpoenas are:

(1) relevancy and materiality: the hearing officer must determine if and how the evidence sought will aid in completing the record. The hearing officer should require that the parties discuss the relevancy of the subpoenaed documents. The hearing officer should secure the parties’ positions to see if there is room for compromise and an alternate source of information that may be satisfactory.

(2) burdensome and oppressive: a party asserts that accumulating documents is too difficult or the number of documents is too voluminous. However, it may be possible to narrow the request and eliminate the basis for the objection. This should be explored by the hearing officer.

(3) confidentiality: the subpoenaed party may contend that the documents to be produced are confidential because, for example, they contain confidential employee information, such as social security numbers or because the subpoena seeks proprietary information. Where confidentiality is asserted, the hearing officer may wish to consider the matter after an in camera inspection. Such an inspection allows the hearing officer to inspect the documents privately, apart from the involved parties, to determine whether the material is relevant, privileged or not producible for other reasons and whether portions of the documents may be redacted to satisfy confidentiality concerns.

(4) failure to tender the appropriate witness fees: if a witness fee was not served with the subpoena, the subpoena is invalid and must be re-served with the appropriate witness fee.

(5) proprietary information, such as production figures and profit and loss statements: The hearing officer may be faced with a claim that wage-related information is proprietary and confidential and not producible.

In sum, as noted above, if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection. The hearing officer should also look for areas of compromise, e.g., redaction of certain information or narrowing the scope of subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed.

Whenever the hearing officer rules on a petition to revoke, his/her rulings and the basis therefor should be clear and on the record, i.e., refer to each item in the subpoena and explain the decision to require production in whole or in part. If a hearing officer rules that some portions of the subpoenaed documents are not producible because, for example, they are irrelevant, or because they seek confidential information, he/she should grant the petition to revoke with respect to those portions of the subpoena and explain the basis for the ruling. The hearing officer may also choose to reserve ruling on all or part of petition to revoke the subpoena until after hearing some testimony, in order to determine whether the subpoenaed information is necessary for a determination of the issues. On occasion, continuation of the hearing, even with an outstanding petition to revoke, may resolve the issue because sufficient testimony is secured and the subpoenaing party is satisfied that production of the documents is no longer necessary. Where there continues to be a dispute about the subpoenaed documents, the subpoena, petition to revoke, the parties' positions and the hearing officer's ruling should be placed on a separate subpoena record. See Section 2(b), Subpoena Record.

(b) Subpoena Record

When there is an ongoing dispute regarding production of subpoenaed documents, a separate subpoena record should be established. To make a subpoena record, the hearing officer should inform the court reporter to stop the proceeding and begin a new transcript for the subpoena record. The subpoena record should include:

- (1) a separate copy of the formal papers
- (2) a copy of the subpoena at issue
- (3) proof of service, and
- (4) any written petitions to revoke the subpoena. If there are any written rulings on the petition to revoke, those documents should be included in a Board exhibit. On the record, the hearing officer should indicate the purpose of the proceeding, that a subpoena has been properly served and that the subpoenaed party is refusing to comply with the subpoena. All parties should state their respective positions regarding the subpoenaed documents and the hearing officer's ruling

should be made on the record.

The purpose of a subpoena record is to have a concise record of the dispute for the Regional Director, the Board and the district court.

(c) Subpoena Enforcement

Section 102.31(d), Rules and Regulations, requires the Regional Director to institute enforcement proceedings “unless in the judgment of the [Regional Director] the enforcement of such subpoena would be inconsistent with law and with the policies of the Act.” Thus, upon the failure of any person to comply with a subpoena issued and upon the request of the subpoenaing party for enforcement proceedings, the hearing officer should advise Regional management of the enforcement request. After consultation with the hearing officer, the Regional Director will decide whether the subpoenaed documents are necessary for a determination of the issues. If the Regional Director determines that the subpoenaed documents are necessary, then, upon the request of a party, the General Counsel, “shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for enforcement of the subpoena.” The Region should prepare the enforcement papers, but is not a party to the proceeding and does not assume responsibility for prosecution of the enforcement proceedings. See Section 102.31(d), Rules and Regulations. *Best Western City View Motor Inn*, 325 NLRB 1186 (1998).

(d) Contempt of Enforced Subpoena

If a district court orders compliance with the subpoena and the subpoenaed party continues to refuse to produce documents or to appear for testimony, then, upon request of the party on whose behalf the subpoena was issued, the Regional Director must institute contempt proceedings in U.S. District Court, upon noncompliance with an enforced subpoena. However, contempt proceedings need not be instituted by the Regional Director, absent a request by the party on whose behalf the subpoena was issued. The Regional Director is under no obligation to institute contempt proceedings sua sponte and need only do so upon request of the subpoenaing party. *Best Western supra*. Conversely, the party refusing to comply with the subpoena may be precluded from introducing secondary evidence on the matters covered by the dishonored subpoena. In such cases, the hearing officer should permit a brief offer of proof.

(e) Consequences of Refusal to Comply with Subpoena

When a party refuses to comply with a properly issued subpoena which requests the production of relevant material, the subpoenaing party can try to prove its case by the use of secondary evidence. *Bannon Mills*, 146 NLRB 611, 613 fn.4 (1964) (Board precluded a litigant from using records wrongfully withheld "and secondary evidence regarding matters provable by such records"). In addition, the hearing officer can strike defenses of a party who refuses to comply with subpoenas duces tecum and may also draw adverse inferences. See Section IX, C, 3, Adverse Inferences. In *Louisiana Cement Company*, 241 NLRB 536, 537 fn.2 (1979), the Board precluded the defiant party from

calling company officials and supervisors as its own witnesses where it had failed to comply with subpoenas calling for the testimony of these officials and supervisors.

In a postelection context, where a party has refused to produce documents that the hearing officer has deemed relevant to the issues for hearing, the hearing officer can rule that the refusing party cannot use the evidence it refused to produce to prove its case, either by way of cross-examination or during its case in chief. The hearing officer, on his/her own initiative, can also prevent the refusing party from introducing testimony relevant to issues covered by the material that was not produced. *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F3d 830 (D.C. Cir. 1998).

The appropriate time to raise an objection to the introduction of evidence (documents or testimony) that a party refused to produce pursuant to subpoena is when the evidence is proffered at the hearing. If a party raises, for the first time, an objection to the evidence in a post hearing brief, it may constitute a waiver of the objection. *Hudson Neckwear Inc.*, 306 NLRB 226 (1992).

3. Adverse Inferences

When a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Greg Construction Co.*, 277 NLRB 1411 (1985). Thus, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. When the missing witness is a supervisor or a manager who is still in the employ of the employer and that person would be the logical witness to testify regarding significant disputed matters, an adverse inference is properly drawn by the employer's failure to call that witness in its defense. The same can be said for a union-side witness. *International Automated Machines, Inc.*, 285 NLRB 1122 (1987). There is no requirement that prior notification be given to a party against whom an adverse inference may be drawn. *Douglas Aircraft Co.*, 308 NLRB 1217 (1992).

However, the Board will not draw an adverse inference where a potential witness is equally available to both parties and is a non-party witness. *Local 259 UAW (Atherton Cadillac)*, 225 NLRB 421, 422 fn.3 (1976); *Hudson Oxygen Therapy Sales*, 264 NLRB 61, 68 fn.11 (1982). Generally, employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling an employee witness. *Torbitt & Castleman Inc.*, 320 NLRB 907, 910, fn.6 (1996). However, there may be circumstances where the hearing officer may, in making credibility determinations, weigh the party's failure to call a potentially corroborating employee bystander to corroborate the party's witness. *C & S Distributors Inc.*, 321 NLRB 404, fn.2 (1996).

When dealing with a party who refuses to comply with a duces tecum subpoena, the hearing officer may draw an adverse inference. *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994). The hearing officer may also bar the non-

complying party from asking questions on direct or cross-examination about the subject matter sought by the subpoena. *Perdue Farms*, 323 NLRB 345, 348 (1997). Finally, the hearing officer may permit the introduction of secondary evidence by the party who has been disadvantaged. *Bannon Mills*, 146 NLRB 611, 614, fn.4 (1964). See the discussion of *Bannon Mills* in Section IX, C, 2 (e), above.

4. Factual Stipulations

During a hearing, the hearing officer may find that parties are prepared to enter into stipulations. If the outcome of a stipulation is that the matter, i.e., the challenges or the objections, is fully resolved, the stipulation need not be factual. NLRB Casehandling Manual, Part Two, Representation Proceedings Sections 11361.2 and 11391.2 note the circumstances under which such resolutions may be accomplished. Stipulations that do not fully resolve the matter, i.e., those that result in the continuation of the hearing to resolve other remaining challenges or objections, must be factual. For example, parties may enter into factual stipulations regarding the eligibility or unit placement of employees.

Hearing officers are encouraged to look for those situations in which, in order to avoid protracted testimony, the parties may be able to enter into factual stipulations resolving issues that are the subject of litigation. When parties are prepared to enter into such a stipulation, it should set forth specific facts and not simply legal conclusions. For example, where an individual's Section 2(11) status is in question, the hearing officer should elicit specific facts that establish that said individual is a Section 2(11) supervisor. All parties to the proceeding, including a decertification petitioner, must agree to the stipulation.

A stipulation of fact is conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted. It is not sufficient to secure a stipulation that involves a legal conclusion without supporting facts. Parties should be precluded from entering into stipulations simply agreeing that a particular employee "is a supervisor within the meaning of Section 2(11) of the Act." This holds true for all stipulations that involve eligibility issues.

In postelection proceedings, parties may enter into stipulations on eligibility for the limited purpose of the instant proceeding, i.e., with the understanding that the stipulation will not bind the parties for subsequent proceedings.

5. Admission of Statements or Affidavits In Postelection Hearing

Witnesses in a postelection proceeding may have provided a statement or an affidavit to the Regional Office. This may be an affidavit taken by a Board agent or one prepared by counsel. If the hearing officer is aware or has been advised that the witness provided an affidavit to any federal agency prior to the postelection proceeding, he/she should ensure that the Regional Office requests the agency possessing the statement to release it for use in the Board proceeding. NLRB Casehandling Manual, Part One, *Unfair Labor Practice Proceedings*, Section 10394.7; *Kawasaki Motors*, 257 NLRB 502 (1981). The hearing officer should be prepared to provide the parties with copies of any affidavits in possession of the Region from any pending or closed R or C case. The

affidavits from those case files should be reviewed by Regional Office personnel other than the hearing officer prior to the hearing. Copies should be appropriately redacted and readily available during the hearing. CHM, Sections 11426.1(b) and 11429.2-.3.

If a witness is called at a postelection hearing by the objecting party, another party may request a copy of the affidavit insofar as it relates to the subject matter about which the witness has testified. Such a request may be made only after the close of direct examination. See Section 102.118(b)(1), Rules and Regulations. A request for a witness' affidavit prior to the conclusion of the witness' direct examination is premature. Even if the witness gave a copy of the affidavit to a union agent, production cannot be required by subpoena prior to direct examination. *H. B. Zachary Co.*, 310 NLRB 1037 (1993). If a party subpoenas affidavits prior to the testimony of that witness, that portion of the subpoena should be quashed. Since the proper time for the request to produce an affidavit is at the close of direct examination, if a party seeks the affidavit after the witness has been excused, it is too late to require production. *Walsh-Lumpkin Drug*, 129 NLRB 294, 296 (1960).

If a party contends that portions of the affidavit do not relate to the subject matter of the witness' testimony, the hearing officer may exercise his/her discretion to inspect the affidavit in-camera and redact any portion of the affidavit that does not relate to the testimony. After the hearing officer has completed the in-camera inspection, he/she should note the findings on the record, along with the ruling regarding production of other affidavits.

Once the affidavit has been turned over to the requesting party, he/she may be given a reasonable period of time to examine the document before commencing cross-examination. Section 102.118(b)(1), Rules and Regulations provides that the affidavit can be used to impeach the witness's credibility. Normally, the portion of the affidavit that is inconsistent with the witnesses' testimony should be read into the record. If a party requests that additional sections be read or that the entire affidavit be admitted and if there is no objection to admission of the entire affidavit, it may be admitted into evidence. The hearing officer, when making credibility determinations, may weigh the witness' testimony at the hearing against the prehearing statement provided.

Unless the affidavit has been admitted into evidence, it must be returned to the hearing officer or Regional office representative upon conclusion of cross examination. Note that under Section 102.118(b)(1), Rules and Regulations, parties are not allowed to keep copies of affidavits for purposes other than cross-examination. Thus, parties may not use copies of affidavits for purposes of writing a posthearing brief. NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 10394.9.

6. Audio or Visual Tape Recordings in Postelection Hearing

Issues regarding admissibility of tape recordings (audio or visual) can arise, e.g., when meetings, conferences or other events are alleged as objectionable and they have been recorded. If a party seeks to introduce a tape recording, it is admissible even when

the recording was made without the knowledge or consent of a party to the conversation. *Williamhouse of California Inc.*, 317 NLRB 699 fn.2 (1995). The Board has found the tapes admissible even when the taping violates state law. *Wellstream Corp.*, 313 NLRB 698, 711 (1994). Nevertheless, the tape recording must be properly authenticated before its receipt into evidence. Proper authentication of a tape requires, in part, proof of chain of custody, further, an explanation of any editing must be provided by someone with knowledge of the editing. *Medita of New Mexico Inc.*, 314 NLRB 1145, 1146 fn.7 (1994). Hearing officers should be aware that tape recordings are frequently of less than perfect quality and some passages may be inaudible. However, unless the defects are so substantial that they render the entire recording untrustworthy, defects go to weight and not to the admissibility of the recording. *U.S. v. Parks*, 100 F.3d 1300, 1305 at fn.2 (7th Cir. 1996). The *NLRB Division of Judges Bench Book* suggests that the best way to receive evidence of a tape recording is to obtain a stipulation of a written transcript for receipt into evidence, along with the tape if requested.

In postelection cases, parties may subpoena and seek to introduce either audio or visual tape recordings, e.g., a video of electioneering. Tape recordings, either audio or visual, are subject to production by subpoena and are admissible upon proper authentication. *Delta Mechanical Inc.*, 323 NLRB 76, 77 (1997).

7. Immunity

Under Section 102.31(c), Rules and Regulations, if any party desires to obtain testimony from a witness who has claimed a privilege under the 5th Amendment, the party may request an order requiring the witness to testify under a grant of immunity. The Agency must obtain the Attorney General's approval (and possibly that of other state or local enforcement agencies) for transactional immunity, which means for immunity for purposes of the particular proceeding. Under no circumstances may the hearing officer grant requests for immunity. Instead, a memorandum should be sent to the Division of Operations-Management requesting immunity, along with supporting reasons for the request. Operations-Management will handle the request thereafter.

8. Appeals from Rulings

A request for special permission to appeal to the Regional Director or the Board a ruling by the hearing officer on motions, objections and orders should be made promptly and in writing. The hearing officer does not have to adjourn the hearing immediately. The hearing officer may ask that the special appeal be prepared at an appropriate break time. A copy must be served on the Regional Director and the other parties. See Section 102.65(c), Rules and Regulations. The other parties should be given an opportunity to respond to the special appeal.

The request should set forth the ruling, the reasons special permission should be granted and the grounds relied on for the appeal, including the prejudice that resulted from the ruling.

The hearing officer should recess the hearing long enough for the preparation of the request. The hearing should then be resumed, even though the Regional Director or the Board has not passed on the request. Once all evidence is received (other than the issues raised by the special appeal), the hearing should be closed whether or not the Regional Director or the Board has ruled on the special appeal. After ruling on the special appeal, the Regional Director or the Board will take further action as is appropriate.

D. Evidentiary Matters

Representation case hearings are investigatory proceedings. Although it is not required that the rules of evidence and trial procedure be strictly followed, they serve as a guide for helping the hearing officer make a sound record. See Section 102.66(a), Rules and Regulations. The most common objections to evidence are based upon relevance, materiality and hearsay. These issues and other evidentiary matters are discussed below.

Considerations in Ruling on Common Objections

Hearing officers are frequently faced with objections to oral testimony, a line of questioning, types of questions (e.g., leading questions, beyond the scope of direct examination, hearsay, etc.) and documentary evidence. When an objection is raised, the hearing officer should ask the basis for the objection. The other parties' positions should be solicited, and the hearing officer should render a clear ruling on the record (either overruled or sustained) together with a brief statement of the basis for the ruling. The hearing officer should permit the party adversely affected by the ruling to make an offer of proof, if requested (see Section 9, Offers of Proof). Any documentary evidence, which is ruled inadmissible, may be placed in a rejected exhibit file.

1. Foundation

Before a witness testifies on a subject, the record should reflect the basis for his or her knowledge. The basis of the witness' knowledge goes to the competency of that witness to testify about a particular subject. The competency of the witness to testify goes to the weight given that testimony and not admissibility. For example, if a witness testifies about the job duties of employees in a specific classification, the record should clearly establish how the witness obtained the information. Does the witness supervise these employees? Is the witness employed in the job classification being discussed? Is the witness at the facility on a regular basis? When, where, what time and who was present are the types of preliminary fact questions which should be asked to establish the witness' ability and competency to testify. Foundation questions also may help determine if the testimony is going to be relevant. If a witness does not have personal knowledge of facts that are in issue, the hearing officer should ask the party presenting that witness whether a more competent witness is available to testify. Thus, hearing officers should pay attention to the testimony, and, if necessary, interrupt the testimony where it is not probative. In extreme cases, where a party insists on further questioning

of an incompetent witness, the hearing officer should ask for an offer of proof. See Section 9, Offers of Proof.

2. Relevancy

Evidence is relevant if it has a tendency to make more (or less) probable a fact of importance to the issue under consideration. See FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration it should be admitted. If not, then it should be excluded. Relevancy is a factor not only in oral testimony, but also regarding documentary evidence.

Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to the exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues. If the hearing officer determines that the documents are not relevant and should be excluded, the offering party may request that they be placed in the rejected exhibits file. See Section III, C, Rejected Exhibits. If voluminous documents are offered, the hearing officer should require the offering party to provide a full description and to designate with specificity the portions being relied on. Before ruling on admissibility, the hearing officer should request parties to analyze, preferably on the record, any documents offered; often, thereafter, there is no need to admit the documents. Additionally, the hearing officer should request that the parties submit a summary in lieu of voluminous documents. See Section IX, E, 6, Summaries.

3. Materiality

Materiality is related to relevance but is not identical. Materiality relates to the degree of importance of the evidence. If the evidence is relevant but of miniscule importance, it may be excluded.

4. Hearsay (FRE 801–807)

Hearsay is a statement (oral or written or non-verbal conduct), other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. This usually comes up in the context of a witness testifying about what someone else told him (e.g., ‘‘Joe told me he never works in the warehouse’’). If the testimony is being offered to prove the truth of what is asserted—that Joe never works in the warehouse—this would be hearsay. The witness has no direct knowledge of the fact and the declarant, Joe, a non-party, is not on the stand to be cross-examined about the matter. Similarly, a document may be excluded from evidence as hearsay if it is intended by the person as an assertion of truth of the matter asserted in the document.

The following are *not* hearsay:

- (1) Prior inconsistent statements of the witness made under oath and now being

cross-examined;

(2) Consistent prior statements offered to rebut assertions that the statement has been fabricated;

(3) Statements which identify a person;

(4) Admissions of a party or its agents (if made during and relating to the agent's employment) and admissions adopted by a party. For example:

“My supervisor told me that Joe never works in the warehouse.” This is an admission by an agent of a party and is not hearsay. Such testimony can be received to prove the truth of the matter asserted.

Most common exceptions to the hearsay rule that hearings officers will encounter during a hearing are:

(1) Commercial publications. **FRE 803(17)**. For instance, Dun and Bradstreet reports and newspapers.

(2) Public records. **FRE 803 (8)**. For instance, Secretary of State documents, certificates of incorporation and court records. See Section 11, Official/Judicial Notice.

(3) Business records and other records regularly kept (must present testimony by custodian or other qualified witness and establish that such records are regularly kept in the ordinary course of business and relates thereto). **FRE 803 (6)**.

Note on Hearsay Evidence: Although there are many technical considerations about hearsay, it is important to remember that it may be received into evidence at an R case hearing in the discretion of the hearing officer. However, hearsay will probably be accorded lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). The hearing officer should encourage parties to produce other witnesses or evidence that will be more probative of the point.

5. Leading Questions

A leading question is one in which the questioner suggests an answer to the witness by his or her question and merely receives agreement. In effect, the examiner is doing the testifying. If the proponent of a witness is asking leading questions in significant areas, the witness' responses will be of little assistance. If the hearing officer finds that the questioner is asking questions like, "do charge nurses direct the work of CNAs," he/she should make sure that, on objection or on his/her initiative, the questioner is cautioned not to use leading questions. If the record reflects answers to leading questions, it is likely that the testimony will lack specificity and the hearing officer must obtain specific examples on the record when a witness has answered such leading questions.

In most representation case situations leading questions are acceptable in preliminary areas (e.g., “You are an employee of the Jones Co.?”). However, try to avoid leading questions during direct examination in critical areas (e.g., “Isn’t it correct that you have the authority to hire and fire?”). The value of the evidence is enhanced if the testimony provided is not an answer to a leading question. Leading questions on direct examination are permissible to refresh recollection of a witness who may have forgotten something (e.g., “Do you recall anything being said about a truck accident?”) During cross-examination, leading questions are permissible.

6. Common Objections

Here are some common objections raised in postelection hearings and some suggested responses by the hearing officer:

Objection to hearsay testimony:

- (a) Objection overruled. The testimony is not hearsay.**
- (b) Objection overruled. The testimony falls within a hearsay exception (delineate the exception).**

Objection to documentary evidence as irrelevant:

- (a) Objection overruled. The document is relevant and I will accord it whatever weight is appropriate.**
- (b) Objection sustained. The document is irrelevant and may be placed in the rejected exhibit file.**

Objections to leading questions or questions beyond scope of direct:

- (a) Objection overruled. The question is a preliminary or introductory question and thus a leading question is appropriate.**
- (b) Objection sustained. Counsel is excessively leading the witness and it appears that counsel, not the witness, is testifying.**
- (c) Objection overruled. This is an investigatory proceeding and, although the question goes beyond the scope of direct, I will allow the question in the interest of establishing a full and complete record.**

E. Evidence Issues

1. Best Evidence

Where the contents of a document are in issue, the document is the best evidence available and should be produced. The hearing officer may allow oral testimony about the contents of the document, but should demand the document be produced and question the witness about the document. A copy of the original document is sufficient if there is no dispute about its authenticity or accuracy (i.e., a copy of a signed collective-bargaining

agreement is sufficient). If a document is not available, secondary evidence should be admitted in lieu thereof.

2. Authentication (FRE 901–902)

If there is a question regarding the authenticity of a document, evidence should be obtained to verify that fact. The burden of proof for authenticating a document is slight. The person offering the document has that burden and usually establishes authenticity through a witness who can relate its origin (e.g., showing the letter to the witness, having him/her identify it, establishing the basis for his/her knowledge about the letter). It is common practice to use a copy of the original when there is no dispute about the document's authenticity. This includes allowing the withdrawal of an original document so that a copy may be substituted in the record.

FRE 902 sets forth the type of documents which are self-authenticating. These include, but are not limited to, certified copies of domestic public documents and records, official publications, newspapers and periodicals.

3. Parole Evidence

Parole evidence is oral testimony of a witness offered to contradict or modify the terms of a written agreement. For instance, when the terms of a contract have been embodied in writing, like a collective-bargaining agreement, evidence of contemporaneous or prior oral agreements is not admissible for the purpose of varying or contradicting the written contract. However, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining the correct interpretation of the agreement. *Don Lee Distributors*, 322 NLRB 470, 484–485 (1996).

4. Scope of Cross-examination Exceeds Direct Examination

Generally, in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. This has no application in R case hearings. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination.

5. Cumulative Testimony

Hearing officers should avoid permitting repetitious testimony on the record. If the hearing officer is satisfied that the record will not be enhanced by redundant evidence, it should be excluded. If the hearing officer finds that a party is eliciting testimony that is unduly repetitious, the hearing officer should ask for an offer of proof regarding the testimony. In such a case, the hearing officer may seek a stipulation that further witnesses would testify similarly. See Section 9, Offers of Proof. However, in a case involving close issues of fact, evidence that is corroborative and pertains to the issue in dispute is not repetitious testimony and should not be excluded. For example, where

charge nurses' 2(11) status is in issue, testimony from various charge nurses regarding the scope of their duties would not be repetitious and should be admitted if each nurse works in a different area of the facility or on different shifts.

6. Summaries

Voluminous documents are frequently reduced to summary form for better understanding. On request, the opposing party is given the opportunity to examine the underlying documentation on which the summary is based. See FRE 1006. The examination may have to be done at periods of time outside of normal hearing hours. The summary is typically received into evidence with the understanding that an objection will be entertained after examination of the underlying documents. In rare cases involving claims of privilege and when the parties agree to do so, the hearing officer may conduct an in camera inspection of the documents to confirm that the summary accurately reflects the underlying documents. If an in camera inspection is performed, the results thereof should be noted on the record.

7. Opinion Evidence

Opinion evidence proffered by witnesses is usually admissible. Opinion testimony commonly deals with such matters as time, distance, speed, etc. These are subjects that an observant person is competent to render an opinion about.

8. Offers of Proof

An offer of proof is generally a statement made by counsel or a representative setting forth the testimony of a witness if the party called that witness to testify. An offer of proof may be made when the hearing officer has ruled that a party may not examine a witness or offer exhibits on a topic to which an objection has been sustained. The party adversely affected by that ruling may ask permission of the hearing officer to make an offer of proof to show the content of the excluded evidence. This enables the reviewer of the record to determine whether it was appropriate to exclude the evidence. Normally, the offer is made in narrative form by counsel stating what the witness would testify to if permitted to answer a particular line of questioning. A question and answer offer of proof should generally not be allowed. On occasion, a party may wish to submit a written statement as an offer of proof. The written statement should be made part of the record as an exhibit.

Cross-examination does not follow the offer of proof. If the hearing officer determines, based on the proffer, that the testimony should be allowed, the hearing officer can reverse his/her earlier ruling on the objection and allow the party to elicit testimony in the area previously rejected by the hearing officer. However, if the hearing officer believes, based on the proffer, that his/her earlier ruling was correct, i.e., that the testimony was properly excluded to begin with, the hearing officer can receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

9. Proactive Use of Proffers

Offers of proof can be an effective tool for controlling and streamlining a hearing. Regional Office practices vary on the use of offers of proof and the circumstances under which their use is appropriate. When a hearing officer elicits offers of proof, he/she will have a better idea of the evidence to be presented and can maintain more effective control over the hearing. This way, the hearing officer can streamline the hearing and exclude potentially redundant or unhelpful testimony.

10. Judicial Notice/Official Notice

Judicial notice allows a court to shortcut the taking of testimony regarding matters that are common knowledge (e.g., Washington, D.C., is the capital of the U. S.). Official notice allows an agency to recognize its own proceedings and decisions (e.g., relevant jurisdictional facts in another Board transcript). Matters arising in a prior case may or may not be dispositive of the current issue. For example, where the Board has asserted jurisdiction previously and a party asserts that the facts have changed, additional evidence may be required. The hearing officer may take official notice at the request of a party or on his/her own motion.

On occasion, a hearing officer will be asked to take either judicial or official notice of other agencies' proceedings or a decision from another Regional Office. For instance, a party may seek to introduce state unemployment compensation proceedings, which may establish a particular employee's eligibility (i.e., an independent contractor finding by a state's agency). The Board admits into evidence and considers decisions in state unemployment compensation proceedings, but does not give the decisions controlling weight. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67, fn.2 (1997). If a party wishes to have official or judicial notice taken of any particular document, that party must produce a copy of the document.

11. Voir dire Examination

When a party offers an exhibit, the other parties may question the witness at that time concerning the exhibit. (E.g., Attorney A: "Mr./Ms. hearing officer, I offer into evidence this letter which is marked for identification as Employer's Exhibit 6 and which the witness has just identified." Hearing Officer: "Mr./Ms. B, any objection?" Attorney B: "May I voir dire the witness about the letter first?" Hearing Officer: "You may.") This interruption in the offering party's examination is permitted in order to clear up any questions the opposing party has about the authenticity of the exhibit. Voir dire questioning about an exhibit should be limited to the admissibility of the exhibit. Voir dire examination should be limited to a few basic questions about a document:

- who prepared the document?

- was the witness present when it was prepared/signed?
- is the document kept in the normal course of business?
- where is it kept?
- if the document is a summary, is the summary based on documents that are kept in the normal course of business; what is the summary based on?

Voir dire examination may also be used to question the competency or qualifications of the witness. See Section 1(a), Foundation. The questioner should not be allowed to question the witness in other areas until his/her normal turn to examine arises. Thus, voir dire questioning should not turn into cross-examination of a witness and the hearing officer should intervene in those circumstances.

12. Rejected Exhibits

If the hearing officer decides not to accept exhibits because they are not relevant or because they are cumulative, the offering party may request that they be placed in the rejected exhibit file. This should be permitted, as it will preserve the documents upon review to the Board. This may come up in the context of an offer of proof when exhibits accompany testimony or statements of the party.

F. Witnesses

1. Oath

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. The hearing officer should ask the following question: “Do you solemnly swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?” Affirmation may be used if requested. On recall, a witness need not be resworn but should be asked to signify that he/she understands that he/she is still under oath.

2. Witness’ Refusal to Answer Questions

If a witness refuses to answer a question that the hearing officer deems to be proper, the hearing officer can exercise his/her discretion to strike all testimony previously given by the witness on related matters. However, as an alternative, the hearing officer may advise the witness that refusal to answer the question may weigh against his/her credibility.

If a witness appears under subpoena but refuses to answer questions, it is as if the witness did not appear at all. Accordingly, subpoena enforcement proceedings may be appropriate where requested by the subpoenaing party. Under those circumstances, the district court judge should be notified that the subpoenaing party seeks an order compelling the witness to testify.

One way to avoid subpoena enforcement proceedings is to ask the subpoenaing party to wait until the end of the hearing to evaluate whether the subpoenaed witness remains a necessity. The subpoenaing party may find that, at the close of the hearing, there is sufficient record testimony in support of their position and that there is no longer

a need for the subpoenaed witness to testify. Thus, when faced with a request by a party to institute enforcement proceedings, the hearing officer should recommend too that the party await the completion of testimony and evaluate the need for the subpoenaed witness at that time. Note and advise the parties, that a request for subpoena enforcement must be made before the record closes.

3. Failure to Appear

If a subpoenaed witness fails to appear at the hearing and the Regional Director or the hearing officer believes that a decision cannot be made in the absence of that witness' testimony, the Regional Director may consider subpoena enforcement upon the request of the subpoenaing party. However, that process is a lengthy one and the Regional Director or the hearing officer may decide to avoid a protracted proceeding and decide the case without the subpoenaed witness if at all possible. The Regional Director or the hearing officer may also decide to call other witnesses instead of instituting subpoena enforcement proceedings.

4. Foreign Language Witnesses

Although non-English speaking witnesses have always appeared in representation cases, they now appear with greater frequency. Therefore, when preparing for a post election hearing, the Regional office and the hearing officer should be alert to any potential foreign language issue and should ask the parties to apprise the Regional Office promptly of a need for interpreter services. The hearing officer should ensure that appropriate arrangements for interpreters are made in order to avoid unnecessary expense or delay. In the event foreign language witnesses are required, the Regional Office must secure and pay for certified interpreter services. See *Solar International Shipping Agency*, 327 NLRB 369 (1998).

The Agency's limited budget is always a concern in regard to the expenses related to processing representation cases, particularly at hearings. The Regional Office and the hearing officer should take all reasonable steps to reduce costs, including interpreter costs. With respect to interpreter costs, hearing officers should exclude irrelevant and repetitious material from the record. In circumstances where it is unclear that a witness' testimony would be relevant or necessary and the witness would require a translator if called to testify, it may be appropriate for the Region Office or the hearing officer to request that the party which intends to call the non-English speaking witness identify, either through a formal offer of proof or any other satisfactory method, the nature of the testimony to be given by the witness. It may be possible to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and require that witness and an interpreter.

5. Board Agents as Witnesses

Parties may seek the testimony of Board agents regarding conduct that occurred during the election. See CHM Section 11429.1. However, under Section 102.118(a)(1),

Rules and Regulations, before a Board agent may testify, the General Counsel must authorize such testimony. In GC Memorandum 94-14, the General Counsel granted Regional Directors the authority to consider and decide whether or not to approve most requests for authorization to allow a Board agent to testify under Section 102.118. Accordingly, a party seeking Board agent testimony must make a request in writing to the General Counsel or, in the circumstances outlined in GC Memorandum 94-14, the Regional Director, pursuant to Section 102.118, Rules and regulations.

Note for the parties that in *Millsboro Nursing & Rehabilitation Center, Inc.*, 327 NLRB 879, fn.2 (1999), the Board held that there are important policy reasons for not involving Board employees as witnesses in Board litigation. See generally, *Sunol Valley Golf Co.*, 305 NLRB 493 (1991) supplemented by 310 NLRB 357 (1993).

6. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of other witnesses. Sequestration is a matter of right in C cases, not in R cases. *Hamilton Nursing Home*, 270 NLRB 1357 (1984); *Fall River Savings Bank*, 246 NLRB 831 fn.4 (1979) (R cases hearings not adversarial).

Accordingly, in a postelection hearing with multiple witnesses present where credibility of witnesses is at issue, the hearing officer should normally impose a sequestration order. Any request for sequestration should be made at the start of the hearing so it affects all witnesses and parties equally. If presented with such a request, the hearing officer should ask the parties whether the witnesses present in the hearing room are scheduled to or may testify. The hearing officer should then evaluate the position of the parties. If the hearing officer grants a sequestration request, the witnesses should be cautioned not to discuss their testimony with anyone and not to read the transcript testimony of other witnesses unless shown it by counsel for the purposes of rebuttal testimony. The sequestered witness(es) should leave the hearing room until called to testify. Use the following language when imposing a sequestration order:

I have granted a request to sequester witnesses. This means that all persons who are going to testify in this proceeding, with specific exceptions, may only be present in the hearing room when they are giving testimony. Each party may select one person to remain in the room and assist it in the presentation of its case. They may remain in the hearing room even if they are going to testify or have testified. The order also means that from this point on, until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any other potential witness until after the hearing is completed. Under the rule as applied by the Board, with one exception, counsel for a party may not in any manner, including by showing of transcripts of testimony, inform a witness about the content of the testimony given by a preceding witness, without express permission of the hearing officer. However, counsel for a party may inform counsel's own witness of the content of testimony and may

show to a witness transcripts of testimony given by a witness for the opposing side in order to prepare for rebuttal of such testimony. I expect counsel to police the sequestration order and to bring any violation of it to my attention immediately. Also, it is the obligation of counsel to inform potential witnesses of their obligations under the order. It is also recommended that as witnesses leave the witness stand upon completion of their testimony, they be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.

As witnesses leave the witness stand upon completion of their testimony, they should be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.

After a witness has testified, the witness can remain in the hearing room. However, if that witness is called on rebuttal after having heard the testimony of others, the hearing officer should inquire as to what testimony the witness heard. The hearing officer can exercise his/her discretion in permitting the witness to testify on rebuttal but evaluate the credibility of that witness based on the testimony that witness provides.

As indicated above, a party is normally allowed to have a representative present in the hearing room to assist counsel during the course of the hearing. This is true even if that representative will later be called to testify. In this regard, an RD Petitioner is also a party, even though he/she may be called as a witness, the RD Petitioner may remain in the hearing room and may have a person assist him or her.

7. Hostile or Adverse Witnesses-Section 611(c) Witnesses

A witness who is either hostile or has interests adverse to the calling party may be asked leading questions and is subject to cross-examination by the party that called the witness. Under FRE 611(c), a witness is considered a hostile or adverse witness when that witness' relationship to the opposing party is such that his or her testimony may be adverse to that party. On rare occasions, FRE 611(c) may arise in a postelection case. A foundation should be laid to establish that the witness falls within the parameters for invoking FRE 611(c). If a dispute arises regarding use of FRE 611(c) examination, seek guidance from Regional Office management.

G. Conduct of Representatives

The Board expects that the parties will conduct themselves in a professional manner at hearings. If a party at a hearing engages in misconduct, the hearing officer should request that he/she conduct him or herself in an acceptable manner. If the party persists in its misconduct, the hearing officer should remind him/her of potential consequences, including sanctions, which could result from his/her behavior.

The Board's rules provide for two sanctions that can be applied to parties who engage in misconduct at hearings. Those sanctions are exclusion from the hearing and suspension or disbarment from further practice before the Board. The conduct of the

party must be of an aggravated nature to justify such sanctions. In addition, the Board has sometimes issued a note of censure or condemnation for less serious misconduct. See Section 102.177, Rules and Regulations and OM 94-6, OM 97-2, OM 01-80; *In re: Stuart Bochner*, 322 NLRB 1096 (1997); and *In re: Joel I. Keiler*, 316 NLRB 763 (1995).

The hearing officer may exclude from the hearing any party or its representative that has engaged in misconduct. The type of misconduct which may justify a hearing officer's invocation of this sanction would include: violence or threats of violence; subornation of perjury; or using rude, vulgar and/or profane language, if egregious. Before invoking the exclusion sanction, the hearing officer should discuss the matter with Regional Office management, as serious due process concerns are raised in this circumstance.

H. Pro Se parties

Unrepresented parties (pro se) may not be familiar with our processes, the pertinent law or their burden of proof. The hearing officer should take the time to explain the process involved and the extent of their obligations, if any, and should be particularly sensitive to any language difficulty problems. The hearing officer should explain the nature of the hearing, burdens of proof (Section B, above) and that he/she has the right to seek subpoenas to compel the testimony of witnesses, to call witnesses and to question witnesses on cross-examination. The hearing officer may also develop areas of testimony which he/she deems critical to the case. However, the hearing officer is not obligated to advocate on behalf of a pro se party and is not required to develop extensive lines of testimony.

I. Prehearing Procedures

1. Research Issues

Prior to the hearing, the hearing officer should research the issues that are set for hearing. He/she should review the Regional Director's Report or Notice of Hearing and the challenges and/or objections to determine the legal issues and research those issues prior to the hearing. When prepared with the applicable case law, the hearing officer will know the evidence that is needed for a complete record. As a start, use *An Outline of Law and Procedure in Representation Cases* or *The Developing Labor Law*.

2. Formal Papers

In advance of the hearing, the formal papers should be prepared. They consist of the following:

- (a) Notice of Hearing with objections included or attached;
- (b) Regional Director's Report on Objections or Challenges or Notice of Hearing directing a hearing;
- (c) Exceptions to the Regional Director's Report on Objections or Challenges or Notice of Hearing;

- (d) Any Board decisions on the Regional Director's Report on Objections or Challenges or Notice of Hearing;
- (e) Any motions or requests on which prehearing rulings have been made that bear on the issues to be resolved by the hearing.

The formal papers should be placed in one legal backing, in chronological order, and marked as Board's Exhibit 1.

3. Prehearing Discussions

Prior to opening the hearing, the hearing officer should conduct an off-the-record conference to determine the positions of the parties and to discuss procedural matters. During the conference, the parties and the hearing officer can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, litigation of issues and the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. The hearing officer should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

The hearing officer should attempt to resolve all challenges prior to opening the record. For instance, if an employee was left off the list because he/she was hired after the eligibility cutoff date (set forth in the stipulated election agreement or determined in the Decision and Direction of Election) or voluntarily left the employer's employ prior to the date of the election, these matters may be easily resolved with payroll or other personnel records. In resolving the challenges, the parties should execute a written document explaining the resolution of the challenge (e.g., the parties agree that Mr. Jones is eligible to vote because he performs unit work, was employed as of the payroll period eligibility date, and was employed on the day of the election). The hearing officer should explain that the parties may limit their resolution of eligibility to only the purpose of this proceeding.

Prior to the hearing, the hearing officer should specify whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these grounds bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

4. Requests for Postponements

Once the hearing opens, the schedule for the hearing is determined by the hearing officer. It is the Agency's policy that hearings are to be conducted on consecutive days wherever possible. However, the hearing officer at his/her discretion may adjourn to a later date or to a different place. In so doing, he/she should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption. The hearing officer should insist upon an adequate basis for any adjournment request prior to ruling on the request. Motions of the parties for postponements may be granted for good cause, bearing in mind the importance of promptly processing the representation case. Unwarranted delay should be avoided and, when possible, the hearing should proceed on those issues where progress is possible. Adjournments or postponements should be to a specific date with the provision that the hearing will continue on consecutive days thereafter until completed.

5. Role of the Regional Director's Representative

The Regional Director may assign a Board agent, designated as representative of the Regional Director, to appear at the hearing to see that evidence adduced during the Region's administrative investigation becomes part of the record. If the Director appoints a representative, the Board agent should be thoroughly familiar with the contents of the Regional Office case file. The primary function of the representative is to see that the relevant evidence adduced during the investigation becomes part of the record. During the hearing, the file should be in his/her possession.

If a representative of the Regional Director is present during the hearing, he/she should make the following statement after entering his/her appearance at the hearing:

I am here as a representative of the Regional Director to see that the evidence adduced during the investigation is made available to the hearing officer. In this function, I may ask some questions and, if necessary, call witnesses. I am not here to advocate on behalf of any party to this proceeding. My services are equally at the disposal of the hearing officer and all parties.

The representative may voice objections, cross-examine, call and question witnesses and call for and introduce appropriate documents. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. However, the Regional Director's representative should not offer new material unless he/she is certain it will not be offered by one of the parties. If the representative finds it necessary to impeach the testimony of witnesses or contradict the evidence that has been presented, the representative must exercise self-restraint and display impartiality.

6. Statements of Witnesses

In preparation for the hearing, it is advisable to prepare copies of the relevant

portions of statements by witnesses. If there is to be a representative of the Regional Director at the hearing, these copies would enable him/her to provide the statements to the parties. In the event there is no representative, these copies should be provided to the hearing officer, prior to the hearing, in sealed envelopes labeled with the names of the affiants, to enable him/her to provide copies as the hearing progresses. These statements are not part of the record and should not be opened or examined by the hearing officer except in connection with their production under Section 102.118(c), Rules and Regulations. For the procedures to follow at the hearing for releasing the affidavits to the parties see Section C, 5, Admission of Statements or Affidavits In Postelection Hearing.

J. Opening the Record

1. General

The hearing officer should keep the record as short as is commensurate with it being complete. In this regard, the hearing officer should ask that the parties to the hearing succinctly state on the record their positions as to the issues to be heard. The hearing officer should also attempt to secure stipulations, wherever possible, in order to narrow the issues and to shorten the record. See Section C, 4, Factual Stipulations. The hearing officer should attempt to exclude irrelevant and cumulative material, including by utilizing offers of proof. See Section E, 8 and 9.

2. Opening Statement

At the commencement of the hearing, the hearing officer should make the following opening statement.

“The hearing will be in order.

This is a hearing before the National Labor Relations Board in the matter of _____ - Case No. _____ pursuant to the order of the Regional Director/Board dated _____.

The hearing officer conducting this hearing is _____.

The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, on appropriate request, be permitted to an entire line of questioning.

It appears from the Regional Director's/Board's order dated _____ that this

hearing is held for the purpose of taking evidence concerning _____.

In due course, the hearing officer will prepare and file with the Regional Director/Board, his/her report and recommendations in this proceeding and will cause a copy thereof to be served on each of the parties. The procedure to be followed from that point forward is set forth in Section 102.69, Rules and Regulations.

Will counsel and other representatives for the parties please state their appearances for the record? For the Regional Director? Are there any other appearances? Let the record show no response.

Will the parties please identify the issues for hearing and their positions on each issue?

Employer?

Petitioner?

Intervenor?

If the issue involves statutory exclusions, such as 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., supervisory status) involves a statutory exclusion; the party seeking to exclude employees on these grounds bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

K. Briefs

In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should be not be permitted. The hearing officer should encourage the parties to prepare closing statements in lieu of briefs, providing them with sufficient opportunity to prepare their statements. Closing statements may include the pertinent case law that each party claims supports its position.

Where a hearing officer permits the filing of briefs, the hearing officer sets the time limits for filing. It is assumed that in the interests of expeditiously resolving a representation question, generally no more than 7 days should be allowed for the filing of briefs.

Parties should be advised that requests for extensions of time to file briefs will not be granted by the hearing officer, except under the most unusual circumstances. A request for an extension to file briefs must contain the specific reasons that a party cannot submit the brief within 7 days.

It should be made clear that a party planning to order a transcript for the purposes of a brief must make arrangements with the reporting service contractor to obtain it on an expedited basis, by pick up, delivery or overnight mail. The hearing officer should also advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or the nonreceipt of a transcript will normally be denied in the event arrangements for expedited delivery were not made by the party.

L. The Hearing Officer's Report

1. General

The order directing the hearing always specifies whether the report should be served on the Regional Director or the Board. The form and content of the Hearing Officer's Report will vary according to the case. In general, it should narrate the background material, set forth the facts and apply the appropriate legal analysis. Questions of credibility should be resolved, with the basis for resolution cited. Appropriate recommendations should be made to the Board or the Regional Director. A copy of the Hearing Officer's Report should be served on all parties, including the Regional Director. If the Hearing Officer's Report is filed directly with the Board, eight (8) copies of the report should be sent to the Office of the Executive Secretary.

2. Due Dates

Pursuant to the General Counsel's guidelines, a Hearing Officer's Report on Objections, Challenges or both should be given priority attention. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11360.1 and 11390.1.

3. Credibility Determinations

A postelection hearing officer is required to evaluate the credibility of witnesses and explain his/her credibility findings in the Hearing Officer's Report. The Hearing Officer's Report should lay out credibility findings, including specifying the witnesses found to be credible and the basis for those findings. Where at all possible, they should not be based solely on the demeanor of the witness. It is critical that credibility findings and the basis for those findings be set forth in the report. Accordingly, it is recommended that credibility findings be as clear and explanatory as possible.

To this end, the hearing officer should not only pay careful attention to witnesses' substantive testimony, but also to their demeanor. The hearing office should take detailed notes while observing the witnesses, particularly where there are multiple witnesses, and look for the specificity of the witness' testimony; how detailed it was; its vagueness; whether the witness answered questions even on cross-examination in a direct non-combative manner; the witness' consistency on both direct and cross; whether the witness provided conclusionary responses or implausible explanations; to what extent the witness' testimony contradicted documentary evidence or the testimony of other witnesses; and internal inconsistencies. The hearing officer may evaluate the inherent

probability of events in assessing consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. *Universal Camera v. NLRB*, 340 U.S. 474 (1951). When assessing a witness' credibility, the hearing officer should keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony.

4. Structure of Report

(a) Introduction of the Issues

At the outset of the Hearing Officer Report, a short introduction should briefly explain the purpose of the hearing, the issues presented, and the hearing officer's recommendations with respect to those issues, e.g., "Based on my credibility resolutions and the evidence presented, I recommend overruling Objection No. 1 and 3, but sustaining Objection No. 2." See samples on the legal writing bulletin board.

(b) Procedural History of the Case

Thereafter, the Hearing Officer's Report should lay out the procedural history of the case, in particular, the date the petition was filed, the date the parties entered into a stipulated election agreement or the date of the Regional Director's Decision and Direction of Election, the appropriate unit, the date of the election, the Tally of Ballots, the objections/challenges and the Notice of Hearing.

(c) Substantive Organization of the Report

After the explanation of the procedural history of the case, the report should discuss the facts of the case. Objections and challenges should be discussed separately, or in appropriate groupings, including identifying the legal standard involved, the evidence presented as to each objection/challenge (either testimony of witnesses or documentary evidence), the credibility resolutions that relate to the objections/challenges, and the hearing officer's analysis regarding those issues. Do not discuss facts in the analysis unless were previously laid out in the factual section

(d) Conclusions

The hearing officer's recommendations should be clear with respect to each challenge and/or each objection. Here are examples of suggested language to use in challenges and objections cases:

Where the ballots would not be counted:

Suggested language: It is recommended that the challenge to the ballots of Mr. Jones and Mr. Smith be sustained.

Where the ballots would be counted:

Suggested language: It is recommended that the challenge to the ballots of Mr. Smith and Mr. Jones be overruled and that their ballots be opened and counted.

Where objections are found to have merit:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objections No. 1 and 4 be sustained and that the election be set aside.

Where the objections are found to lack merit:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objection No. 2 be overruled and that the appropriate certification issue.

Where some objections have merit and others do not:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objection No. 1 and 3 be overruled, but that Objection No. 2 be sustained and the election be set aside.

(e) Exceptions

CHM Sections 11366.2 (Challenges) and 11396.2 (Objections) set forth the appropriate language to be used regarding the parties' rights to file exceptions to or a request for review of the Hearing Officer Report. [Note: If the report is addressed to the Regional Director rather than the Board, the exceptions language should be modified accordingly.]

X. 10(K) HEARINGS

A. Prehearing Preparation for 10(k) Hearings

The hearing officer should:

1. Bring the following to the hearing:
 - (a) Board's Formal Exhibit - check for completeness and accuracy (see Section D).
 - (b) Appearance sheet and Form NLRB-856.
 - (c) Subpoena (both types).
 - (d) ULP Manual (See Section 10210 for information on 10(k) hearings).
 - (e) Rules and Regulations.
2. If 10(l) relief has been sought, the hearing officer should be familiar with the 10(l) record, including the transcript and exhibits.
3. Review the agenda minute or final investigative report.
4. Appendix A is a stipulation form for use as Board Exhibit 2. It should identify the correct names of the parties, jurisdiction and labor organization status. In addition, the following written stipulations should be secured. They may be added to Board Exhibit 2.
 - (a) Work in dispute and competing claims
 - (b) Prior Board orders
 - (c) To whom the work was assigned
 - (d) Voluntary adjustment mechanisms
 - (e) 10(l) court proceedings
5. Read recent Board 10(k) determinations, particularly those involving the same unions, the same kind of work that is disputed and the same kind of issues.
6. Prepare a list of questions to ask should the parties neglect to cover them. (See Section H, Relevant Areas of Inquiry, *infra*).
7. Call each of the parties' attorneys/representatives several days before the hearing opens to remind them of the hearing time, place and date. Explain what is needed in the record. Encourage the parties to resolve the dispute prior to the hearing, emphasizing that the Board's Decision will likely apply only to the job in question and oftentimes will issue only after the job is completed. This is not an *ex parte* communication prohibited by Section 102.128(d), Rules and Regulations (also see Section 102.131) because the hearing officer is not the decision-maker in the case.

B. The Hearing

The hearing officer should:

1. Before the hearing opens, show the parties the formal papers.

2. Have parties sign and fill out the appearance sheets.
3. Solicit as many stipulations as possible. (Make sure to get stipulation that employer is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the disputed work.)
4. Open the record using opening statement below.
5. Get the appearances stated on the record.
6. Ask for intervenors.
7. Get the correct names of all parties—amendments if necessary.
8. Ask the parties for their positions (after clearly defining the nature of the work in dispute).
9. Decide on the order of presentation of evidence, i.e., who will put on evidence first.
10. To the extent the matters below are not covered by the written stipulations of the parties in Board Exhibit 2, receive evidence, preferably in the following order:
 - (a) Jurisdictional facts (see Section IV, A, Jurisdiction).
 - (b) Evidence or stipulation establishing labor organization(s) status.
 - (c) Evidence on issue of “reasonable cause to believe” that Section 8(b)(4)(D) has been violated.
 - (d) Competing claims.
 - (e) Evidence in support of the various positions regarding the merits.
11. Give all parties opportunity to argue orally on the record.
12. Read closing statement.
13. Set the due date for briefs. Section 102.90, Rules and Regulations provides that briefs shall be filed within 7 days after the close of the hearing. Because Section 10(k) hearing transcripts have a 10-day delivery, parties will probably not have them by the due date. Thus, advise them that extensions of time must be filed with the Executive Secretary's Office. Also note that the Hearing Officer's Report is due within 48 hours after the close of the hearing. It is imperative that the report is timely in order to enable the Executive Secretary's Office to rule on the requested extensions of time.
14. Ask reporter for estimate of number of pages of transcript.

C. Opening Statement

At the commencement of the hearing, the hearing officer shall make the following opening statement:

“The hearing will come to order. This is a formal hearing pursuant to Section 10(k) of the National Labor Relations Act in the matter of (names of parties)

The case number is _____.

The hearing officer appearing for the Board is _____.

Will counsel please state their appearances for the record?

For the Charging Party?

For Employer?

For other unions involved?

For _____?

Are there any other persons in the hearing room at this time who claim an interest in this proceeding?

I wish to inform all the parties that the official reporter makes the only official transcript of these proceedings and all citations and briefs and arguments must refer to the official record. After the close of the hearing, one or more of the parties may wish to have corrections made in the record. All such proposed corrections, either by way of stipulation or motion, should be forwarded to the Board in Washington instead of to the hearing officer. The hearing officer has no authority to make any rulings in connection with the case after the hearing is closed. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. Statements of reasons in support of motions or objections should be as concise as possible. An original and two copies of all pleadings submitted during the hearing are to be filed with the hearing officer, with copies immediately served on the other parties. The role of the hearing officer is to ensure that the record contains as full a statement of the facts as may be necessary for a determination of the issues by the Board. All parties will be afforded a full opportunity to present their respective positions and to produce evidence in support of their contentions. It may become necessary for me to ask questions, call witnesses and explore avenues with respect to matters not raised or only partially raised by the parties.

The services of the hearing officer are equally at the disposal of all the parties to the proceeding in developing the material evidence.

D. Formal Exhibits

The formal papers consist of the following:

- (a) Copy of the charge and proof of service.
- (b) Notice of charge filed.
- (c) Notice of 10(k) hearing and affidavits of service.
- (d) Any request by the parties for postponements of the hearing.
- (e) Any 10(l) injunctions entered by the court.
- (f) Appearance sheet.

The hearing officer should state:

The formal exhibit in this matter has been marked as Board's Exhibit 1(a) through 1(____), the latter being the index of the exhibit. This formal exhibit has already been shown to the parties.

Are there any objections to the receipt of the Board's Exhibit 1(a) through 1(____)?

Ask each party and get his/her response clearly for the record.

Board's Exhibit 1 is received in evidence.

E. Intervention

Are there any motions to intervene in this proceeding at this time?

F. Stipulations

As set forth above in Section A, 4, receive into evidence Board Exhibit 2 containing the parties' written stipulations. If the hearing officer has not secured stipulations prior to the opening of the hearing, secure them at this time. If the parties refuse to enter into written stipulations, attempt to secure their verbal stipulations, on the record. Make sure that each party consents to enter into the stipulations you receive. The hearing officer must state on the record the precise stipulation and that it is received or rejected.

If the parties do not enter into written stipulations, the hearing officer must obtain the following oral stipulations:

1. Jurisdictional Information

See Section IV, A, Jurisdiction, for commerce standards.

Can it be stipulated that (here give the jurisdictional information, e.g., XYZ Co. is a Delaware corporation engaged in the business of _____ and annually sells and ships goods valued at in excess of \$___ from its facility located at

____ to customers located outside the State of _____. The parties stipulate that the employer is engaged in commerce within the meaning of the NLRA.

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

2. Labor Organization

Will the parties stipulate that Local _____ is a labor organization within the meaning of Section 2(5) of the Act?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

3. Work in Dispute

Can it be stipulated that the work described in the Notice of Hearing is the work that is in dispute? [Note: If the parties will not stipulate that the Notice of Hearing is accurate, attempt to obtain a stipulation of the work that is in dispute. If no stipulation can be reached, evidence needs to be presented regarding this issue].

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

4. Board Orders

Can it be stipulated that the employer herein is *not* failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute?

Mr./Ms. ____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. ____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. ____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

5. Work Claims

Can it be stipulated that (Union A) and (Union B) both claim the work in dispute?

Mr./Ms. ____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. ____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. ____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

6. Voluntary Adjustments

Will the parties stipulate that there is no agreed-on method for voluntary adjustment of the work dispute in question here which would bind all parties?

Mr./Ms. ____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. ____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. ____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

7. Reasonable Cause

(Note: A party may object to entering into a stipulation on this issue. If so, evidence must be taken on the matter.)

Will the parties stipulate that on or about (date), the business agent for (union) told (employer), there would be (strike, picketing or other forms of

inducement, coercion) unless the work of (disputed work) was assigned to members of the (charged) union and that since or about (date), the employer assigned the disputed work to (members of other union or unrepresented employees) who are its employees?

Mr./Ms. ____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. ____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. ____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

8. Court Proceedings

Can it be stipulated that on or about (date), a petition under Section 10(l) of the Act was filed with the U.S. District Court for the District of ____, seeking an injunction against (Respondent Union), Civil No. ____, and that on (date) the district court granted an injunction prohibiting Respondent Union ____ from ____ (i.e., status of 10(l) petition). The parties have no objection to the receipt in evidence of the petition and order. (If you cannot get this stipulation, official notice can be taken of the court's action.)

Mr./Ms. ____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. ____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. ____, do you so stipulate on behalf of the Intervenor?

The stipulation is received. The Board's injunction petition and court's order will be marked as Board Exhibit (___).

G. Presentation of Evidence

The parties should now state their positions and present their cases. Keep accurate notes and ensure that the record contains all evidence needed for the hearing officer's report.

H. Relevant Areas of Inquiry

Make sure that the parties cover the following areas of inquiry. If the parties do not cover these issues, the hearing officer must make sure that the record is complete.

1. Testimony to show that the work assignment is disputed by the unions.
2. Are the unions certified by the NLRB to represent any of the employer's employees?
3. Precise description of the disputed work.

4. Relative skills necessary to perform disputed work.
5. Do the members of the respective unions possess these skills?
6. Certification and collective-bargaining agreements.
7. Employer preference.
8. Area and industry practice.
9. Past practice of employer.
10. Economy and efficiency of operations.
11. Arbitration awards and grievances.
12. Evidence to show no agreed-on method of handling dispute.
13. Conduct violative of Section 8(b)(4)(D).
14. Current status of the dispute.

I. Concluding Remarks

When the parties have called all their witnesses and put in all the documentary evidence, state on the record the following:

Does anyone have more witnesses to call or any documentary evidence to submit?

Does anyone wish to argue orally on the record? (If so, give them the opportunity; if not:) That being the case, I will read the following closing statement into the record:

Should any party desire to file a brief with the Board in this case, such brief must be printed or otherwise legibly duplicated, double spaced on 8-1/2- by 11 inch paper. An original plus seven copies must be filed with the Board in Washington, D.C. within 7 days after the close of this hearing. A copy must also be served on each of the other parties and proof of such service must be filed with the Board at the time the briefs are filed. Any request for an extension of time must be made of the Board, through the Executive Secretary, in Washington, D.C. not later than 3 days before the date the briefs are due. Such request must be made in writing and copies must be served immediately on each of the parties. Is there anything further?

The hearing is now closed.

(Obtain number of transcript pages from the reporter.)

APPENDIX A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION __**

| |
|-----------------------------|
| Correct Name of Employer: |
| Case No. |
| Correct Name of Petitioner: |
| Correct Name of Intervenor: |

STIPULATION

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.

2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Intervenor is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

4. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar to this proceeding.

6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts:

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7. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

Included:

Excluded:

Upon receipt of this Stipulation by the hearing officer it may be admitted, without objection, as a Board exhibit in this proceeding.

For the Employer

For the Petitioner

For the Intervenor

RECEIVED:

Hearing Officer

Date: _____

Board Exhibit No. _____

APPENDIX B

HEARING OFFICER'S SCRIPT FOR RC/RD HEARING

1. OPENING STATEMENT

The hearing will be in order.

This is a formal hearing in the matter of _____, Case No. _____, before the National Labor Relations Board.

The Hearing Officer appearing for the National Labor Relations Board is:

All parties have been informed of the procedures at formal hearings before the Board by service of a Statement of Standard Procedures with the notice of hearing. I have additional copies of this statement for distribution, if any party wants more.

Will counsel please state their appearances for the Record?

For the Petitioner: _____.

For the Employer: _____.

For the Intervenor: _____.


Are there any other appearances? _____.

Let the record show no (further) response.

Are there any other persons, parties or labor organizations in the hearing room who claim an interest in this proceeding?

Let the record show no (further) response.

2. INTRODUCTION OF FORMAL PAPERS

 I now propose to receive the formal papers. They have been marked* for identification as Board's Exhibit 1-a through 1-__, inclusive, Exhibit 1-__ being an index and description of the entire exhibit. The exhibit has already been shown to all parties. Are there any objections to the receipt of these Exhibits into the record?

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 Hearing no objections, the formal papers are received in evidence. ←

(If the parties agree to Board Exhibit 2, introduce that exhibit into the record as

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follows and then proceed to the appropriate section below:)

_____ The parties to this proceeding have executed and I have approved a document which is marked as Board Exhibit 2. That Exhibit contains a series of stipulations including, among other items, that the petitioner is a labor organization within the meaning of the Act, there is no contract bar and the Employer meets the jurisdictional standards of the Board. Are there any objections to the receipt of Board Exhibit 2?

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_____ Hearing no objection, Board Exhibit 2 is received in evidence.

(If Board Exhibit 2 is not agreed upon, proceed with section 3 below.)

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3. PREHEARING MOTIONS

Are there any pre-hearing motions (*e.g., motions to quash subpoenas*) made by any party that need to be addressed at this time?

4. INTERVENTION

Are there any motions to intervene in these proceedings to be submitted to the Hearing Officer at this time? Are the parties aware of any other employers or labor organizations that have an interest in this proceeding? The Hearing Officer hears no (further) response.

(If there is a motion to intervene, then...)

M. _____, please state the correct and complete name of the Intervenor.

(if there is no objection)

The motion of _____ for intervention herein is granted (denied).

5. JURISDICTION

Will the Employer please state its full and correct name for the record?

(If necessary): Are there any objections to having the petition and other formal papers amended so that the name of the Employer will correctly appear in the captions thereon as _____? Hearing no objection, the amendment is allowed.

Can it be stipulated that the Employer is engaged in commerce within the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board and that commerce facts are as follows:

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

6. LABOR ORGANIZATION

M. _____, is the correct and complete name of the Petitioner that which appears on the petition filed in this case, _____?

(If necessary): Are there any objections to having the petition and other formal papers amended so that the name of the (Petitioner) will correctly appear in the captions thereon as _____?

Hearing no objection, the amendment is allowed.

Can it be stipulated that the Petitioner herein, _____, is a labor organization within the meaning of the National Labor Relations Act, as amended?

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

(Obtain the same stipulation for any Intervenor)

7. ISSUES AND BURDENS OF PROOF

Will the parties please identify the issues for hearing and their positions on each issue?

- Employer?**
- Petitioner?**
- Intervenor?**

(If the issue involves a presumption under Board law, advise the party with the burden that the burden lies with it and say the following:)

Please be aware that because (e.g., single facility unit) involves a presumption under Board law, the burden lies with the party seeking to rebut the presumption. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

(If the issue involves statutory exclusions, such as 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:)

Please be aware that because (e.g., supervisory status) involves a statutory exclusion, the party seeking to exclude employees on these bases bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

8. COLLECTIVE BARGAINING HISTORY

(If there is no collective bargaining history, the record should reflect that fact. If there is a collective bargaining history, obtain details about the nature and origin of that relationship and include those facts in any stipulation. See Section 9 in Outline of Hearing. Read the stipulation into the record.)

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

9. CASES PENDING IN OTHER REGIONS

Are there any petitions pending in other Regional Offices involving other facilities of the Employer?

10. BARS TO CONDUCT OF ELECTION

Can it be stipulated that there is no contract or other bar in existence that would preclude the processing of this petition?

- M. _____, do you so stipulate for the Employer?**
- M. _____, do you so stipulate for the Petitioner?**
- M. _____, do you so stipulate for the Intervenor? (if necessary)**

The stipulation is received.

11. APPROPRIATE UNIT

(If parties can stipulate to all or part of the unit description, use the appropriate stipulation below:)

A. (full unit:) - **Can it be stipulated that a bargaining unit that includes _____ and excludes _____ is appropriate for the purposes of collective bargaining?**

(Read from Petition or off-the-record discussion notes of unit)

B. (partial unit:) - **Can it be stipulated that any unit found appropriate by the Regional Director should include _____ and exclude _____?**

- M. _____, do you so stipulate for the Employer?**
- M. _____, do you so stipulate for the Petitioner?**
- M. _____, do you so stipulate for the Intervenor? (if necessary)**

The stipulation is received.

(Sample supervisor stipulation language:)

Can it be stipulated that _____ is a supervisor within the meaning of Section 2(11) of the Act and as such possesses and exercises one or more of the following authorities: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; utilizing independent judgment in exercising such authority; and, therefore, should be excluded from the bargaining unit?

- M. _____, can you so stipulate for the Employer?**
- M. _____, can you so stipulate for the Petitioner?**
- M. _____, can you so stipulate for the Intervenor?**

12. FRAMING ISSUES

Frame the remaining issue(s) on the record. Get the parties to agree on the issue(s).

It is my understanding that the issue(s) to be litigated today are _____

(i.e., supervisory status of Mr. John Wayne, whether the quality control employees have a community of interest with the plant employees, single versus multi-location unit, etc.)

Are there any other issues that I am not aware of? (If no response, proceed to 13., **Presentation of Evidence**; if a response, let the parties state their position on that issue, then proceed to 13., **Presentation of Evidence**)

13. PRESENTATION OF EVIDENCE

(Generally the Employer should begin, but the hearing officer can use his/her own judgment and have the parties present their evidence in whatever order makes the most sense. A witness should be presented to testify about the overall structure of the Employer's operations and organization.)

Employer, please present your first witness.

(Employer calls first witness.)

(Stand and Swear in each Witness:) **Please raise your right hand. Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?**

(If the witness objects to swearing in the indicated fashion, ask the witness:) **Do you solemnly affirm that you will testify truthfully at this hearing?**

(Swearing in an Interpreter:) **Please raise your right hand. Do you solemnly swear that you are fluent in both English and _____ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to _____ (foreign language) and from ___ (foreign language) to English when called upon to do so during the hearing, so help you God?**

(After they confirm, ask the witness to:) **Please state your name and spell it for the record.**

(After Employer has rested, proceed to the next party.)

Petitioner you may call your first witness.

(After Petitioner has rested, proceed to the next party, if any.)

Intervenor you may call your first witness *(if necessary)*.

14. COMPLETING AND CLOSING THE RECORD

(See Sections 15 and 16 of the Outline of Hearing, Section II A, for instructions on completing the record)

(To the extent that there are issues that have been resolved during the hearing, list those resolved issues at this point.)

M. _____, what is the Employer's final position regarding *(unit contentions, inclusions or exclusions or other issues raised during the hearing)?*

M. _____, what is the Petitioner's final position regarding *(unit contentions, inclusions or exclusions or other issues raised during the hearing)?*

Is the petitioner prepared to proceed to an election in any unit found appropriate by the Regional Director or the Board?

M. _____, what is the Intervenor's final position regarding *(unit contentions, inclusions or exclusions or other issues raised during the hearing, if necessary)?* **Does the Intervenor wish to appear on the ballot in any unit found appropriate by the Regional Director or the Board?**

Any outstanding stipulations agreed to during these proceedings are now received.

Are the parties willing to waive the filing of briefs?

(If not:) **Briefs are due by close of business on _____.** **Any motion for extensions should be addressed to the Regional Director.**

The parties are reminded that they should request an expedited copy of the transcript from the court reporter. Late receipt of the transcript will not be grounds for an extension of time to file briefs if you fail to do so.

If there is nothing further, the hearing will be closed.

(Absent response) **The hearing is now closed.**

(If the hearing is being adjourned) **If there is nothing further, the hearing will be adjourned to _____** *(indefinitely).*

APPENDIX C
OFFICE OF THE GENERAL
COUNSEL

MEMORANDUM GC 91-3

May 9, 1991

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jerry M. Hunter, General Counsel

**SUBJECT: Guidelines Concerning Application of Health Care Rule (29 CFR Part 103,
54 FR No. 76, 284 NLRB 1580)**

I. Introduction

On April 21, 1989, the Board issued its Final Rule on Collective Bargaining Units in the Health Care Industry. The Rule was to become effective on May 22, 1989, but was enjoined by the U.S. District Court for the Northern District of Illinois. As a result of the injunction, the Acting General Counsel circulated a memo to the Regional Offices (GC 89-7 dated May '30, 1989) informing them that they were to continue processing election petitions under current case law in cases involving acute-care facilities, but to suspend processing of cases pending further notice if the outcome would be decided differently under the Rule than under St. Vincent Hospital, 285 NLRB 365 (1987) (separate units for RNs, doctors, skilled maintenance employees, or business office clericals) and the Region could not secure a stipulation to the unit. On April 11, 1990, the Seventh Circuit, on appeal, reversed the District Court and found the Board's Rule to be valid. However, the Seventh Circuit stayed the effect of its Order. The Supreme Court accepted certiorari and on April 23, 1991, affirmed the Circuit Court decision. You will be advised shortly as to the Rule's effective date.

The Rule itself, and the various Notices of Proposed Rulemaking leading up to the Rule, are published in full in 284 NLRB 1515 to 1597. All Regional personnel should, as soon as possible, familiarize themselves with all aspects of the Rule. Each Regional office should undertake training sessions with respect to the Health Care Rule. However, in order to assist the Regions in their processing of these cases and in their training programs we provide you with the following summary.

II. Contents of the Rule

A. The Rule is applicable only to "acute-care hospitals."

1. Hospital is defined in the same manner as defined under Medicare (currently 42 U.S.C. 1395x(e) (as revised 1990) attached).

2. Acute-care hospital is either:

- a. a short term care hospital in which the average length of patient stay is less than 30 days; or
- b. a short term care hospital in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days.

(1) The average length of stay shall be determined by reference to the most recent 12-month period preceding receipt of a representation petition for which data are readily available.

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3. The term acute-care hospital shall include those hospitals operating as acute-care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care (see 4, following).
 4. The following are excluded from the definition of acute care hospital:
 - a. facilities that are primarily nursing homes.
 - b. facilities that are primarily psychiatric hospitals.
 - (1) Psychiatric hospital is defined in the same manner as defined in the Medicare Act (currently in 42 U.S.C. 1395x(f) attached).
 - c. facilities that are primarily rehabilitation hospitals.
 - (1) The term rehabilitation hospital includes and is limited to all hospitals accredited as such by either the Joint Committee on Accreditation of Healthcare Organizations (JCAHO) or by the Commission for Accreditation of Rehabilitation Facilities (CARF).
 5. The Board may presume that an employer is an acute-care hospital where, after issuance of a subpoena, the employer does not produce records sufficient for the Board to determine the facts.
- B. In acute-care hospitals, the following shall be appropriate units, and the only appropriate units, for RC and RM petitions (see exceptions in "C" below):
1. All registered nurses.
 2. All physicians.
 3. All professionals except for registered nurses and physicians.
 4. All technical employees.
 5. All skilled maintenance employees (generally includes all employees involved in the maintenance, repair, and operation of the hospital's physical plant systems, as well as their trainees, helpers, and assistants). Classifications which should generally be included in such units are carpenter, electrician, mason/bricklayer, painter, pipefitter, plumber, sheetmetal fabricator, automotive mechanic, HVAC (heating, ventilating, and air conditioning) mechanic, maintenance mechanic, chief engineer, operating engineer, fireman/boiler operator, locksmith, welder, and utility man (53 FR No. 170, pp. 33923-24, 284 NLRB at 1561-62).
 6. All business office clerical employees.
 7. All guards.
 8. All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

C. Exceptions

1. Combined units.

- a. If sought by labor organizations (not employers) various combinations of the eight units set forth above, may also be appropriate. See 53 FR 33932, 284 NLRB at

1573. See also 54 FR 16348, 284 NLRB 1597. Appropriateness of particular combinations will be decided in each case by adjudication, except that the Board has stated some combinations -(e.g., "all professionals," or "all nonprofessionals") are obviously appropriate (53 FR 33932, 284 NLRB at 1573).

2. Existing nonconforming units.

- a. The Rule is aimed at initial organizing at acute care hospitals. Where there are already existing units, the Board contemplates that they will fall into two categories:

(1) Existing units in conformity with the Rule (either one of the eight listed above or a combination among those eight units). In such a case, new petitions should be in conformity with the Rule.

(2) Where there are existing nonconforming units, these cases will be decided by adjudication; the Board will find appropriate only units which comport, insofar as practicable, with the eight appropriate units or appropriate combinations thereof.

3. Residual units. The Board left for adjudication the issue of the continuing viability of Levine Hospital of Hayward, 219 NLRB 327 (1975), (53 FR 33930, 284 NLRB 1570-71).

4. Stipulations.

- a. The Board will approve agreements providing for elections in one of the eight units listed above.
- b. Where parties stipulate to a unit which is not one of the eight units, but is rather some other unit, nothing shall preclude Regional Directors from approving stipulations, as long as the stipulated unit does not violate any express statutory provision or established Board policy other than its rule on collective-bargaining units in the health care industry (53 FR 33931-32, 284 NLRB at 1572-73, Otis Hospital, 219 NLRB 164 (1975) remains applicable).

5. Extraordinary circumstances.

- a. Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication, to avoid "accidental or unjust application of the rule."
- b. A unit of five or fewer employees is automatically considered an extraordinary circumstance.
- c. Extraordinary circumstances are to be narrowly defined. The arguments raised in the course of the rulemaking proceedings, including but not limited to those listed below, alone or in combination, even in situations in which such variations may be highly unusual, normally shall not constitute an extraordinary circumstance justifying an exception to the rule.

(1) Diversity of the industry, such as size of institution, variety of services offered, or staffing patterns.

(2) Increased functional integration of, and a higher degree of work contacts among, employees as a result of multicompetent workers, "team" care, and cross training.

(3) Impact of nationwide hospital chains.

(4) Recent changes within traditional employee groupings and professions; for example, increased specialization among RNs.

(5) Effects of various governmental and private cost-containment measures.

(6) Single institution occupying more than one contiguous building.

- d. A party urging "extraordinary circumstances" bears a "heavy burden" to demonstrate that its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding, as, for instance, that there are such unusual and unforeseen deviations from the range of circumstances already considered that it would be "unjust" or "an abuse of discretion" for the Board to apply the rule to the facility involved (53 FR 33933, 284 NLRB at 1574).

D. The following issues involving acute-care hospitals are still to be decided by adjudication.

1. Unit placement.

- a. The Rule does not determine the placement of employees in specific units, but leaves that to determination by adjudication.

2. Decertification petitions.

- a. Continue to apply Campbell Soup Co., 111 NLRB 234 (1955), i.e., petition must be for an established unit. Technically, decertification petitions under 9(c)(1)(A)(ii) are not covered by the Rule. See 53 FR 33930, 284 NLRB at 1570, for explanation.

E. Cases involving health care facilities that do not fall within the Rule's definition of acute-care hospitals shall continue to be decided by adjudication.

III. Procedure to be Followed Upon Receipt of RC or RN Petition

- A. The Rule is set forth at 54 FR No 76 pp 16347-48 (284 NLRB at 1596-97). Detailed explanations regarding each segment of the Rule are found in the Second Notice of Proposed Rulemaking, 53 FR No. 170 (9/1/88) pp 33900-35 (284 NLRB at 1528-78), and in Final Rule 54 FR 16336-47 (284 NLRB at 1580-1596).

- B. Upon receipt of an RC or RM petition involving health care facilities (note: the Rule does not apply to RD petitions):

1. Prior to initial contacts with parties, the Board agent should review definitions to determine whether the petition is governed by the Rule. If the petition is **governed by the Rule, standard representation** case handling procedures still apply unless superseded by the Rule.
2. The Board agent should advise the parties of the Rule.
3. With regard to whether the facility is an acute-care hospital, in the normal case it will be obvious. Stipulations on this issue should usually be obtainable.
4. If there is disagreement as to whether the health care facility is an acute-care hospital, the employer should be apprised that, since it has control of the records, it will have the burden, upon issuance of subpoena if necessary, of coming forward at the hearing with facts to enable the Board to decide this issue (54 FR 16344, 284 NLRB at 1591-92.) See Tropicana Products, Inc., 122 NLRB 121 (1958).

- a. Employer may voluntarily produce these facts.

b. If not, the Board agent should refer to the definition of "hospital" in the Medicare Act, and of "acute care" in the Rule; §103.30 (f) (2) (54 FR 16348, 284 NLRB at 1597). The Region should subpoena employer's books and records necessary to show at the hearing whether the facility meets the definition of acute-care hospital—a short-term care hospital in which the average length of patient stay is less than 30 days or in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days. Determine the average length of stay by referring to the most recent 12-month period preceding receipt of a representation petition for which data are readily available.

c. The facility is not an acute-care facility under the Rule if it is primarily a nursing home, primarily a psychiatric facility, or primarily a rehabilitation hospital. To determine if the facility is a psychiatric hospital, consult attached Medicare definition. To determine whether the facility is a rehabilitation hospital, check whether it is accredited by either the JCAHO or CARF (see 103.30 (f)(3) and (4)).

d. If, after subpoena, the employer does not supply sufficient facts to enable the Board to make a determination, the Board will presume that the facility is an acute-care facility.

5. If the case involves other than an acute-care hospital, the Region is to proceed in the normal manner, by stipulation or adjudication.

6. If the case involves an acute-care hospital, check whether the petitioned for unit is for more than five employees. A requested unit which conforms to the units set forth in the Rule but which nonetheless contains five or fewer employees is considered an extraordinary circumstance, and its appropriateness must be resolved by stipulation or adjudication.

7. If for more than five employees, see if the petition conforms to the units in the Rule. Encourage parties to stipulate to one of the eight units. The Board will approve consent agreements for elections in the eight units.

8. If a petitioning union is contending for a unit different from the eight established in the Rule, determine the basis for the position.

a. Combination units - if sought by union, a combination of some of the units may be appropriate.

b. Existing units.

(1) where the existing units conform to the eight established units in the Rule, the petitioned for new unit should conform to the Rule.

(2) where the existing units do not conform, proceed by adjudication or stipulation. The unit sought should comport, insofar as practicable, with units established by the Rule (see "c" below).

(3) where the unit requested is residual to an existing, nonconforming portion of one of the eight appropriate units proceed by adjudication, if no stipulation can be obtained. The Board will decide the continuing viability of Levine Hospital of Hayward, 219 NLRB 327 (1975); (53 FR 33930, 284 NLRB 1570-71).

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- c. **Stipulation.** The Regional Director may approve a consent agreement for a combination of the eight units. In addition, nothing precludes the Regional Director from approving a stipulation not in accordance with the eight units, as long as the stipulation is otherwise "acceptable." (I.e., does not "violate any express statutory provision or established Board policies other than the Rule." 53 FR 33931, 284 NLRB at 1572. Examples would be: guards being placed in units with nonguards; supervisors or managers being included in units, etc.)
- d. **Extraordinary circumstances.** This provision is to be narrowly construed. Apprise the party claiming extraordinary circumstances of the Board's determination that a number of circumstances (set forth in Second Notice, 53 FR at 33932, 284 NLRB at 1573-74) are not considered extraordinary.

Note: If none of the above exceptions appears to apply, the Region should consider dismissing the petition administratively, i.e., without a hearing.

C. **Hearing**

1. A hearing will be held if parties do not execute a stipulation or consent agreement form approved by the Region, and the petition is not dismissed for administrative reasons.
2. Issues to be determined.
 - a. Acute care hospital.
 - (1) Is the facility a hospital?
 - (2) Is there a sufficient number of its patients receiving acute care?
 - (3) Is the facility primarily a nursing home, psychiatric hospital or rehabilitation hospital?
 - (4) If records have not been previously subpoenaed by the Region, they should now be subpoenaed. The Board will presume the facility is an acute-care hospital if the material provided by the employer in response to the subpoena is not sufficient to allow the Board to make a determination.
 - b. The appropriateness of a unit of five or fewer employees.
 - (1) Consider the Board's concern with proliferation of °units, and other considerations. See 54 FR 16341-42, 284 NLRB at 1587-88.
 - c. Existing nonconforming units.
 - (1) A number of issues may arise in this area. The hearing officer may need to elicit evidence which will enable the Regional Director to determine whether, where the existing units are smaller than those encompassed by the Rule, an incumbent or a nonincumbent may petition for a residual unit. The Regional Director may ultimately need to address the continued viability of *Levine Hospital*, 219 NLRB 327 (1975).
 - (2) The Regional Director is to view requests for nonconforming units in light of the Board's concern with proliferation, as well as the other considerations set forth in the Rule and Supplementary Information.
- d. Extraordinary circumstances.
 - (1) The party arguing that the case raises an extraordinary circumstance should normally make an offer of proof. In determining whether to accept the offer, the hearing officer should be familiar with those arguments which the Board has said

it will not consider extraordinary circumstances, alone or in combination. See, e.g., 53 FR 33932-33, 284 NLRB at 1573-75; 54 FR 16344-45, 284 NLRB at 1592-93. The hearing officer will then either permit the requested evidence to be adduced or refer the issue to the Regional Director and, if requested, ultimately to the Board for ruling.

(2) The extraordinary circumstances exception is to be narrowly construed. Extraordinary circumstances exist only where a hospital is shown to be uniquely situated such that application of the Rule would be unjust or an abuse of discretion.

3. Addressing nonunit scope issues.

a. Of course, absent stipulation, hearings will need to be held to resolve disputed issues other than unit scope such as:

(1) The placement of employee classifications within the appropriate unit. During the rulemaking proceeding, disputes arose regarding the unit placement of several categories of employees: for example, the nurse anesthetist (RN-or physician unit), respiratory therapist (professional or technical unit), medical technologist (professional or technical unit), ward clerk (technical or service and maintenance unit). Questions also arose as to the placement of dual function employees (54 FR 16340, 284 NLRB at 1586). Disputes over these and other classifications may arise in the future.

(2) Supervisory and managerial status

(3) Contract bar.

(4) Labor organization status.

(5) Single facility appropriateness.

(6) Eligibility issues, etc.

If you have any questions regarding this memo, please contact your Assistant General Counsel.

/s/Jerry M. Hunter

Attachments

Distribution: Washington - Special Regional - All Professionals NLRBU

Legislative History. For legislative history and purpose of Pub.L. 101-239, see 1989 U.S. Code Cong. and Adm. News, p. 1906. See, also, Pub-L. 101-508, 1990 U.S. Code Cong. and Adm. News, p. 2017.

Library References

Social Security and Public Welfare «241.10, 241.65.
WESTLAW Topic No. 356A.
C.J.S. Social Security and Public Welfare §§ 131, 137, 138.

PART C-MISCELLANEOUS PROVISIONS

§1395x. Definitions

For purposes of this subchapter

(a) Spell of illness

The term "spell of illness" with respect to any individual means a period of consecutive days

(1) beginning with the first day (not included in a previous spell of illness) (A) on which such individual is furnished inpatient hospital services or extended care services, and (B) which occurs in a month for which he is entitled to benefits under part A, and

(2) ending with the close of the first period of 60 consecutive days thereafter on each of which he is neither an inpatient of a hospital nor an inpatient of a facility described in section 1395i—3(a)(1) of this title or subsection (y)(1) of this section.

(b) Inpatient hospital services

The term "inpatient hospital services" means the following items and services furnished to an inpatient of a hospital and (except as provided in paragraph (3)) by the hospital

[See main volume for text of (1) and (2)]

(3) such other diagnostic or therapeutic items or services, furnished by the hospital or by others under arrangements with them made by the hospital, as are ordinarily furnished to inpatients either by such hospital or by others under such arrangements;

excluding, however

(4) medical or surgical services provided by a physician, resident, or intern, services described by subsection (sx2XXxi) of this section, certified nurse-midwife services, qualified psychologist services, and services of a certified registered nurse anesthetist; and

[See main volume for text of (5)]

(6) an intern or a resident-in-training under a teaching program approved by the Council on Medical Education of the American Medical Association or, in the case of an osteopathic hospital, approved by the Committee on Hospitals of the Bureau of Professional Education of the American Osteopathic Association, or, in the case of services in a hospital or osteopathic hospital by an intern or resident-in-training in the field of dentistry, approved by the Council on Dental Education of the American Dental Association, or in the case of services in a hospital or osteopathic hospital by an intern or resident-in-training in the field of podiatry, approved by the Council on Podiatric Medical Education of the American Podiatric Medical Association; or

[See main volume for text of (7), (c)]

(d) Repealed. Pub.L. 98-369, Title III, § 2336(b)(I), July 18, 1984, 98 Stat. 1090

(e) Hospital

The term "hospital" (except for purposes of sections 1895f(d), 1395f(f) and 1395n(b) of this title, subsection (ax2) of this section, paragraph (7) of this subsection, and subsection (i) of this section) means an institution which

[See main volume for text of (1) to (3)]

(4) has a requirement that every patient with respect to whom payment may be made under this subchapter must be under the care of a physician;

[See main volume for text of (5)]

(6)(A) has in effect a hospital utilization review plan which meets the requirements of subsection (k) of this section and (B) has in place a discharge planning process that meets the requirements of subsection (ee) of this section;

[See main volume for text of (7) to (9)]

For purposes of subsection (a)(2) of this section, such term includes any institution which meets the requirements of paragraph (1) of this subsection. For purposes of sections 1395f(d) and 1395n(b) of this title (including determination of whether an individual received inpatient hospital services or diagnostic services for purposes of such sections), section 1395f(f)(2) of this title, and subsection (i) of this section, such term includes any institution which (i) meets the requirements of paragraphs (5) and (7) of this subsection, (ii) is not primarily engaged in providing the services described in subsection (j)(1)(A) of this section and (iii) is primarily engaged in providing, by or under the supervision of individuals referred to in paragraph (1) of subsection (r) of this section, to inpatients diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. For purposes of section 1395f(f)(1) of this title, such term includes an institution which (i) is a hospital for purposes of sections 1395f(d), 1395f(f)(2), and 1395n(b) of this title and (ii) is accredited by the Joint Commission on Accreditation of Hospitals, or is accredited by or approved by a program of the country in which such institution is located if the Secretary finds the accreditation or comparable approval standards of such program to be essentially equivalent to those of the Joint Commission on Accreditation of Hospitals. Notwithstanding the preceding provisions of this subsection, such term shall not, except for purposes of subsection (ax2) of this section, include any institution which is primarily for the care and treatment of mental diseases unless it is a psychiatric hospital (as defined in subsection (f) of this section). The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations. For provisions deeming certain requirements of this subsection to be met in the case of accredited institutions, see section 1395bb of this title. The term "hospital" also includes a facility of fifty beds or less which is located in an area determined by the Secretary to meet the definition relating to a rural area described in subparagraph (A) of paragraph (5) of this subsection and which meets the other requirements of this subsection, except that

[See main volume for text of (A) to (C)]

The term "hospital" does not include, unless the context otherwise requires, a rural primary care hospital (as defined in section 1395x(mm)(1) of this title).

(f) Psychiatric hospital

The term "psychiatric hospital" means an institution which

[See main volume for text of (1) and (2)]

(3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals entitled to hospital insurance benefits under part A; and

(4) meets such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution.

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(5) Repealed. Pub.L. 98-369, Title III, § 2340(ax3), July 18, 1984, 98 Stat. 1093.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "psychiatric hospital".

(g) Outpatient occupational therapy services

The term "outpatient occupational therapy services" has the meaning given the term "outpatient physical therapy services" in subsection (P) of this section, except that "occupational" shall be substituted for "physical" each place it appears therein.

[See main volume for text of (h) and (i)]

(j) Skilled nursing facility

The term "skilled nursing facility" has the meaning given such term in section 13951-3(a) of this title.

[See main volume for text of (k) and (l)]

(m) Home health services

The term "home health services" means the following items and services furnished to an individual, who is under the care of a physician, by a home health agency or by others under arrangements with them made by such agency, under a plan (for furnishing such items and services to such individual) established and periodically reviewed by a physician, which items and services are, except as provided in paragraph (7), provided on a visiting basis in a place of residence used as such individual's home

[See main volume for text of (1) to (4)]

(5) medical supplies (including catheters, catheter supplies, ostomy bags, and supplies related to ostomy care, but excluding drugs and biologicals) and durable medical equipment while under such a plan;

[See main volume for text of (6) and (7)]

excluding, however, any item or service if it would not be included under subsection (b) of this section if furnished to an inpatient of a hospital.

(a) Durable medical equipment

The term "durable medical equipment" includes iron lungs, oxygen tents, hospital beds, and wheelchairs (which may include a power-operated vehicle that may be appropriately used as a wheelchair, but only where the use of such a vehicle is determined to be necessary on the basis of the individual's medical and physical condition and the vehicle meets such safety requirements as the Secretary may prescribe) used in the patient's home (including an institution used as his home other than an institution that meets the requirements of subsection (ex1) of this section or section 13951-3(ax1) of this title), whether furnished on a rental basis or purchased; except that such term does not include such equipment furnished by a supplier who has used, for the demonstration and use of specific equipment, an individual who has not met such minimum training standards as the Secretary may establish with respect to the demonstration and use of such specific equipment. With respect to a seat-lift chair, such term includes only the seat lift mechanism and does not include the chair.

(o) Home health agency

The term "home health agency" means a public agency or private organization, or a subdivision of such an agency or organization, which

[See main volume for text of (1) to (5)]

(6) meets the conditions of participation specified in section 1395bbb(a) of this title and such other conditions of participation as the Secretary may

(c) Inpatient psychiatric hospital services

The term "inpatient psychiatric hospital services" means inpatient hospital services furnished to an inpatient of a psychiatric hospital.

(d) Inpatient tuberculosis hospital services

The term "inpatient tuberculosis hospital services" means inpatient hospital services furnished to an inpatient of a tuberculosis hospital.

(e) Hospital

The term "hospital" (except for purposes of sections 1395f(d), 1395f(f) and 1395n(b) of this title, subsection (a)(2) of this section, paragraph (7) of this subsection, and subsection (i) of this section) means an institution which

- (1) is primarily engaged in providing, by or under the supervision of physicians, to inpatients (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;
- (2) maintains clinical records on all patients;
- (3) has bylaws in effect with respect to its staff of physicians;
- (4) has a requirement that every patient must be under the care of a physician;
- (5) provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times; except that until January 1, 1979, the Secretary is authorized to waive the requirement of this paragraph for any one-year period with respect to any institution, insofar as such requirement relates to the provision of twenty-four-hour nursing service rendered or supervised by a registered professional nurse (except that in any event a registered professional nurse must be present on the premises to render or supervise the nursing service provided, during at least the regular daytime shift), where immediately preceding such one-year period he finds that
 - (A) such institution is located in a rural area and the supply of hospital services in such area is not sufficient to meet the needs of individuals residing therein,
 - (B) the failure of such institution to qualify as a hospital would seriously reduce the availability of such services to such individuals, and
 - (C) such institution has made and continues to make a good faith effort to comply with this paragraph, but such compliance is impeded by the lack of qualified nursing personnel in such area;
- (6) has in effect a hospital utilization review plan which meets the requirements of subsection (k) of this section;

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(7) in the case of an institution in any State in which State or applicable local law provides for the licensing of hospitals, (A) is licensed pursuant to such law or (B) is approved, by the agency of such State or locality responsible for licensing hospitals, as meeting the standards established for such licensing;

(8) has in effect an overall plan and budget that meets the requirements of subsection (z) of this section; and

(9) meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.

For purposes of subsection (a)(2) of this section, such term includes any institution which meets the requirements of paragraph (1) of this subsection. For purposes of sections 1395f(d) and 1395n(b) of this title (including determination of whether an individual received inpatient hospital services or diagnostic services for purposes of such sections), section 1395f(f)(2) of this title, and subsection (i) of this section, such term includes any institution which (i) meets the requirements of paragraphs (5) and (7) of this subsection, (ii) is not primarily engaged in providing the services described in subsection (j)(1)(A) of this section and (iii) is primarily engaged in providing, by or under the supervision of individuals referred to in paragraph (1) of subsection (r) of this section, to inpatients diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. For purposes of section 1395f(f)(1) of this title, such term includes an institution which (i) is a hospital for purposes of sections 1395f(d), 1395f(f)(2), and 1395n(b) of this title and (ii) is accredited by the Joint Commission on Accreditation of Hospitals, or is accredited by or approved by a program of the country in which such institution is located if the Secretary finds the accreditation or comparable approval standards of such program to be essentially equivalent to those of the Joint Commission on Accreditation of Hospitals. Notwithstanding the preceding provisions of this subsection, such term shall not, except for purposes of subsection (a)(2) of this section, include any institution which is primarily for the care and treatment of mental diseases or tuberculosis unless it is a tuberculosis hospital (as defined in subsection (g) of this section) or unless it is a psychiatric hospital (as defined in subsection (f) of this section). The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations. For provisions deeming certain requirements of this subsection to be met in the case of accredited institutions, see section 1395bb of this title. The term "hospital" also includes a facility of fifty beds or less which is located in an area determined by the Secretary to meet the definition relating to a rural area described in subparagraph (A) of para

graph (5) of this subsection and which meets the other requirements of this subsection, except that

(A) with respect to the requirements for nursing services applicable after December 31, 1978, such **requirements shall provide** for temporary waiver of the requirements, for such period as the Secretary deems appropriate, where (i) the facility's **failure to fully** comply with the requirements is attributable to a temporary shortage of qualified nursing personnel in the area in which the facility is located, (ii) a registered professional nurse is present on the premises to render or supervise the nursing service provided during at least the regular daytime shift, and (iii) the Secretary determines that the employment of such nursing personnel as are available to the facility **during such temporary** period will not adversely affect the health and safety of patients;

(B) with respect to the health and safety requirements promulgated under paragraph (9), such requirements shall be applied by the Secretary to a facility herein defined in such manner as to assure that personnel requirements take into account the availability of technical personnel and the educational opportunities for technical personnel in the area in which such facility is located, and the scope of services rendered by such facility; and the Secretary, by regulations, shall provide for the continued participation of such a facility where such personnel requirements are not fully met, for such period as the Secretary determines that (i) the facility is making good faith efforts to fully comply with the personnel requirements, (ii) the employment by the facility of such personnel as are available to the facility will not adversely affect the health and safety of patients, and (iii) if the Secretary has determined that because of the facility's waiver under this subparagraph the facility should limit its scope of services in order not to adversely affect the health and safety of the facility's patients, the facility is so limiting the scope of services it provides. And

(C) with respect to the fire and safety requirements promulgated under paragraph (9), the Secretary (i) may waive, for such period as he deems appropriate, specific provisions of such requirements which if rigidly applied would result in unreasonable hardship for such a facility and which, if not applied, would not jeopardize the health and safety of patients, and (ii) may accept a facility's compliance with all applicable State codes relating to fire and safety in lieu of compliance with the fire and safety requirements promulgated under paragraph (9), if he determines that such State has in effect fire and safety codes, imposed by State law, which adequately protect patients.

(f) Psychiatric hospital

The term "psychiatric hospital" means an institution which

- (1) is primarily engaged in providing, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons;
- (2) satisfies the requirements of paragraphs (3) through (9) of subsection (e) of this section:

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- (3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals entitled to hospital insurance benefits under part A;
- (4) meets such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution; and
- (5) is accredited by the Joint Commission on Accreditation of Hospitals.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "psychiatric hospital" if the institution is accredited by the Joint Commission on Accreditation of Hospitals or if such distinct part meets requirements equivalent to such accreditation requirements as determined by the Secretary.

(g) Tuberculosis hospital

The term "tuberculosis hospital" means an institution which

- (1) is primarily engaged in providing, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis;
- (2) satisfies the requirements of paragraphs (3) through (9) of subsection (e) of this section;
- (3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals covered by the insurance program established by part A;
- (4) meet such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution; and
- (5) is accredited by the Joint Commission on Accreditation of Hospitals.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "tuberculosis hospital" if the institution is accredited by the Joint Commission on Accreditation of Hospitals or if such distinct part meets requirements equivalent to such accreditation requirements as determined by the Secretary.

(h) Extended care services

The term "extended care services" means the following items and services furnished to an inpatient of a skilled nursing facility and (except as provided in paragraphs (3) and (6)) by such skilled nursing facility

- (1) nursing care provided by or under the supervision of a registered professional nurse;

APPENDIX D

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 91-4

June 5, 1991

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Health Care Unit Placement Issues

GC Memorandum 91-3 set forth guidelines for the application of the Board's Health Care Rule. One important purpose of the Rule is to establish stable and consistent law with respect to appropriate health care units covered by the Rule, so as to reduce the frequency and the length of hearings.

There will, of course, continue to be disagreements as to unit placement issues in some health care cases, both those covered by the Rule and those not covered. Although in most cases those disagreements will render stipulated elections impossible and hence necessitate hearings, the Regions should do everything possible to avoid unnecessarily lengthy litigation over unit placement issues, especially those that are clearly governed by outstanding Board precedent. Obviously parties cannot be forced to stipulate a unit placement issue, but in some cases it may be appropriate, in advance of the hearing, to advise the parties of relevant Board precedent as to disputed classifications. I am hopeful that this information will result in an agreement on some or all the disputed classifications.

When, however, efforts at a stipulation are unsuccessful and a party continues to adhere to a position that appears contrary to outstanding Board law or policy, the Board agent or hearing officer should advise the party that, at the hearing which will necessarily ensue, the hearing officer may solicit a showing, e.g., an offer of proof as to what the party's witnesses would testify to regarding how the job classification differs from that in one or more prior cases in which the classification has been addressed by the Board. (See *CHM*, secs. 11226 and 10396 for discussion of Offers of Proof.)

To assist the Board agents in handling these matters, we are attaching research materials on various frequently litigated health care unit classifications. As these materials reflect, the Board law as to the placement of many of these classifications has been generally consistent since 1974. Thus, in some cases it may not be necessary for a hearing officer to permit extensive testimony on covered unit positions except to the extent the party offering this testimony is able to distinguish the disputed classification from a line of consistent Board cases. The attached research materials may also be of assistance to Regional staffs in the drafting of decisions. The attached materials are, as indicated, offered for assistance only, and have not been "approved" by the Board as representing the current thinking of any particular Board Member or, in fact, even of a

majority of the current Board. They have merely been compiled to minimize duplication of research and will, we hope, be supplemented and updated periodically.

I. REGISTERED NURSES—Professional employees involved in direct patient care who have graduated from an accredited nursing school and are required to pass a uniform state licensing exam. The following classifications have generally been included in RN units:

Graduate Nurses or Nurse Permittees—Nursing school graduates who, pursuant to temporary state permits, perform RN duties under RN supervision until such time as they pass the state licensing exam. *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975); *Meharry Medical College*, 219 NLRB 488, 489 (1975); *St. Elizabeth's Hospital*, 220 NLRB 325 (1975); *St. Mary's Hospital*, 220 NLRB 496 fn. 3 (1975); *Lydia E. Hall Hospital*, 227 NLRB 573 (1976).

Non-Nursing Dept. Nurses—RNs who are assigned to departments or divisions other than Nursing Services. *St. Mary's Hospital*, supra at 498 (epidemiology, product evaluation, and employee health service); *Newton-Wellesley Hospital*, 250 NLRB 409, 414 (1980) (pathology and employee health); *Frederick Memorial Hospital*, 254 NLRB 36, 39 (1981), rev'd. and remanded on other grounds 691 F.2d 191 (4th Cir. 1982) (operating room, recovery room, home care, infection surveillance, and oncology); *Milwaukee Children's Hospital Assn.*, 255 NLRB 1009, 1010 (1981) (emergency room, poison control, child & adolescent center, employee health services, pediatric-medical education, and pediatric-cancer); *Long Island College Hospital*, 256 NLRB 202, 207 (1981) (kidney center, methadone clinic, homecare, and alcoholism treatment).

Nurse Anesthetists—RNs who work in the Anesthesiology Department. *Trustees of Noble Hospital*, 218 NLRB 1441, 1444 (1975); *Kaiser Foundation Hospitals*, 219 NLRB 325, 326 fn. 2 (1975); *Samaritan Health Services*, 238 NLRB 629, 634 fn. 14 (1978); *Addison-Gilbert Hospital*, 253 NLRB 1010 (1981). But cf. *Long Island College Hospital*, supra at 207 fn. 21 (accepting stip excluding nurse anesthetists from RN unit where “record accords with the stip”).

Nurse Instructors or Faculty Nurses—RNs who provide nursing instruction. *Presbyterian Medical Center*, 218 NLRB 1266, 1267 (1975); *Jersey Shore Medical Center-Fitkin Hospital*, 225 NLRB 1191 (1976); *Ohio Valley Hospital Assn.*, 230 NLRB 604 (1977); *Newton-Wellesley Hospital*, supra at 414. But cf. *Long Island College Hospital*, supra, 256 NLRB 202, 207 fn. 21 (1981) (accepting stip excluding instructors from RN unit where “record accords with the stip”).

Nurse Practitioners—RNs with additional education and training who have the authority, subject to review by a licensed physician, to make diagnoses and prescribe medications and therapy. *Rockridge Medical Care Center*, 221 NLRB 560 (1975).

Conversely, the following classification has been excluded from RN units:

Admitting Officers—RNs whose duties are limited to admitting and discharging patients. *Newton-Wellesley Hospital*, supra at 704 (duties are primarily clerical).

Finally, there are cases going both ways on whether the following classification should be included in RN units:

Utilization Review Coordinators—RNs whose primary function is reviewing patient medical charts to evaluate whether the care provided is within administrative, government, and insurance guidelines. Held included: *Trustees of Noble Hospital*, supra at 1444–1445; *Samaritan Health Services*, supra, 238 NLRB 629, 634 fn. 14 (1978); *Long Island College Hospital*, supra. Contra: *Addison-Gilbert Hospital*, supra at 1011–1012; *Ralph K. Davies Medical Center*, 256 NLRB 1113, 1117 (1981) (duties are primarily administrative). See also *St. James Hospital*, 248 NLRB 1045, 1046 (1980) (finding that stipulated professional unit which included utilization review coordinators did not contravene Act or policy).

II. ALL PROFESSIONALS EXCEPT RNS AND PHYSICIANS—Includes all employees defined as professional within the meaning of Section 2(12) of the Act, except for physicians and registered nurses. (See Board’s Health Care Rules, 284 NLRB 1553.) The following classifications have been held to be included:

Audiologists—*Sutter Community Hospitals*, 227 NLRB 181, 185 (1976).

Chemists—*Barnert Memorial Hospital Center*, 217 NLRB 775, 783 (1975).

Counselor Consultants—oversee client-related work of counselors and senior counselors but are not managerial or possess 2(11) authority. *Buffalo General Hospital*, 218 NLRB 1090, 1093 (1975).

Dieticians—*Mason Clinic*, 221 NLRB 374, 376 (1975); *Sutter Community Hospitals*, supra at 188.

Educational Programmer—develops training programs on use of dialysis equipment for presentation to patients and medical personnel. *Sutter Community Hospitals*, supra at 188.

Educator—Special education teacher who works with adolescents implementing educational programs required by physician. *Mount Airy Psychiatric Center*, 253 NLRB 1003, 1005 (1981).

Medical Artists—depict medical procedures performed by MDs, illustrate parts of anatomy for use in educational or graphic demonstrations, prepare charts and

graphs illustrating effects of treatment. *Mason Clinic*, supra at 376.

Nuclear Physicist—*Sutter Community Hospitals*, supra at 185.

Pharmacists—*Mount Airy Psychiatric Center*, supra at 1005; *San Jose Hospital*, 228 NLRB 21 (1977); *Kaiser Foundation*, 219 NLRB 325 (1975).

Social Worker—*Mount Airy Psychiatric Center*, supra at 1005; *Gnaden Huetten Hospital*, 219 NLRB 235 fn. 1 (1975).

Technologists (medical lab; cardiopulmonary)—*St. Barnabas Hospital*, 283 NLRB 472 (1987) (technologists found to be professionals based on exercise of discretion and independent judgment, duties performed were predominantly intellectual and varied, and output could not be standardized in relation to a given period of time. Although not required to have college degree, 20 of 26 techs held degrees). Cf. *Middlesex General Hospital*, 239 NLRB 837 (1978) (techs found not to be professionals) and *Norton Community Hospital*, 291 NLRB 1174, 1175 fn. 10 (1988) (record did not support finding that technologists were professionals). See section III, “Technical Employees” (Laboratory Technicians).

Therapists (physical, recreational, occupational)—*Mount Airy Psychiatric Center*, supra at 1005; *Sutter Community Hospitals*, supra at 187.

Utilization Review Coordinator—reviews patient medical charts to determine if hospitalization is warranted under Medicare/Medicaid. *St. James Hospital*, 248 NLRB 1045, 1046 (1980). See section I, “Registered Nurses” (Utilization Review Coordinators); but see also section V, “All Nonprofessional Employees” (Utilization Review Coordinator included in service and maintenance unit in *Baptist Memorial Hospital*, 225 NLRB 1165, 1170 (1976)).

III. TECHNICAL EMPLOYEES—Employees whose job/jobs involve the use of independent judgment and specialized training in major health care occupational groups such as medical laboratory, respiratory therapy, radiography, emergency medicine, and medical records. They supply a support role and work in patient care. Although the laws on licensing, training, registration, and qualifications vary, most health care technical employees are certified (usually by a national examination) licensed or registered with state authorities. (For additional details see 284 NLRB 1553–1555.) The following classifications have generally been included in technical units:

Infant Care Technicians—*Barnert Hospital Center*, 217 NLRB 775, 779 (1975).

Laboratory Technicians—*Mad River Community Hospital*, 219 NLRB 25 (1975); *Trinity Memorial Hospital*, 219 NLRB 215, 218 (1975); *Alexian Bros. Hospital*, 219 NLRB 1122 (1975); *William W. Backus Hospital*, 220 NLRB 414, 417 (1975); *Children's Hospital*, 222 NLRB 588, 591 (1976). But compare

laboratory technologists. See *Children's Hospital*, supra at 590 (finding laboratory technologists to be professionals). See also section II, "All Professionals except RNs and Physicians" (Technologists).

Licensed Practical Nurses—*Trinity Memorial Hospital*, supra at 216; *Alexian Bros. Hospital*, supra; *St. Catherine's Hospital*, 217 NLRB 787 (1975). See also discussion of Rule, 284 NLRB 1528, 1555 (1988).

Operating Room Technicians (Surgical Technicians)—*Barnert Hospital Center*, supra at 780 (certified ORT); *Trinity Memorial Hospital*, supra at 216; *William W. Backus Hospital*, supra at 418. Compare *St. Elizabeth's Memorial Hospital*, 220 NLRB 325, 329 (1975) (including ORT in-service and maintenance unit).

Orthopedic Technicians—*Barnert Hospital Center*, supra at 779.

Physical Therapy Assistants—*Trinity Memorial Hospital*, supra at 216.

Psychiatric Technicians (Mental Health Counselor)—*Barnert Memorial Hospital Center*, supra at 778; *Southern Maryland Hospital*, 274 NLRB 1470, 1475 (1985).

Respiratory Therapy Technicians (Pulmonary Function Therapist)—*Trinity Memorial Hospital*, supra at 216; *St. Elizabeth's Hospital*, supra at 327; *William W. Backus Hospital*, supra at 417; *Children's Hospital*, supra at 593; *Alexian Bros. Hospital*, supra, 219 NLRB 1122 fn. 5.

Surgical Assistants—*Trinity Memorial Hospital*, supra at 217.

X-Ray (Radiology) Technicians (Technologists)—*Barnert Memorial Hospital Center*, supra at 778; *Mad River Community Hospital*, 219 NLRB 25 (1975); *Trinity Memorial Hospital*, supra at 217; *Clarion Osteopathic Hospital*, 219 NLRB 248, 249 (1975); *Alexian Bros. Hospital*, supra; *St. Elizabeth's Hospital*, supra at 328; *William W. Backus Hospital*, supra at 416; *Pontiac Osteopathic Hospital*, 227 NLRB 1706, 1707 (1977).

Conversely, the following classifications have generally been found not to be technical employees and are excluded from a technical unit:

Dark Room Technicians—*Barnert Memorial Hospital Center*, supra at 778; *St. Elizabeth's Hospital*, supra at 329; *William W. Backus Hospital*, supra at 416; *Southern Maryland Hospital*, supra at 1475.

EEG Technicians—*Barnert Memorial Hospital Center*, supra at 778; *Trinity Memorial Hospital*, supra at 218; *St. Elizabeth's Hospital*, supra at 329; *William W. Backus Hospital*, supra at 417; *Pontiac Osteopathic Hospital*, supra at 1707.

Compare Southern Maryland Hospital, *supra* at 1476 (including EEG tech in technical unit).

EKG Technicians—Barnert Memorial Hospital Center, *supra* at 777; Trinity Memorial Hospital, *supra* at 218; St. Elizabeth's Hospital, *supra* at 329; William W. Backus Hospital, *supra* at 417; Pontiac Osteopathic Hospital, *supra* at 1707; Southern Maryland Hospital, *supra* at 1473.

IV. BUSINESS OFFICE CLERICALS—Those clerical employees who, because they perform business office functions, are geographically isolated from and have minimal contact with other nonprofessional employees and patients, are separately supervised, and thus do not share a community of interest with other nonprofessionals. The following classifications have generally been found to be business office clericals (BOCs):

Accounting Clerks—*St. Catherine's Hospital*, 217 NLRB 787, 789 (1975); *Trumbull Memorial Hospital*, 218 NLRB 796 (1975); *Valley Hospital*, 220 NLRB 1339, 1343 (1975); *Seton Medical Center*, 221 NLRB 120 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 676 (1976); *Baker Hospital*, 279 NLRB 308 (1986).

Administration Clerks—*Trumbull Memorial Hospital*, *supra*; *St. Luke's Episcopal Hospital*, *supra* at 676.

Audit Clerks—*Trumbull Memorial Hospital*, *supra*; *Seton Medical Center*, *supra*; *St. Luke's Episcopal Hospital*, *supra* at 676.

Cashiers—*St. Catherine's Hospital*, *supra* at 789; *Southwest Community Hospital*, 219 NLRB 351, 352 (1975); *St. Claude General Hospital*, 219 NLRB 991 (1975); *William W. Backus Hospital*, 220 NLRB 414, 415 (1975); *Valley Hospital*, *supra* at 1343; *Seton Medical Center*, *supra*.

Communications Clerks (see also Switchboard, Telephone & PBX Operators)—*St. Luke's Episcopal Hospital*, *supra* at 676; *Jewish Hospital*, 223 NLRB 614, 621 (1976).

Computer Operators & Programmers—*Trumbull Memorial Hospital*, *supra* at 797; *St. Francis Hospital*, 219 NLRB 963, 964 (1975).

Credit & Collection Clerks—*Trumbull Memorial Hospital*, *supra* at 797; *Valley Hospital*, *supra* at 1343; *Seton Medical Center*, *supra*.

Credit Union Clerks—*St. Luke's Episcopal Hospital*, *supra* at 676.

Data Processors, Keypunch Operators & Data Control Clerks— *Trumbull Memorial Hospital*, *supra* at 797; *St. Francis Hospital*, *supra* at 964; *William W.*

Backus Hospital, supra at 415; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra, 221 NLRB 120, 121–122 (1975).

Insurance Clerks—*Trumbull Memorial Hospital*, supra at 797; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra.

Management Engineering Clerks—*St. Luke’s Episcopal Hospital*, supra at 676.

Personnel & Payroll Clerks—*Trumbull Memorial Hospital*, supra at 797; *St. Luke’s Episcopal Hospital*, supra at 676.

Planning & Development Clerks—*Seton Medical Center*, 221 NLRB 120 (1975); *St. Luke’s Episcopal Hospital*, supra at 676.

Public Relations & Community Affairs Clerks—*William W. Backus Hospital*, supra at 415; *St. Luke’s Episcopal Hospital*, supra at 676.

Switchboard, Telephone & PBX Operators—*St. Catherine’s Hospital*, supra at 789; *St. Francis Hospital*, supra, 219 NLRB 963, 964 (1975); *St. Claude General Hospital*, supra; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra; *Medical Arts Hospital of Houston*, 221 NLRB 1017, 1018 (1975); *Baptist Memorial Hospital*, 225 NLRB 1165, 1168–1169 (1976); *Duke University*, 226 NLRB 470, 471 (1976).

Volunteer Dept. Clerks—*Seton Medical Center*, supra.

Conversely, the following classifications have generally been found not to be business office clericals:

Emergency Room Clerks—*St. Elizabeth’s Hospital*, 220 NLRB 325 fn. 1 (1975); *William W. Backus Hospital*, supra at 416.

Housekeeping Clerks—*William W. Backus Hospital*, supra at 415; *Baptist Memorial Hospital*, supra, 225 NLRB 1165, 1167–1168 (1976).

Laboratory Clerks/Secretaries—*Kanawha Valley Memorial Hospital*, 218 NLRB 846 (1975); *Gnaden Huetten Memorial Hospital*, 219 NLRB 235, 236–237 (1975); *William W. Backus Hospital*, supra at 415; *Baptist Memorial Hospital*, supra at 1167–1168.

Library Clerks—*Jewish Hospital of Cincinnati*, 223 NLRB 614, 622 (1976); *Duke University*, supra at 471.

Maintenance Clerks—*William W. Backus Hospital*, supra at 415.

Medical Dept. Clerks—*Trumbull Memorial Hospital*, 218 NLRB 796 (1975); *St.*

Elizabeth's Hospital, supra, 220 NLRB 325 fn. 1 (1975); *St. Luke's Hospital*, supra at 677; *Baptist Memorial Hospital*, supra at 1167–1168; *Duke University*, 226 NLRB 470 (1976).

Operating Room Clerks—*William W. Backus Hospital*, supra at 415.

Pharmacy Clerks—*St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *William W. Backus Hospital*, supra at 415; *Medical Arts Hospital of Houston*, supra at 1018.

Ward Clerks—*Sisters of St. Joseph of Peace*, 217 NLRB 797 (1975); *William W. Backus Hospital*, supra at 415; *St. Luke's Episcopal Hospital*, supra at 677–678; *Duke University*, supra at 471.

Finally, there are cases going both ways on whether the following classifications are business office clericals:

Admitting Clerks—Held BOCs: *St. Catherine's Hospital*, 217 NLRB 787, 789 (1975); *Trumbull Memorial Hospital*, 218 NLRB 796 (1975); *St. Francis Hospital*, 219 NLRB 963, 964 (1975); *St. Claude General Hospital*, 219 NLRB 991 (1975); *St. Elizabeth's Hospital*, 220 NLRB 325 (1975); *Valley Hospital*, 220 NLRB 1339, 1343 (1975); *Seton Medical Center*, 221 NLRB 120 (1975); *Medical Arts Hospital of Houston*, 221 NLRB 1017 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 676 (1976); *Baptist Memorial Hospital*, 225 NLRB 1165, 1168 (1976). Contra: *William W. Backus Hospital*, 220 NLRB 414, 415–416 (1975); *Jewish Hospital of Cincinnati*, 223 NLRB 614, 621 (1976) (finding admitting clerks to be hospital clericals rather than business office clericals).

Billing Clerks—Held BOCs: *St. Catherine's Hospital*, supra at 789; *William W. Backus Hospital*, supra at 415. Contra: *St. Luke's Episcopal Hospital*, supra at 677 (placing certain billing clerks in service and maintenance unit).

Mail Clerks & Messengers—Held not BOCs: *St. Luke's Episcopal Hospital*, supra at 677–678; *Jewish Hospital of Cincinnati*, supra at 622; *Duke University*, supra at 471. Contra: *Trumbull Memorial Hospital*, supra at 797; *Seton Medical Center*, supra (including mail clerks and messengers in BOC unit).

Medical Education Clerks—Held not BOCs: *St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *Baptist Memorial Hospital*, supra at 1168–1169. Contra: *St. Francis Hospital*, supra at 964; *St. Luke's Episcopal Hospital*, supra at 676 (finding RN and medical education clerks to be BOCs).

Medical Records Clerks—Held not BOCs: *St. Catherine's Hospital*, supra at 790; *Sisters of St. Joseph of Peace*, supra at 798; *Gnaden Huetten Memorial Hospital*, supra at 236–237; *Alexian Bros. Hospital*, supra at 1123; *St. Claude General Hospital*, supra at 992; *William W. Backus Hospital*, supra at 415; *Valley*

Hospital, supra at 1343; *Central General Hospital*, 223 NLRB 110, 111 (1976); *Baptist Memorial Hospital*, supra at 1168; *Morristown-Hamblen Hospital Assn.*, 226 NLRB 76, 79 (1976); *Duke University*, 226 NLRB 470, 471 (1976). Contra: *Seton Medical Center*, 221 NLRB 120, 122 fn. 21 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 677 (1976) (excluding medical records clerks from service and maintenance unit).

Nursing Office Clerks—Held not BOCs: *St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *St. Luke's Episcopal Hospital*, supra at 677; *Baptist Memorial Hospital*, supra at 1168–1169. Contra: *Medical Arts Hospital of Houston*, 221 NLRB 1017, 1018 (1975) (excluding nursing office clerks from service and maintenance unit).

Pastoral Care Clerks—Held BOCs: *St. Luke's Episcopal Hospital*, supra at 676. Contra: *Baptist Memorial Hospital*, supra at 1167 (including chaplain's secretary in service and maintenance unit); *Duke's University*, supra at 471 (including chapel receptionist in service and maintenance unit).

Purchasing, Stockroom & Inventory Clerks—Held BOCs: *Trumbull Memorial Hospital*, 218 NLRB 796, 797 (1975); *St. Francis Hospital*, supra at 964; *William W. Backus Hospital*, supra at 415; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra; *St. Luke's Episcopal Hospital*, supra at 676. Contra: *St. Catherine's Hospital*, supra, 217 NLRB 787, 789–790 (1975); *Alexian Bros. Hospital*, supra at 1123; *St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *Jewish Hospital of Cincinnati*, supra at 622; *Duke University*, supra.

Receptionists & Information-Desk Clerks—Held BOCs: *St. Catherine's Hospital*, supra at 789; *Southwest Community Hospital*, 219 NLRB 351, 353 (1975); *William W. Backus Hospital*, supra at 415; *Duke University*, supra. Contra: *Trumbull Memorial Hospital*, supra at 797 (including all but one receptionist classification in service and maintenance unit); *Jewish Hospital*, supra at 621–622 (including information-desk clerks in service and maintenance unit).

V. ALL NONPROFESSIONAL EMPLOYEES, EXCEPT FOR TECHS, SKILLED MAINTENANCE, BOCS, AND GUARDS. This unit will generally include all service and maintenance employees. See 284 NLRB 1565–1566. This unit is analogous to the plantwide production and maintenance unit in the industrial sector and, as such, is the classical appropriate unit. 284 NLRB 1523 fn. 60. *Newington Children's Hospital*, 217 NLRB 793 (1975). Employees in this category generally perform manual and routine job functions, and are not highly skilled or trained. The following classifications have been held to be included:

Barbers—*Baptist Memorial Hospital*, 225 NLRB 1165, 1169 (1976).

Clerks (hospital clericals who work side by side with service and

maintenance employees in various depts. performing clerical functions, i.e., admitting; emergency room; radiology dept.; purchasing dept. clerk and typist; classified data input clerk)—*William W. Backus Hospital*, 220 NLRB 414, 415–416 (1975); *Baptist Memorial Hospital*, supra at 1167.

Hostesses (department of religion)—*Baptist Memorial Hospital*, supra at 1171.

Housekeeping employees—*Gnaden Huetten Memorial Hospital*, 219 NLRB 235, 236 (1975).

Librarian—*William W. Backus Hospital*, supra at 418; *Baptist Memorial Hospital*, supra at 1173.

Manicurist—*Baptist Memorial Hospital*, supra at 1169.

Medical Record Clerical Employees—*St. Luke's General Hospital*, 220 NLRB 488, 489 (1975); *Gnaden Huetten Memorial Hospital*, supra at 236; *Sisters of St. Joseph of Peace*, 217 NLRB 797 (1975); *William W. Backus Hospital*, supra at 415.

Nurses Aides—*Gnaden Huetten Memorial Hospital*, supra at 236.

Photographer-Cinematographer-Television Technician—*Newington Children's Hospital*, supra at 795.

Physical Therapy Aides—*Gnaden Huetten Memorial*, supra, 219 NLRB 235, 236.

Porter (hospital barber shop)—*Baptist Memorial Hospital*, supra at 1169.

Printer—*Baptist Memorial Hospital*, supra at 1171.

Psychiatric Activities Director (and Assistant)—*Baptist Memorial Hospital*, supra at 1169.

Recovery Room Technicians—*Baptist Memorial Hospital*, supra at 1172.

Respiratory and Pulmonary Dept. Employees—*Baptist Memorial Hospital*, supra at 1172.

Secretaries (staffing, nursing office, liaison office, in-service education, office of the chaplain, director of housekeeping, medical education, cardiac lab. secretaries and clericals, pulmonary and respiratory dept. medical secretaries, medical transcribers)—*Baptist Memorial Hospital*, supra at 1167.

Technicians (darkroom; EKG; orthotic footwear; leather)—*William W. Backus Hospital*, supra, 220 NLRB 414, 416 (1975); *Barnert Memorial Hospital*

Center, 217 NLRB 775, 778 (1975); *Newington Children's Hospital*, supra at 795.

Utilization Review Coordinator—*Baptist Memorial Hospital*, supra at 1170. But see section II “All Professionals, except RNs and Physicians” (utilization review coordinator found to be professional in *St. James Hospital*, 248 NLRB 1045, 1046 (1980)).

Ward Clerks—*Sisters of St. Joseph of Peace*, 217 NLRB 797 (1975).

APPENDIX E
Sample *Tropicana* Subpoena

ATTACHMENT TO SUBPOENA DUCES TECUM

1. [XYZ Company] shall be referred to in this subpoena as the Employer.
2. Documents which show the full and correct name and address of the Employer's business, its legal status, and the names, titles and dates of tenure of all owners, partners, principals, officers, and directors of the Employer's business.
3. True copies of the Employer's Articles of Incorporation, Corporate Charter and Certificate of Incorporation, Corporate By-Laws, and all amendments thereto, and all annual reports and licenses or applications to do business filed by the Employer with state and county governments, including but not limited to the State of ____ and/or the County of ____.
4. A true copy of all contracts and other agreements between the Employer and state and county governments, including but not limited to the State of _____ and/or the County of _____.
5. All books, records or other documents, including but not limited to books of accounts, accounts receivable records, purchase orders, invoices, journals, ledgers, bills of lading, canceled checks, billing slips, delivery and/or receiving records, and State and Federal tax returns, for the period from _____ to the present, which will show:
 - a) Gross receipts for products sold and services rendered by the Employer directly to enterprises or persons located outside the State of _____.
 - b) Gross receipts for products sold and services rendered by the Employer directly to enterprises or persons located within the State of _____, including the identity and address of each of the enterprises or persons to whom sales were made or services performed.
 - c) The dollar value of all goods, supplies, and services purchased and/or received by the Employer from enterprises or persons located outside the State of _____.
 - d) The dollar value of all goods, supplies, and services purchased and/or received by the Employer from all enterprises or persons located within the State of _____, including the identity and address of each of the enterprises or persons from whom purchases were made or services received.
6. Pay roll records showing names, addresses, job classifications, departments, rates of pay, dates of hire, and hours of employment for all individuals employed by the Employer, including individuals on layoff status and the dates of layoffs, for the period from _____ to date.

7. In lieu of physically producing the information and/or records required above, the hearing officer for the National Labor Relations Board will accept sworn testimony by a responsible official of the Employer regarding each of the items above.

APPENDIX F

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION __**

| |
|--------------------------------------|
| Correct Name of Employer: |
| Case No. |
| Correct Name of Charged Party Union: |
| Correct Name of Intervening Union: |

STIPULATION

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.

2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.

3. The Charged Party is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Intervening Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

6. The Charging Party Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts:

7. The disputed work is:
(Describe work in dispute)

Upon receipt of this Stipulation by the Hearing Officer it may be admitted, without objection, as a Board exhibit in this proceeding.

HEARING OFFICER'S GUIDE

For the Charging Party Employer

For the Charged Party Union

For the Intervenor

RECEIVED:

Hearing Officer

Date: _____

Board Exhibit No. _____

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I. INTRODUCTION

This manual is intended to give guidance to hearing officers and to serve as a reference source for them when conducting preelection, postelection and Section 10(k) hearings. Included in the manual are procedural guidelines to follow in preparing for and conducting the hearing, substantive issues to be covered at the hearing and suggested questions and/or areas of inquiry to be explored on various issues. This manual should supplement the prehearing preparation of hearing officers, not take the place of that preparation.

The R case hearing is a formal proceeding, the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a full record, and nonadversarial.

As a formal proceeding, an R case hearing should be conducted at a place conducive to the maintenance of a judicial atmosphere. If it cannot be held in a Regional Office hearing room, it should be held, if possible, in a courtroom. If the space secured proves inadequate or accommodations are poor, the Board agent should take remedial action, if possible. At the hearing, the conduct of the parties should be dignified, both on and off the record. Smoking is prohibited.

The R case hearing is conducted by a hearing officer who is normally a Board agent from the Region in which the hearing is held. The hearing officer is not an advocate of any position and must be impartial in his/her rulings and in conduct both on and off the record. The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing. NLRB Casehandling Manual, Part Two, Representation Proceedings (CHM) Sections 11187–11188. The hearing officer ensures that a full and complete record is obtained, upon which the Regional Director can make a decision regarding the issues. While the record must be complete, it is also the duty of the hearing officer to keep the record as short as is commensurate with its being complete. This also minimizes the significant costs associated with a hearing.

In a preelection hearing, the hearing officer does not make any recommendations or participate in any phase of the decisional process. He/she may or may not be the same agent who handled earlier or who may handle later phases of the same case.

In a postelection hearing, the hearing officer makes credibility resolutions, findings of fact, conclusions of law and recommendations to either the Regional Director or the Board. Since those determinations must be based solely on the record made in the hearing, he/she may not be the same agent who handled any phase of postelection processing of the case.

A. Prehearing Preparation

The hearing officer must fully prepare for the hearing. In advance of the hearing, the hearing officer should be aware of all issues in the case and of the types of information generally bearing on such issues, in order to prepare properly to conduct the hearing. In the context of a preelection hearing, the hearing officer should have a meeting with the appropriate Regional management and/or supervisory personnel in advance of the hearing to discuss the issues that may be raised and develop a plan for the conduct of the hearing.

Prior to a scheduled hearing, the basic facts with respect to each potential issue should be secured and the relevant issues should be researched. The hearing officer should discuss with the parties the critical issues, the law and the likelihood of the parties' positions prevailing. Attempts should also be made to arrive at a firm commitment regarding an election agreement. In this regard, it is the Agency's policy to make every effort to secure an election agreement whenever possible to avoid the delay and expense of a hearing.

Where an employer has refused to cooperate in providing commerce information prior to the hearing or has indicated that it will not voluntarily do so at the hearing, the Regional Director will have issued a subpoena as part of the prehearing preparations. *Tropicana Products*, 122 NLRB 121 (1958). See sample *Tropicana* subpoena language in Appendix D. The Regional Director's issuance of a subpoena of commerce information prior to the hearing is a proper basis for utilization of the *Tropicana* rule, i.e., if an employer refuses to comply with a *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the employer is engaged in more than de minimis interstate commerce, rather than seek enforcement of the *Tropicana* subpoena. See Section IV, A, Jurisdiction, for examples of appropriate secondary evidence. See also Section II, B, 5, *Tropicana* Subpoenas.

B. Hearing Preparation

1. Review CHM Sections 11010 (Initial Investigation) through 11124.4.
2. Make sure that all known or potential parties, intervenors or parties in interest have been contacted and/or served with a notice of hearing (NOH). Check for other labor organizations or other employers involved. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002) (all parties must receive the NOH at least 5 working days prior to the hearing, absent unusual circumstances or waiver).
3. Research prior cases involving the same employer and other cases involving similar issues.
4. Contact parties and attempt to work out all details for a consent/stipulated election agreement.

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- (a) If agreement is reached, notify supervisor immediately.
 - (b) When contacting parties, obtain correct names and addresses of parties.
5. If agreement cannot be reached, question parties regarding the following hearing data:
- (a) Stipulations concerning: jurisdictional facts and concessions of jurisdiction, labor organization, questions concerning representation (QCR), history of bargaining, unit scope and unit composition. (Explore written stipulations. See Section D, below.)
 - (b) Availability of list of employee classifications, inclusions and exclusions.
 - (c) Issues that will be raised at hearing.
 - (d) Availability of documents, evidence and witnesses to support positions.
 - (e) Evidence and witnesses to support case should a party refuse to cooperate.
 - (f) Subpoenas. (See Section II, B, Subpoenas.)
 - (g) Need for an interpreter.
 - (h) If a party is unrepresented, see I, G, Unrepresented Parties.
6. Check date, time, and place of hearing. Verify arrangements for hearing room and court reporter. Secure court reporter's telephone number.
7. Examine formal papers for completeness and accuracy of documents.
8. Review case file thoroughly, noting issues and legal and procedural problems.
9. Discuss with his/her supervisor the issuance of subpoenas to obtain, for example, jurisdictional information in *Tropicana* situations (122 NLRB 121 (1958)) or position descriptions, in situations when supervisory status is in issue.
10. Prepare hearing outline.

C. Materials for Hearing

The hearing officer should have a kit that contains all of the materials set forth below:

1. Specific

- (a) Case file.
- (b) Formal papers, ready for introduction as exhibits, including:
 - (1) Petition and/or amended petition(s).
 - (2) Notice of representation hearing and affidavit of service.
 - (3) Notice of postponement (if any) and affidavit of service.
 - (4) Any other prehearing motions, orders or documents properly included in the formal papers.
- (c) Original and copy of appearance sheet (Form NLRB-1801).
- (d) Close of R Case Hearing (Form NLRB-856)—two copies.
- (e) Board Exhibit 2—Pre hearing stipulation form (See Appendix A)

2. General

- (a) Board's Rules and Regulations.
- (b) NLRB Casehandling Manual, Part Two, Representation Proceedings.
- (c) Guide for Hearing Officers in NLRB Representation Proceedings.
- (d) An Outline of Law and Procedure in Representation Cases.
- (e) Extra copies of Statement of Standard Procedures in Formal Hearing Held Before the National Labor Relations Board Pursuant to Petition Filed Under Section 9 of the National Labor Relations Act, as Amended (Form NLRB-4669).
- (f) Copies of blank subpoenas, ad testificandum and duces tecum.
- (g) Copies of blank appearance sheets (Form NLRB-1801).
- (h) Copies of blank consent election forms - Agreement for Consent Election (Forms NLRB-651 and 4931) and Stipulated Election Agreement (Forms NLRB-652 and 4932). (The basic difference between the consent agreement and the stipulated election agreement is that questions that arise after the election are decided by the Regional Director in a consent election and by the Board in a stipulated election.)
- (i) Withdrawal Request (Form NLRB-601).
- (j) Request to Proceed (Form NLRB-4551).
- (k) Copies of blank Report on Investigation of Interest (Form NLRB-4069).
- (l) Copies of blank R Case Petition (Form NLRB-502).
- (m) Copies of blank Report of Obligated Cost of Hearing Held or Hearing Canceled (Form NLRB-4237).
- (n) Telephone numbers of appropriate Regional personnel and Court Reporter.
- (o) Envelopes of various sizes addressed to the Regional Office.
- (p) Pencils and writing pad.

D. Prehearing Conference

Prior to the hearing, the hearing officer should prepare a *written* stipulation, for signature by the parties at the hearing, that covers all of the generally uncontested issues for hearings, i.e., the correct names of the parties, labor organization status, commerce information, etc., as well as any other issues that are known not to be in dispute, such as contract bar, bargaining history, demand for and refusal of recognition, etc. A sample stipulation appears as Appendix A. Preparation of such a stipulation prior to the hearing can save reporting costs and provide accurate information, while avoiding typographical and other errors that the transcript may contain as to details. Such a stipulation, once signed by the parties, should become a Board exhibit, usually Board Exhibit 2, and should be entered into evidence after the introduction of the formal papers (Board Exhibit 1; CHM Section 11192).

Prior to opening the hearing, the hearing officer should conduct a prehearing conference to determine the positions of the parties and discuss procedural matters. During the conference, the parties and the hearing officer can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, litigation of unnecessary issues and the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. The

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likelihood of parties' positions prevailing should be candidly discussed. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. The hearing officer should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

During the prehearing conference, the hearing officer should inform the parties that where issues are raised involving a presumption under Board law, the party seeking to rebut that presumption has the burden of proof. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should inform the parties that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer will typically discuss the following topics at the prehearing conference:

1. The issues and each party's position on each issue.
2. All stipulations reached should be drafted in longhand preparatory to reading them into the record at the appropriate time, e.g., commerce, supervisors who are not in dispute, unit description, etc. A sample stipulation which could be used to deal with the preliminary matters at the hearing, including statement of standard procedures, the formal papers, labor organization status, question concerning representation, contract bar and jurisdiction, if they are not in issue, is contained in Appendix A of this manual (Board Exhibit 2).
3. The hearing officer should determine the size and structure of the Employer's work force and the size of the agreed upon unit, as well as the number of individuals in disputed categories. The hearing officer should determine the managerial hierarchy and a description of the organization of the plant, including departments and numbers of employees in departments and job classifications.
4. Explore with the parties the need for amendments to the petition, including amendments to correct the name of the company, labor organization and unit description wherever appropriate.
5. Related R or C cases in the Region or another Region.
6. Show the formal papers to the parties and explain what they are to parties unfamiliar with the Agency's processes.
7. The hearing officer should make one last effort to secure an election agreement. **If successful, do not release the court reporter until the consent/stipulated election agreement is concluded.**

If an agreement is executed, the hearing should not be opened; the subsequent approval of the agreement serves as a withdrawal of the notice of hearing.

If the possibility of an election agreement arises during the hearing, the hearing should be recessed for its consideration. If agreement is reached, the hearing should be adjourned indefinitely. It is unnecessary to insert the agreement in the record. The subsequent approval of the agreement serves as a withdrawal of the notice of hearing.

E. Before Opening the Record

At the hearing, the hearing officer should discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited. The hearing officer should take an active role in exploring all potential areas of agreement and narrowing the issues that remain to be litigated.

F. Opening the Hearing

After the preliminary matters set forth in the hearing officer outline and script are resolved, the hearing officer should open the record by specifying the issues that have been identified by the parties to be covered at the hearing. In order to help make the record clear, the hearing officer should have the parties state their positions on the issues at the beginning of the hearing.

1. Notification of Burdens

The hearing officer should specify on the record whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. For instance, if the Union has petitioned for a presumptively appropriate unit, such as the employees at a single facility of the Employer, and the Employer contends that the smallest appropriate unit must include the employees at all of its facilities, the hearing officer should inform the Employer that it has the burden of rebutting the single facility presumption.

If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

2. Hearing Officer's Role

The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted "for what it's worth." Cf. CHM Section 11217. In addition, the hearing officer should solicit stipulations and utilize offers of proof in order to achieve an uncluttered record. CHM Sections 11187.2, 11189(f) and 11226. Although difficult to accomplish, the hearing officer should make every attempt to organize the record so that each issue, and the evidence in support of the issue, is presented separately and

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completely. In this way, the transcript will be organized according to the issues, to assist the decision writer in analyzing the issues and writing the decision.

The hearing officer may cross-examine and call and examine witnesses. The questions contained in the substantive sections of this manual should be used as a guide in examining witnesses. However, not every question on a particular issue set forth in this manual need be asked. The hearing officer may call for and introduce all appropriate documentary evidence, being limited only by the relevance of the evidence to the issues. It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

At the end of the hearing, if there are changes in the parties' positions, the hearing officer should make them clear on the record and should summarize the issues that have been resolved. Whenever the hearing officer's technical assistance is required by any party, e.g., how to amend a petition, it should be given.

When necessary to ensure the development of a record that is complete, concise and cogent, it may become necessary for the hearing officer to interrupt the presentation of a party and conduct some or all of the questioning of a witness or witnesses. However, it should be recognized that the hearing officer's responsibility for the development of a complete yet concise record may on occasion lead to an appearance of undue assistance to a party that does not itself introduce evidence in support of its positions or of undue interference with a party seeking to introduce immaterial, irrelevant or cumulative evidence. The hearing officer should explain his/her role in developing a full yet concise record. The hearing officer must also keep constantly in mind that, to the parties, he/she is the Board's representative and they expect him/her to be objective and considerate in the conduct of the hearing. Thus, the hearing officer, while meeting his/her primary responsibility to develop a full yet concise record, should also exercise self-restraint, give the parties prior opportunity to develop points and refrain from needlessly taking over.

G. Unrepresented Parties

Unrepresented parties (pro se) may not be familiar with our processes, the pertinent law or their burden of proof. The hearing officer should take the time to explain the process involved and the extent of their obligations, if any, and should be particularly sensitive to any language difficulty problems. The hearing officer should also explain the nature of the hearing and burdens of proof and that he/she has the right to seek subpoenas to compel the testimony of witnesses, call witnesses and question witnesses on cross-examination. However, the hearing officer is not obligated to advocate on behalf of a pro se party and is not required to develop extensive lines of testimony.

HEARING OFFICER'S GUIDE

II. PROCEDURAL MATTERS

A. Outline of Hearing

This section of the manual contains instructional information on conducting a hearing and covering the key elements of the hearing, including the opening statement, introduction of Board exhibits, prehearing motions, intervention, jurisdiction, labor organization, question concerning representation, history of collective bargaining, bars to the conduct of an election and the appropriate unit. Incorporated in this manual as Appendix B is a script of the hearing, with the instructional information from this section deleted, which can be used by the hearing officer as an aid in providing continuity while conducting the hearing. Attached to the script is a sample of a chart that can be used by the hearing officer as an aid in tracking exhibits. For the hearing officer's convenience, a copy of the script can be downloaded from this manual, which is available on the Agency internet and intranet, for purposes of adapting the script to a particular case.

During the hearing, the hearing officer may find that parties are prepared to enter into stipulations. When obtaining a stipulation, the hearing officer should ensure that each party to the proceeding enters into the stipulation and that he/she receives the stipulation. Stipulations should be supported by facts and should not be conclusionary. All parties to the proceeding, including a decertification petitioner, must agree to the stipulation. A stipulation of fact is conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted. If the hearing officer is unable to obtain a stipulation on a key element of the hearing, as outlined in the script, he/she should refer to this and other sections of the manual for instructions and/or guidance on how to handle that or any other particular issue. The script is only an aid and is not intended to replace the substantive material contained elsewhere in the manual.

Appendix A to this manual is an exhibit that can be used to streamline the hearing by reducing some of the key elements of the hearing to written stipulations that can be introduced into the record. That exhibit (often Board Exhibit 2) can be used to resolve all issues on which there is no dispute, leaving those that are in dispute for litigation.

1. Opening statement

On opening the hearing, the hearing officer should read into the record the following statement:

The hearing will be in order.

This is a formal hearing in the matter of _____, Case No. _____ before the National Labor Relations Board. The hearing officer appearing for the National Labor Relations Board is _____.

All parties have been informed of the procedures at formal hearing before the Board by service of a Statement of Standard Procedures with the notice

of hearing. I have additional copies of this statement for distribution if any party wants more.

Will counsel please state their appearances for the record? . . .

For the Petitioner: _____

For the Employer: _____

For the Intervenor: _____

Are there any other appearances? . . . Let the record show no (further) response.

Fill out any additions to the appearance sheet.

Are there any other persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding?

. . . Let the record show no (further) response.

2. Introduction of formal papers

I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1(a) through 1 (—), inclusive, Exhibit 1(—) being an index and description of the entire exhibit. The exhibit has already been shown to all parties. Are there any objections to the receipt of these exhibits into the record? Hearing no objections, the formal papers are received in evidence.

Explain if necessary that the papers in question constitute a routine introduction of the documents which set up the issues for hearing; that admission of the document does not irrevocably establish the truth of any allegations therein; that any relevant evidence may be introduced irrespective of such allegations; and that, in any event, the Regional Director (Board) will pass on the validity of this and any other evidence. Whether or not objections are voiced, receive the formal papers in evidence.

Verify correct names of parties. Entertain motion to amend petition if necessary, to conform to the correct names.

If the parties agree to Board Exhibit 2, introduce that exhibit into the record as follows and then proceed to the appropriate section below:

The parties to this proceeding have executed and I have approved a document which is marked as Board Exhibit 2. That Exhibit contains a series of stipulations including, among other items, that the petitioner is a labor organization within the meaning of the Act, there is no contract bar and the Employer meets the jurisdictional standards of the Board. Are there any objections to the receipt of Board Exhibit 2?

Hearing no objection, Board Exhibit 2 is received in evidence.

If Board Exhibit 2 is not agreed upon, proceed with Section 3 below.

3. Prehearing motions

Identify and receive prehearing motions, rulings and referrals. Referrals include motions which the Regional Director has referred to the hearing officer for ruling (e.g., motions to quash subpoenas). If appropriate, rule on the motions at this time. If not, the hearing officer may want to indicate that he/she will withhold ruling on the motion until later in the hearing. Be sure to rule on all motions still remaining at the end of the hearing, except those that cannot be ruled on by the hearing officer, e. g., motions to dismiss the petition. (See Section II, G, Motions at Hearing).

Are there any prehearing motions made by any party that need to be addressed at this time (e.g., motions to quash subpoenas)?

4. Intervention

Appearances for prospective intervenors should have been made during the opening statement, but at this point, if intervention has been indicated, the actual motion to intervene should be solicited. The hearing officer should call attention to any prehearing motions to intervene which have been referred to him/her and ask for any current motions.

Are there any motions to intervene in these proceedings to be submitted to the hearing officer at this time? Are the parties aware of any other employers or labor organizations that have an interest in this proceeding?

The hearing officer hears no (further) response.

After soliciting the positions of the parties on the motion to intervene, the hearing officer must rule, for example:

If there is a motion to intervene:

M. _____, please state the correct and complete name of the Intervenor.

If there is no objection:

The motion of _____ for intervention herein is granted (denied).

Require motions to intervene to be offered in evidence, orally or in writing, setting forth the grounds for intervention and inquire of the other parties as to their positions. (Be sure to obtain the full and complete name of the intervenor.)

Before intervention is permitted, the prospective intervenor must produce a showing of interest. This may be any of the following:

- (a) Valid authorization card(s): Merely note the fact that a showing of interest has been made; under no circumstances introduce the cards into evidence. Indicate the level of intervention. However, if no showing is made, this fact may and should be announced on the record.
- (b) Current or recently expired contract; if the showing is a contract, a copy of it should be procured and placed in the record.
- (c) Any other evidence of a showing of interest that would be accepted from a petitioner.

The rights of an intervenor depend on the level of intervention based on its showing of interest. CHM Section 11194.5.

If an intervenor indicates an interest in groups apart or unrelated to that sought by the petition, it should be advised to file a separate petition, in which event the normal 30-percent showing of interest will be required.

If the hearing officer has any substantial doubt as to the propriety of permitting intervention by any person or labor organization, he/she should recess the hearing for a time sufficient to enable him/her to resolve the doubt. If such questions are not susceptible of prompt determination, the hearing officer should permit intervention for the time being, making it clear, however, that a final decision is being reserved.

If the hearing officer permits intervention and the Intervenor raises an issue with respect to the lack of receipt of the NOH at least 5 working days prior to the hearing, the hearing officer should consult the Regional Office. See discussion of *Croft Metals, Inc.*, 337 NLRB No. 106 (2002), supra, in Section I, B, Hearing Preparation.

5. Commerce/Jurisdiction

Possibilities of a stipulation of commerce facts should be explored off the record. If attained, the stipulation should be put on record; if not, testimony with respect to commerce and other aspects relevant to the Board's exercise of jurisdiction must be taken. Even when there is a stipulation that the Board's discretionary gross volume standards are met, there must be included sufficient data on actual inflow and outflow to establish de minimis statutory jurisdiction.

Will the employer please state its full and correct name for the record? (Is "Company" spelled out? Is "Incorporated" spelled out?)

If necessary: **Are there any objections to having the petition and other formal papers amended so that the name of the employer will correctly appear in the captions thereon as _____?**

Hearing no objection, the amendment is allowed.

After reading the stipulation prepared in advance or worked out off the record as to the business of the Employer:

Can it be stipulated that the Employer is engaged in commerce within the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board and that the commerce facts are as follows:

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

For questions to develop the record concerning commerce/jurisdiction, joint or single employer or successor employer issues, see Section IV.

6. Labor organization

The possibility of a stipulation that the unions involved are labor organizations within the meaning of Section 2(5) of the Act should be discussed off the record. If attained, the stipulation should be put on the record.

M. _____, is the correct and complete name of the (Petitioner) that which appears on the petition filed in this case, _____?

If necessary: Are there any objections to having the petition and other formal papers amended so that the name of the (Petitioner) will correctly appear in the captions thereon as _____?

Hearing no objection, the amendment is allowed.

Can it be stipulated that the Petitioner herein, _____, is a labor organization within the meaning of the National Labor Relations Act, as amended?

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

Obtain the same stipulation for any Intervenor.

If no stipulation is obtained, the testimony of someone, such as a union representative, is required to establish that the organization is one in which employees participate and which “exists in whole or in part” for the purpose of representing employees with respect to their wages, hours and working conditions. For questions to develop the record concerning labor organization status, see Section IV, D, Status as a Labor Organization, *infra*.

7. Issues and burdens of proof

Will the parties please identify the issues for hearing and their positions on each issue?

Employer?

Petitioner?

Intervenor?

If the issue involves a presumption under Board law, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., single facility unit) involves a presumption under Board law and the burden lies with the party seeking to rebut the presumption. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

If the issue involves statutory exclusions, such as Section 2(11) supervisory status or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., supervisory status) involves a statutory exclusion and the party seeking to exclude employees on this basis bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

8. Disclaimers

If a labor organization at the hearing seeks to disclaim interest in representing the employees, the disclaimer should be in writing or on the record. The hearing officer should ask the parties whether they possess any evidence that the disclaiming labor organization has or is engaged in any conduct inconsistent with its disclaimer.

9. History of collective bargaining

Explore off-the-record the possibilities of a stipulation regarding any history of collective bargaining involving the unit in question, other organizational attempts that resulted in petitions being filed with the Agency and the identity of any union involved. If there is a collective bargaining history, obtain details about the nature and origin of that relationship and include those facts in any stipulation, e.g. voluntary recognition, Board-certified unit, prior Board proceedings involving the employer, 8(f) versus 9(a) recognition, multiemployer units or preexisting non-conforming health care units. If attained, the stipulation should be put on record. If there has been no history of bargaining, the record should reflect that fact. If a stipulation is not received, the history should be developed through witnesses or, if none are available, through statements of counsel. Existing and prior contracts that relate to all or part of the petitioned-for unit should be introduced into the record.

For questions to develop the record on bargaining history see Section IV, E, History of Collective Bargaining.

10. Cases pending in other Regions

The following question should be asked in all cases concerning petitions pending in other Regions, unless the facts adduced thus far in the hearing indicate that the question is unnecessary.

Are there any petitions pending in other Regional offices involving other facilities of the Employer?

M. _____, on behalf of the Petitioner?

M. _____, on behalf of the Company?

M. _____, on behalf of the Intervenor?

If an affirmative response is received, the hearing officer should inquire further in order to determine the impact, if any, on the present proceeding.

11. Bars to conduct of an election

On the basis of the information obtained concerning the bargaining history of the employees sought by the petition, inquiry can be directed to circumstances which might constitute a bar to the petition. Information concerning prior elections or recognition will be disclosed. The positions of the parties on possible contract bars to the petition should be obtained:

Do any of the parties contend that there is a contract bar to an election in this case?

M. _____, what is the position of the Employer?

M. _____, what is the position of the Petitioner?

M. _____, what is the position of the Intervenor?

If the parties agree that there is no bar, obtain the following stipulation:

Can it be stipulated that there is no contract or other bar in existence that would preclude the processing of this petition?

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (*if necessary*)

The stipulation is received.

If not already in the record, a copy of the contract should be placed in evidence. Develop record by way of testimony. For questions to develop the record on issues of contract or recognition bar, other types of agreements raised as bars, labor organization schism or defunctness and merger, see Section IV.

12. Appropriate unit

Read into the record the unit as described in the (amended) petition. Obtain a clear statement on the record reflecting the exact positions of the parties with respect to the appropriate unit. The petitioner may request and should be allowed to amend the petition to reflect changes in its unit contention. If necessary, recheck the showing of interest, off the record, if the Petitioner enlarges its requested unit.

Off the record, determine the disputed and agreed-on inclusions and exclusions. Explore the possibilities of a stipulation covering the scope of the unit, as well as any agreement on the composition. If attained, stipulations should be put on the record. If a stipulation is obtained with respect to the full unit, propose the following:

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Can it be stipulated that a bargaining unit that includes _____ and excludes _____ is appropriate for the purposes of collective bargaining?

Read from the Petition or the off-the-record discussion notes of the unit.

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

If a stipulation is obtained only with respect to part of the unit, with the remainder of the unit being in issue, propose the following stipulation:

Can it be stipulated that any unit found appropriate by the Regional Director should include _____ and exclude _____?

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

Sample supervisor stipulation language:

Can it be stipulated that _____ is a supervisor within the meaning of Section 2(11) of the Act and as such possesses and exercises one or more of the following authorities: to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; utilizes independent judgment in exercising such authority; and, therefore, should be excluded from the bargaining unit?

M. _____, can you so stipulate for the Employer?

M. _____, can you so stipulate for the Petitioner?

M. _____, can you so stipulate for the Intervenor?

The stipulation is received.

Ascertain the following on the record:

(a) How many employees are employed at the facility?

(b) Which classifications do the parties seek to include; how many employees are in each classification?

(c) Which classifications do the parties seek to exclude; how many employees are in each excluded classification?

When possible, secure the number of employees in each classification at

the facility.

When stipulations are not received, take testimony and evidence with respect to unit scope and composition. Introduce a list, usually from the employer, of classifications and the number of employees in each unit, or alternatively, obtain oral testimony about these matters.

(d) Call an official of the employer familiar with the employer's operations, swear him/her in, then develop testimony to show, where relevant:

- (1) Products of the employer.
- (2) Supervisory or management hierarchy, including specific titles.
- (3) Departmental or divisional groupings of operations and the supervisors of each.
- (4) Physical arrangements of operations. If possible, a blueprint or schematic drawing of the facility should be introduced as an exhibit.
- (5) Operations and flow of product from department to department or job to job.
- (6) Number of buildings and distance between them.

For questions on developing the record for various types of units and employees' status and category issues, see Sections IV through VIII.

13. Framing issues

Frame the remaining issue(s) on the record. Have the parties agree on the issues for litigation.

It is my understanding that the issue(s) to be litigated today are _____
_____(e.g., the supervisory status of Mr. John Wayne, whether the quality control employees have a community of interest with the plant employees, single versus multi-location unit, etc.)

Are there any other issues of which I am not aware?

If no response, proceed to 14, Presentation of Evidence. If there is a response, let the parties state their positions on that issue, then proceed to 14, Presentation of Evidence.

14. Presentation of evidence

Generally the employer should begin, but the hearing officer can use his/her own judgment and have the parties present their evidence in whatever order makes the most sense. Ordinarily, a witness should be presented to testify about the overall structure of the Employer's operations and organization.

Employer, please present your first witness.
(Employer calls first witness.)

Stand and Swear in each witness: **Please raise your right hand. Do you**

solemnly swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

If the witness objects to swearing in the indicated fashion, ask the witness:
Do you solemnly affirm that you will testify truthfully at this hearing?

Swearing in an Interpreter: **Please raise your right hand. Do you solemnly swear that you are fluent in both English and _____ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to _____ (foreign language) and from ____ (foreign language) to English when called upon to do so during the hearing, so help you God?**

If the Interpreter objects to swearing in the indicated fashion, ask:
Do you solemnly affirm that you will translate truthfully at this hearing?

Ask the witness: **Please state your name and spell it for the record.**

(After Employer has rested, proceed to the next party)

Petitioner, you may call your first witness.

(After Petitioner has rested, proceed to the next party, if any)

Intervenor, you may call your first witness. (If necessary)

15. Completing the record

- (a) Summarize on the record those issues that the parties resolved during the course of the hearing.
- (b) Obtain on the record the exact final position of the parties regarding unit contentions, inclusions or exclusions or remaining issues raised during the hearing.
- (c) Recap on the record (1) the total number of employees in the unit sought, as well as any alternate unit, and (2) the total number of employees in each disputed category.
- (d) If you have not done so already, evaluate the showing of interest with respect to changes in the unit contentions and revise the Report on Investigation of Interest (Form NLRB-4069) accordingly.
- (e) Inquire if the labor organizations wish to proceed to an election in any alternate unit if the unit sought is found to be inappropriate by the Regional Director or the Board.
- (f) Inquire of the parties whether there are any further witnesses or evidence which they wish to present.
- (g) Rule on outstanding motions and receive or reject outstanding stipulations.
- (h) Inquire of court reporter as to estimated length of transcript.
- (i) Review notes to ensure that all issues, evidence and positions are covered.

(j) When appropriate, seek on the record a waiver of briefs. Provide parties the opportunity for oral argument in lieu of briefs. CHM Section 11242. If a waiver cannot be obtained, set time for briefs on the record. Except where good cause is shown, briefs are due within 7 days after the close of the hearing. See Section 102.67(a), Rules and Regulations and CHM Section 11244.2.

Make the following statement regarding ordering the transcript:

The parties are reminded that they should request an expedited copy of the transcript from the court reporter. If you fail to do so, late receipt of the transcript will not be grounds for an extension of time to file briefs.

16. Adjournment and closing

Adjournment:

If the hearing has not been completed but is being adjourned, the hearing officer should state:

If there is nothing further, the hearing will be adjourned to _____ (indefinitely).

Closing:

Before closing, review the **Closing Checklist**:

- (a) Be certain reporter has all exhibits.
- (b) Obtain estimate of number of pages of transcript from reporter, complete obligation document and provide it to the Regional Office.
- (c) Ensure appearance sheet (Form NLRB-1801) is correct and legible.
- (d) Complete Close of R Case Hearing Form NLRB-856.

When the hearing has been completed, the hearing officer should state:

If there is nothing further, the hearing will be closed.

Absent response:

The hearing is now closed.

When the hearing is being closed except for the subsequent receipt of an exhibit, the "closing" statement should be appropriately revised. CHM Section 11224.6.

Section 8(b)(7)(C) cases:

When the hearing has been completed, the hearing officer should state:

**This is a proceeding pursuant to Section 8(b)(7)(C) of the Act:
Therefore, the parties shall not file briefs without special permission
of the Regional Director but may state their respective positions fully
on the record prior to the closing of this hearing. Will each party
state his/her position at this time?
Employer . . . Petitioner . . . Intervenor.
The hearing is now closed.**

After the hearing has closed, the hearing officer should complete a Hearing Officer's Report. CHM Sections 11250–11252.

B. Subpoenas

The hearing officer should provide subpoenas to any party making a written request after the opening of the hearing. The parties may have been provided with some subpoenas by the Regional Office prior to the hearing. Pursuant to Section 11(1) of the Act, such issuance is automatic, upon request. The case name and number should be filled in before the subpoena is issued. Subpoenas are available to the parties subject to the standards set out in Section 102.66(c), Rules and Regulations.

If a party requests a large number of subpoenas, the hearing officer should ensure that the requestor's intention to subpoena a large number of witnesses does not conflict with the need for a concise as well as complete record and that the scheduling of necessary witnesses reasonably accommodates the need of the employer to avoid disruption of its operations. If a party appears to be engaging in en masse subpoenaing of witnesses as a harassment device, the hearing officer should inform the affected party to bring this concern to the attention of the Regional Director and request appropriate relief. *Rolligon Corp.*, 254 NLRB 22 (1981).

Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry. *Perdue Farms*, 323 NLRB 345, 348 (1997) (the information need only be 'reasonably relevant').

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph or by leaving a copy at the principal office or place of business of the person required to be served. See Section 102.113(c) and (e), Rules and Regulations. *Best Western City View Motor Inn*, 327 NLRB 468 (1999) (the attorney's affirmation of service is sufficient, without the postal return receipt card). The date of service is the day that the subpoena is deposited in the mail or with a private delivery service that will provide a record showing the date it was tendered to the delivery service or is delivered in person. See Section 102.112, Rules and Regulations.

1. Petitions to Revoke

Pursuant to Section 102.66(c), Rules and Regulations, parties may seek to revoke

subpoenas either in whole or in part. Petitions to revoke should be in writing and filed within 5 days after the date of service of the subpoena (also called the "5 day rule"). The date of service for the purposes of computing the time for filing a petition to revoke is the date the subpoena is *received*. See Section 102.112, Rules and Regulations. However, there are times when petitions to revoke are submitted orally to the hearing officer or the petition to revoke may not be timely filed. Even if the petition to revoke does not explicitly comply with the Rules and Regulations, the hearing officer should rule on the substance of the petition to revoke.

To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995). This rule applies to both subpoenas ad testificandum and duces tecum.

The hearing officer must rule on petitions to revoke that are filed after the hearing opens. If the petition to revoke is submitted to the Regional Director prior to the opening of the hearing, the Regional Director may rule on the petition or refer it to the hearing officer for ruling. At the commencement of the hearing, the hearing officer may immediately be faced with a petition to revoke and may be asked for a ruling without the benefit of testimony. The hearing officer may defer ruling until later in the proceeding when it becomes more apparent whether the subpoenaed information is necessary.

Some of the most common reasons for revocation of subpoenas are:

(1) relevancy and materiality: the hearing officer must determine if and how the evidence sought will aid in completing the record. The hearing officer should require that the parties discuss the relevancy of the subpoenaed documents. The hearing officer should secure the parties' positions to see if there is room for compromise and an alternate source of information that may be satisfactory.

(2) burdensome and oppressive: a party may assert that accumulating documents is too difficult or the number of documents is too voluminous. However, it may be possible to narrow the request and eliminate the basis for the objection. This should be explored by the hearing officer.

(3) confidentiality: the subpoenaed party may contend that the documents to be produced are confidential because, for example, they contain confidential employee information, such as social security numbers, or because the subpoena seeks proprietary information. Where confidentiality is asserted, the hearing officer may wish to consider the motion to quash only after an in camera inspection. Such an inspection allows the hearing officer to inspect the documents privately, apart from the involved parties, to determine whether the material is relevant, privileged or not producible for other reasons and whether portions of the documents may be redacted to satisfy confidentiality concerns.

(4) failure to tender the appropriate witness fees: if a witness fee was not served with the subpoena, the subpoena is invalid and must be re-served with the

appropriate witness fee.

(5) proprietary information, such as production figures and profit and loss statements: the hearing officer may be faced with a claim that wage-related information is proprietary and confidential and not producible.

In sum, as noted above, if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection. The hearing officer should also look for areas of compromise, e.g., redaction of certain information or narrowing the scope of the subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed.

Whenever the hearing officer rules on a petition to revoke, his/her rulings and the basis therefor should be clear and on the record, i.e., refer to each item in the subpoena and explain the decision to require production in whole or in part. If a hearing officer rules that some portions of the subpoenaed documents are not producible because, for example, they are irrelevant or because they seek confidential information, he/she should grant the petition to revoke with respect to those portions of the subpoena and explain the basis for the ruling. The hearing officer may also choose to reserve ruling on all or part of the petition to revoke the subpoena until after hearing some testimony, in order to determine whether the subpoenaed information is necessary for a determination of the issues. On occasion, continuation of the hearing, even with an outstanding petition to revoke, may resolve the issue because sufficient testimony is secured and the subpoenaing party is satisfied that production of the documents is no longer necessary. Where there continues to be a dispute about the subpoenaed documents, the subpoena, petition to revoke, the parties' positions and the hearing officer's ruling should be placed on a separate subpoena record. See Section 2, Subpoena Record, below.

2. Subpoena Record

When there is an ongoing dispute regarding the production of subpoenaed documents, a separate subpoena record should be established. To make a subpoena record, the hearing officer should inform the court reporter to stop the proceeding and begin a new transcript for the subpoena record. The subpoena record should include:

- (1) a separate copy of the formal papers;
- (2) a copy of the subpoena at issue;
- (3) proof of service; and
- (4) any written petitions to revoke the subpoena. If there are any written rulings on the petition to revoke, those documents should be included in a Board exhibit. On the record, the hearing officer should indicate the purpose of the proceeding, that a subpoena has been properly served and that the subpoenaed party is refusing to comply with the subpoena. All parties should state their respective positions regarding the subpoenaed documents and the hearing officer's ruling should be made on the record.

The purpose of a subpoena record is to have a concise record of the dispute for the Regional Director and the Board.

3. Subpoena Enforcement

Section 102.31(d), Rules and Regulations, requires the Regional Director to institute enforcement proceedings “unless in the judgment of the [Regional Director] the enforcement of such subpoena would be inconsistent with law and with the policies of the Act.” Thus, upon the failure of any person to comply with a subpoena issued and upon the request of the subpoenaing party for enforcement proceedings, the hearing officer should advise Regional management of the enforcement request. After consultation with the hearing officer, the Regional Director will decide whether the subpoenaed documents are necessary for a determination of the issues. If the Regional Director determines that the subpoenaed documents are necessary, then, upon the request of a party, the General Counsel, “shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for enforcement of the subpoena.” The Region should prepare the enforcement papers, but is not a party to the proceeding and does not assume responsibility for prosecution of the enforcement proceedings. See Section 102.31(d), Rules and Regulations. *Best Western City View Motor Inn*, 325 NLRB 1186 (1998).

4. Contempt of Enforced Subpoena

If a district court orders compliance with the subpoena and the subpoenaed party continues to refuse to produce documents or to appear for testimony, then, upon request of the party on whose behalf the subpoena was issued, the Regional Director must institute contempt proceedings in U.S. District Court. However, contempt proceedings need not be instituted by the Regional Director, absent a request by the party on whose behalf the subpoena was issued. The Regional Director is under no obligation to institute contempt proceedings sua sponte and need only do so upon request of the subpoenaing party. *Best Western City View Motor Inn*, 325 NLRB 1186 (1998). Conversely, the party refusing to comply with the subpoena may be precluded from introducing secondary evidence on the matters covered by the dishonored subpoena. In such cases, the hearing officer should permit a brief offer of proof.

5. *Tropicana* Subpoenas

Where an employer has refused to cooperate in obtaining commerce information, the Regional Director should issue a subpoena. *Tropicana Products*, 122 NLRB 121 (1958). In order to establish a proper basis for utilization of the *Tropicana* rule, the Regional Director should subpoena commerce information prior to the hearing whenever the employer has refused to furnish such information or has indicated that it will not voluntarily do so at the hearing. (See sample *Tropicana* subpoena language in Appendix D)

If an employer fails or refuses to comply with a *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the employer is engaged in more than de minimis interstate commerce, rather than seek enforcement of the *Tropicana* subpoena. See Section IV, A, Jurisdiction, for examples of appropriate secondary evidence.

C. Witnesses

1. Oath

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. On recall, a witness need not be sworn again but should be asked to signify that he/she understands that he/she is still under oath.

2. Witness' Refusal to Answer Questions

If a witness refuses to answer a question that the hearing officer deems to be proper, the hearing officer can exercise his/her discretion to strike all testimony previously given by the witness on related matters. However, if a motion to strike a witness' testimony is made for a reason other than a refusal to answer, it should not be granted. Section II, G, 5, Motions to Strike.

If a witness appears under subpoena but refuses to answer questions, it is as if the witness did not appear at all. Accordingly, subpoena enforcement proceedings may be appropriate, where requested by the subpoenaing party. Section II, B, 3, Subpoena Enforcement. Under those circumstances, the district court judge should be notified that the subpoenaing party seeks an order compelling the witness to testify.

One way to avoid subpoena enforcement proceedings is to ask the subpoenaing party to wait until the end of the hearing to evaluate whether the subpoenaed witness remains necessary. The subpoenaing party may find, at the close of the hearing, that there is sufficient record testimony in support of its position and there is no longer a need for the subpoenaed witness to testify. Thus, when faced with a request by a party to institute enforcement proceedings, the hearing officer should recommend to that party to await the completion of testimony and evaluate the need for the subpoenaed witness at that time. Note and advise the parties that a request for subpoena enforcement must be made before the record closes.

3. Failure to Appear

If a subpoenaed witness fails to appear at the hearing and the Regional Director or the hearing officer believes that a decision cannot be made in the absence of that witness' testimony, the Regional Director may consider subpoena enforcement upon the request of the subpoenaing party. However, that process can be lengthy and the Regional Director may decide that, in order to avoid a protracted proceeding, he/she should decide the case without the subpoenaed witness, if at all possible. The hearing officer or the Regional Director may also decide to call other witnesses instead of instituting subpoena enforcement proceedings.

4. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of other witnesses. Sequestration is a matter of right only in C cases, not in R cases. *Hamilton Nursing Home*, 270 NLRB 1357 (1984); *Fall River Savings Bank*, 246 NLRB 831 fn.4 (1979) (R cases hearings are not adversarial). In preelection R cases, sequestration of witnesses is not appropriate because the proceeding is non-adversarial in character and credibility questions are not resolved by the hearing officer. A hearing officer should not grant a motion to sequester witnesses in a preelection hearing. For sequestration in a postelection hearing, see Section IX F 6.

5. Hostile or Adverse Witnesses - Section 611(c) Witnesses

A witness who is either hostile or has interests adverse to the calling party may be asked leading questions and is subject to cross-examination by the party that called the witness. Under FRE 611(c), a witness is considered a hostile or adverse witness when that witness' relationship to the opposing party is such that his or her testimony may be adverse to that party. On rare occasions, FRE 611(c) may arise in a pre or postelection case. A foundation should be laid to establish that the witness falls within the parameters for invoking FRE 611(c). If a dispute arises regarding use of FRE 611(c) examination, seek guidance from Regional Office management.

D. Foreign Language Witnesses

Although non-English speaking witnesses have always appeared in the processing of representation cases, they now appear with greater frequency. Therefore, during the initial investigation of a representation case, the assigned agent should be alert to any potential foreign language issue and should inform the parties to apprise the Regional Office promptly of a need for interpreter services. The hearing officer should also be aware of the potential need for foreign language witnesses and should ensure that appropriate arrangements are made in order to avoid unnecessary expense or delay. In the event foreign language witnesses are required, the Regional Office must secure and pay for certified interpreter services. *Solar International Shipping Agency*, 327 NLRB 369 (1998).

The Agency's limited budget is always a concern in regard to the expenses related to processing representation cases, particularly at hearings. Board agents should take all reasonable steps to reduce costs, including interpreter costs. With respect to interpreter costs, the hearing officer should exclude irrelevant and repetitious material from the record. Also, in those circumstances where it is unclear whether a witness' testimony would be relevant or necessary and the witness would require a translator if called to testify, it may be appropriate for the hearing officer to request that the party which intends to call the non-English speaking witness identify, either through a formal offer of proof or any other method satisfactory to the hearing officer, the nature of the testimony

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to be given by the witness. The hearing officer would then be able to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and assist the hearing officer with his/her decision regarding the need for the witness and an interpreter.

When swearing an interpreter, use the following oath:

Please raise your right hand. Do you solemnly swear that you are fluent in both English and _____ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to _____ (foreign language) and from _ (foreign language) to English when called upon to do so during the hearing, so help you God?

At the hearing, the hearing officer should provide the interpreter with a copy of the Guidelines for Interpreters (See Memorandum OM 06-49) if that has not been done previously. The hearing officer should also be familiar with the Guidelines. When a party objects to a translation, the objection and the basis for the objection should be preserved on the record. Moreover, interpreters should be provided an opportunity to correct themselves after they hear the objection. The hearing officer should also be alert for a translation that clearly does not include the witness's complete answer. When this occurs, the hearing officer should request that the interpreter translate everything that is said by the witness. If it appears that the witness disagrees with a translation, the Hearing Officer has the responsibility to ensure the accuracy of the translation. In addition, due to the complexity of presenting testimony through an interpreter, the hearing officer should not allow complex or compound questions directed to non-English speaking witnesses. Finally, to ensure an accurate record, the hearing officer should make sure that the witness does not answer the question before completion of the translation.

E. Nonlitigable Issues

1. Matters which would constitute unfair labor practices, except for the legality of a clause in a contract urged as a bar, such as a union security clause. No extrinsic evidence should be introduced.
2. Showing of interest: if evidence of fraud is sought to be introduced at the hearing, the party desiring to present such evidence should be advised on the record to bring it administratively to the attention of the Regional Director within 5 working days; hearing should not be interrupted. CHM 11028.3

If there is an allegation of supervisory solicitation of the cards or the Petitioner is alleged to be a supervisor, it may be necessary to litigate supervisory status. With respect to the solicitation of cards, litigation is only necessary if the number of cards solicited by the alleged supervisor is sufficient to affect the adequacy of the showing of interest. The actions or activities of the card solicitor are not litigable at a preelection hearing.

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3. Matters concerning internal union affairs, except in relation to schism, merger or defunctness issues.
4. Compliance with reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 or alleged violations of statutes other than the National Labor Relations Act.
5. The Region's investigation of a petition.
6. Enforcement of a subpoena (as opposed to ruling on the relevancy of materials sought by the subpoena and/or a petition to revoke a subpoena).
7. Evidence sought to be introduced to bar the issuance of a certification concerning a labor organization's discrimination in admission to membership because of race, immigration status, age, sex or national origin.
8. Requests to proceed.
9. Evidence with respect to the appropriateness of any *substantially different bargaining unit sought by a union* if that union has not submitted a petitioner's 30-percent showing of interest in that unit. *General Dynamics Corp.*, 175 NLRB 1035 (1969). Evidence as to a somewhat different unit may be taken.
10. Failure to comply with notice requirements of Section 8(d) of the Act.
11. Employer's objective considerations in RM cases.
12. Voting eligibility of strikers and strike replacements are not generally litigated at a preelection hearing. They are more commonly disposed of through challenged ballot procedures.
13. Mechanics of the election, including date, time, place of the election, or whether the election should be conducted by mail or manually.
14. Immigration status: pursuant to GC Memorandum 02-06, any party raising an employee's immigration status at a representation case hearing, either pre- or post-election, should not be permitted to adduce any evidence on this issue. The Board has held that an employee's immigration status has no impact on that employee's right to vote. *Intersweet, Inc.*, 321 NLRB 1, 17, fn. 68 (1996); *County Window Cleaning*, 328 NLRB 190 (1999) (challenge to a ballot overruled based on immigration status). Accordingly, hearing officers should not permit any testimony on this issue.

Although the issues listed above are not litigable, the hearing officer may permit brief offers of proof on the record, indicating the evidence a party would present. The offer of proof may also be in writing and can be placed in the record as an exhibit. The hearing officer should receive the offer of proof, but state that "the evidence proffered is

rejected.” The matter is then in the record for the reviewing authority to decide if the hearing officer’s ruling was proper.

F. Conduct of Representatives

The Board expects that the parties will conduct themselves in a professional manner at hearings. If a party at a hearing engages in misconduct, the hearing officer should request that the party conduct him or her self in an acceptable manner. If the party persists in misconduct, the hearing officer should remind him or her of the potential consequences, including sanctions, which could result from such behavior.

The Board’s rules provide for two sanctions that can be applied to parties who engage in misconduct at hearings. Those sanctions are exclusion from the hearing and suspension or disbarment from further practice before the Board. The conduct of the party must be of an aggravated nature to justify the latter sanction. In addition to those two sanctions, the Board has sometimes issued a note of censure or condemnation for less serious misconduct. Section 102.177, Rules and Regulations and OM 94–6, OM 97–2 and OM 01–80; *In re: Stuart Bochner*, 322 NLRB 1096 (1997); *In re: Joel I. Keiler*, 316 NLRB 763 (1995).

For the hearing officer, the sanction of exclusion from the hearing is one that may be invoked, due to a party’s misconduct. Misconduct which could cause a hearing officer to invoke this sanction would include violence or threats of violence; subornation of perjury; or using rude, vulgar and/or profane language, if egregious. Before invoking the exclusion sanction, the hearing officer should discuss the matter with Regional Office management, as serious due process concerns are raised in this circumstance.

G. Motions at Hearing

1. Adjournments or postponements

It is the General Counsel’s policy that hearings be conducted on consecutive days, wherever possible. If a party requests a postponement at some point during the hearing, authority to grant such a request rests with the hearing officer. The hearing officer should insist upon an adequate basis for any adjournment request prior to ruling on the request. However, since the parties were advised prior to the hearing that it would continue on consecutive days until completion (CHM Sections 11008, 11009.2(g), 11082.3, and 11143), such a request should rarely be granted and only under the most compelling circumstances. Therefore, when faced with a postponement request, the hearing officer should grant the request only on a showing of exceptional need. The hearing officer should reconcile two important policies—the prompt processing of R cases under the Act (CHM Sections 11000 and 11740) and the need for a complete and concise record (CHM Section 11188.1). Unwarranted delay should be avoided and, when possible, the hearing should proceed on those issues where progress is possible. Adjournments or postponements should be with the provision that the hearing will continue on consecutive

days thereafter until completed. In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

However, if the hearing officer grants an adjournment at his/her discretion, he/she may adjourn to a specific later date or a different place. In so doing, he/she should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption.

The hearing officer should check with the Regional Office prior to granting any postponement, or any adjournment, unless it is routine (e.g., to continue the hearing on another day). If a party is requesting a postponement based on the failure to receive the NOH at least 5 working days prior to the hearing, the hearing officer should check with the Regional Office prior to ruling on the motion. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002).

If during the hearing the hearing officer concludes that a question concerning representation does not exist, he/she should recess the hearing and present the facts to the Regional Director.

2. Consent/stipulated election agreement

When a consent/stipulated election agreement is entered into after the hearing commences, the hearing officer should adjourn indefinitely. Approval of the agreement by the Regional Director constitutes withdrawal of the notice of hearing.

3. Amendment or filing of petition

(a) Motion to amend petition.

A petitioner may amend its unit at any time before the close of the hearing in the form of an alternative request. The petition will not be dismissed in the absence of prejudice to any party and if there is an adequate showing of interest in the new unit. Obtain the parties' positions concerning the amendment and, if possible, obtain consent to the motion. If a party is opposed, obtain the reasons for its opposition. In ruling on a motion to amend and whether an adjournment is appropriate, consider the following:

- (1) Completeness of record and timing of the amendment request.
- (2) Adequacy of notice and opportunity to prepare for hearing, including the availability of necessary witnesses and/or evidence.
- (3) Adequacy of showing of interest. All discussions of adequacy of showing of interest must take place off the record. If the Petitioner does not have an adequate showing in the amended unit, so advise the Petitioner off the record.

If the amendment sought is substantial, e.g., a material enlargement or a change in the scope of the unit, exercise the greatest care to see that the granting of the amendment and proceeding with the hearing will cause no prejudice to any interested persons or organizations. If an amendment to the petition and an adjournment request are granted,

the adjournment should be to a specific date with the provision that the hearing will continue on consecutive days thereafter until completed.

(b) Filing of petition at hearing.

The hearing officer may accept a petition at the hearing for overlapping units if he/she believes it should be heard simultaneously with the pending petition. Should the hearing officer accept the petition, he/she should:

- (1) Adjourn for a short time.
- (2) Communicate with the Regional Office and inform it of the new filing.
- (3) Get a new docket number.
- (4) Advise the Regional Office of the parties' positions on consolidation and continuance.

On resumption of the hearing, the hearing officer should, if the Regional Director has decided on consolidation:

- (1) Introduce the new petition into the record.
- (2) State on the record the Regional Director's rulings, introducing the amended notice of hearing and order of consolidation, when possible, but when not, reserving exhibit numbers for later introduction of these documents.
- (3) Order a continuance when necessary.

4. Withdrawal or dismissal of petition

(a) Motion to withdraw before hearing.

- (1) Do not open hearing.
- (2) Reduce request to writing.
- (3) Contact Regional Director for approval.

(b) Motion to withdraw during hearing.

- (1) Require that motion be made on record or in writing and introduce in evidence.
- (2) Continue hearing indefinitely.
- (3) Contact Regional Director for approval.

(c) Motions to withdraw during adjournment of hearing.

- (1) Get approval of Regional Director.
- (2) Hearing need not be reopened.

(d) Motion to dismiss made at hearing: all such motions must be referred on the record to the Regional Director or the Board for ruling at such time as the record is considered by them. See Section 102.65(a), Rules and Regulations.

5. Motions to Strike

A party may submit a motion to strike testimony during a hearing. Section 611(a) of the Rules of Evidence provides authority for striking direct-examination testimony where the witness was nonresponsive on cross-examination. Motions to strike also may be based on incompetent testimony or answers to questions that are opinions rather than facts. In a preelection hearing, except under the limited circumstances described in Section II, C, 2, Witness' Failure to Answer Questions, the hearing officer should deny a motion to strike and advise the objecting party that the Regional Director and the Board will give the testimony the appropriate weight.

H. Appeals From Rulings

A request for special permission to appeal to the Regional Director or the Board a ruling by the hearing officer on motions, objections and orders should be made promptly and in writing. A copy must be served on the Regional Director and the other parties. Section 102.65(c), Rules and Regulations. The other parties should be given an opportunity to respond to the special appeal.

The request should set forth the ruling, the reasons special permission should be granted and the grounds relied on for the appeal, including the prejudice that resulted from the ruling.

The hearing officer should recess the hearing long enough for the preparation of the request. The hearing officer is not required to recess the hearing immediately; the special appeal may be prepared at an appropriate breaktime. After the request has been prepared and submitted, the hearing should be resumed, even though the Regional Director or the Board has not passed on the request. Once all evidence is received (other than the issues raised by the special appeal), the hearing should be closed whether or not the Regional Director or the Board has ruled on the special appeal. After ruling on the special appeal, the Regional Director or the Board will take further action as is appropriate.

III. EVIDENTIARY MATTERS

Representation case hearings are investigatory proceedings. Although it is not required that the rules of evidence and trial procedure be strictly followed, they serve as a guide for helping the hearing officer make a sound record. See Section 102.66(a), Rules and Regulations. The most common objections to evidence are based upon relevance, materiality and hearsay. These issues and other evidentiary matters are discussed below.

A. Objections: Considerations in Ruling on Common Objections

Hearing officers are frequently faced with objections to oral testimony, a line of questioning, types of questions (e.g., leading questions, beyond the scope of direct examination, hearsay, etc.) and documentary evidence. When an objection is raised, the hearing officer should ask the basis for the objection. The other parties' positions should be solicited and the hearing officer should render a clear ruling on the record (either overruled or sustained) together with a brief statement of the basis for the ruling. The hearing officer should permit the party adversely affected by the ruling to make an offer of proof, if requested (see Section 9, Offers of Proof). Any documentary evidence which is ruled inadmissible may be placed in a rejected exhibit file.

1. Foundation

Before a witness testifies on a subject, the record should reflect the basis for his or her knowledge. The basis of the witness' knowledge goes to the competency of that witness to testify about a particular subject. The competency of the witness to testify goes to the weight given that testimony, not to its admissibility. For example, if a witness testifies about the job duties of employees in a specific classification, the record should clearly establish how the witness obtained the information. Does the witness supervise these employees? Is the witness employed in the job classification being discussed? Is the witness at the facility on a regular basis? When, where, what time and who was present are the types of preliminary fact questions which should be asked to establish the witness' ability and competency to testify. Foundation questions also may help determine if the testimony is going to be relevant. If a witness does not have personal knowledge of facts that are in issue, the hearing officer should ask the party presenting that witness whether a more competent witness is available to testify. Thus, hearing officers, while listening to the testimony, should interrupt where it is not probative. In extreme cases, where a party insists on further questioning of an incompetent witness, the hearing officer should ask for an offer of proof. See Section B, 8, Offers of Proof.

2. Relevancy

Evidence is relevant if it has a tendency to make more or less probable a fact of importance to the issue under consideration. FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration, it should be admitted; if not, it

should be excluded. Relevancy is a factor not only to oral testimony, but also documentary evidence.

Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to an exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues for hearing. If the hearing officer determines that the documents are not relevant and should be excluded, the offering party may request that they be placed in the rejected exhibits file. Section III, C, Rejected Exhibits. If voluminous documents are offered, the hearing officer should require the offering party to provide a full description and to designate with specificity the portions being relied on. Before ruling on admissibility, the hearing officer should request parties to analyze, preferably on the record, any documents offered; often, thereafter, there is no need to admit the documents. Additionally, the hearing officer should request that the parties submit a summary in lieu of voluminous documents. Section III, B, 6, Summaries.

3. Materiality

Materiality is related to relevance but is not identical. Materiality relates to the degree of importance of the evidence. If the evidence is relevant but of miniscule importance, it may be excluded.

4. Hearsay (FRE 801–807)

Hearsay is a statement (oral or written or nonverbal conduct) other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. This usually arises in the context of a witness testifying about what someone else told him (e.g., “Joe told me he never works in the warehouse”). If the testimony were being offered to prove the truth of what is asserted—that Joe never works in the warehouse—this would be hearsay. The witness has no direct knowledge of the fact and the declarant, Joe, a non-party, is not on the stand to be cross-examined about the matter. Similarly, a document may be excluded from evidence as hearsay if it is intended by the person as an assertion of truth of the matter asserted in the document.

The following are *not* hearsay:

- (1) Prior inconsistent statements of the witness made under oath and now being cross-examined;
- (2) Consistent prior statements offered to rebut assertions that the statement has been fabricated;
- (3) Statements which identify a person;
- (4) Admissions of a party or its agents (if made during and relating to the agent's employment) and admissions adopted by a party. For example:

“My supervisor told me that Joe never works in the warehouse.” This is an admission by an agent of a party and is not hearsay. Such testimony can be received to prove the truth of the matter asserted.

EVIDENTIARY MATTERS

Most common exceptions to the hearsay rule that the hearing officer will encounter during a hearing are:

(1) Commercial publications. FRE 803(17). For instance, Dun and Bradstreet reports and newspapers.

(2) Public records. FRE 803 (8). For instance, Secretary of State documents, certificates of incorporation and court records. See Section III, B, 10, Official/Judicial Notice.

(3) Business records and other records regularly kept (must present testimony by custodian or other qualified witness and establish that such records are regularly kept in the ordinary course of business and relate thereto). FRE 803 (6)

Note on Hearsay Evidence: Although there are many technical considerations about hearsay, it is important to remember that it may be received into evidence at an R case hearing, in the discretion of the hearing officer. However, hearsay will probably be accorded lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). The hearing officer should encourage parties to produce other witnesses or evidence that will be more probative of the point.

5. Leading Questions

A leading question is one in which the questioner suggests an answer to the witness by his question and merely receives agreement. In effect, the examiner is doing the testifying. If the proponent of a witness is asking leading questions in significant areas, the witness' responses will be of little assistance. If the hearing officer finds that the questioner is asking such questions as "do charge nurses direct the work of CNAs," make sure that on objection or on your own initiative, the questioner is cautioned not to use leading questions. If the record reflects answers to leading questions, it is likely that the testimony will lack specificity and the hearing officer must obtain specific examples on the record when a witness has answered such leading questions.

In most preelection circumstances, leading questions are acceptable in preliminary areas (e.g., "You are an employee of the Jones Co.?"'). However, try to avoid leading questions during direct examination in critical areas (e.g., "Isn't it correct that you have the authority to hire and fire?"). The value of the evidence is enhanced if the testimony provided is not an answer to a leading question. Leading questions on direct examination are permissible to refresh recollection of a witness who may have forgotten something (e.g., "Do you recall anything being said about a truck accident?"). During cross-examination, leading questions are permissible.

6. Common Objections

Here are some common objections raised in preelection hearings and some suggested responses by the hearing officer:

Objection to hearsay testimony:

- (a) Objection overruled. The testimony is not hearsay.
- (b) Objection overruled. The testimony falls within a hearsay exception (delineate the exception).
- (c) Objection overruled. This is not an adversarial proceeding where credibility is in issue and the reader of the record will accord whatever weight is appropriate to the testimony received.

Objection to documentary evidence as irrelevant:

- (a) Objection overruled. The document is relevant and the reader of the record will accord it whatever weight is appropriate.
- (b) Objection sustained. The document is irrelevant and may be placed in the rejected exhibit file.

Objections to leading questions or questions beyond scope of direct:

- (a) Objection overruled. The question is a preliminary or introductory question and thus a leading question is appropriate.
- (b) Objection sustained. Counsel is excessively leading the witness and it appears that counsel, not the witness, is testifying.
- (c) Objection overruled. This is not an adversarial proceeding and although the question goes beyond the scope of direct, I will allow the question in the interest of establishing a full and complete record.

B. Evidence Issues

1. Best Evidence

Where the contents of a document are in issue, the document is the best evidence available and should be produced. The hearing officer may allow oral testimony about the contents of the document, but should demand the document be produced and question the witness about the document. A copy of the original document is sufficient if there is no dispute about its authenticity or accuracy (i.e., a copy of a signed collective-bargaining agreement is sufficient). If a document is not available, secondary evidence should be admitted in lieu thereof.

2. Authentication (FRE 901 and 902)

If there is a question regarding the authenticity of a document, evidence should be obtained to verify that fact. The burden of proof for authenticating a document is slight. The person offering the document has that burden and usually establishes authenticity through a witness who can relate its origin (e.g., showing the letter to the witness, having

him/her identify it, establishing the basis for his/her knowledge about the letter). It is common practice to use a copy of the original when there is no dispute about the document's authenticity. This includes allowing the withdrawal of an original document so that a copy may be substituted in the record.

FRE 902 sets forth the type of documents which are self-authenticating. These include, but are not limited to, certified copies of domestic public documents and records, official publications, newspapers and periodicals.

3. Parole Evidence

Parole evidence is oral testimony of a witness offered to contradict or modify the terms of a written agreement. For instance, when the terms of a contract have been embodied in writing, like a collective bargaining agreement, evidence of contemporaneous or prior oral agreements is not admissible for the purpose of varying or contradicting the written contract. However, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining the correct interpretation of the agreement. *Don Lee Distributors*, 322 NLRB 470, 484–485 (1996).

4. Scope of Cross-examination Exceeds Direct Examination

Generally, in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. This has no application in R case hearings. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination.

5. Cumulative Testimony

Hearing officers should avoid permitting repetitious testimony on the record. If the hearing officer is satisfied that the record will not be enhanced by redundant evidence, it should be excluded. If the hearing officer finds that a party is eliciting testimony that is unduly repetitious, the hearing officer should ask for an offer of proof regarding the testimony. In such a case, the hearing officer may seek a stipulation that further witnesses would testify similarly. See Section III, B, 8, Offers of Proof. However, in a case involving close issues of fact, evidence that is corroborative and pertains to the issue in dispute is not repetitious testimony and should not be excluded. For example, where charge nurses' Section 2(11) status is in issue, testimony from various charge nurses regarding the scope of their duties would not be repetitious and should be admitted if each nurse works in a different area of the facility or on different shifts.

6. Summaries

Voluminous documents are frequently reduced to summary form for better understanding. On request, the opposing party is given the opportunity to examine the

underlying documentation on which the summary is based. FRE 1006. The examination may have to be done at periods of time outside normal hearing hours. The summary is typically received into evidence with the understanding that an objection will be entertained after examination of the underlying documents. In rare cases involving claims of privilege and when the parties agree to do so, the hearing officer may conduct an in camera inspection of the documents to confirm that the summary accurately reflects the underlying documents. If an in camera inspection is performed, the results should be noted on the record.

7. Opinion Evidence

Opinion evidence proffered by witnesses is usually admissible. Opinion testimony commonly deals with such matters as time, distance, speed, etc. These are subjects that an observant person is competent to render an opinion about.

8. Offers of Proof

An offer of proof is generally a statement made by counsel or a representative setting forth the testimony of a witness if the party called that witness to testify. An offer of proof may be made when the hearing officer has ruled that a party may not examine a witness or offer exhibits on a topic to which an objection has been sustained. The party adversely affected by that ruling may ask permission of the hearing officer to make an offer of proof to show the content of the excluded evidence. This enables the reviewer of the record to determine whether it was appropriate to exclude the evidence. Normally, the offer is made in narrative form by counsel, stating what the witness would testify to if permitted to answer a particular line of questioning. A question and answer offer of proof should generally not be allowed. On occasion, a party may wish to submit a written statement as an offer of proof. The written statement should be made part of the record as an exhibit.

No cross-examination follows the offer of proof. If the hearing officer determines, based on the proffer, that the testimony should be allowed, the hearing officer can reverse his/her earlier ruling on the objection and allow the party to elicit testimony in the area previously rejected by the hearing officer. However, if the hearing officer believes, based on the proffer, that his/her earlier ruling was correct, i.e., that the testimony was properly excluded to begin with, the hearing officer can receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

9. Proactive Use of Proffers

Offers of proof can be an effective tool for controlling and streamlining a hearing. Regional Office practices vary on the use of offers of proof and the circumstances under which their use is appropriate. When a hearing officer elicits offers of proof, he/she will have a better idea of the evidence to be presented and can exclude potentially redundant or unhelpful testimony.

10. Judicial Notice/Official Notice

Judicial notice allows a court to shortcut the taking of testimony regarding matters that are common knowledge (e.g., Washington, D.C. is the capital of the U. S.). Official notice allows an agency to recognize its own proceedings and decisions (e.g., relevant jurisdictional facts in another Board transcript). Matters arising in a prior case may or may not be dispositive of the current issue. For example, where the Board has asserted jurisdiction previously and a party asserts that the facts have changed, additional evidence may be required. The hearing officer may take official notice at the request of a party or on his/her own motion.

On occasion, a hearing officer will be asked to take either judicial or official notice of other agency's proceedings or a decision from another Regional Office. For instance, a party may seek to introduce State unemployment compensation proceedings, which the party contends may have an impact upon an employee's eligibility (i.e., an independent contractor finding by a State's agency). The Board admits into evidence and considers decisions in State unemployment compensation proceedings, but does not give the decisions controlling weight. *Cardiovascular Consultants of Nevada*, 323 NLRB 67, fn.2 (1997). If a party wishes to have official or judicial notice taken of any particular document, that party must produce a copy of the document.

11. Voir Dire Examination

When a party offers an exhibit, the other parties may question the witness at that time concerning the exhibit. For example: Attorney A: "Mr./Ms. hearing officer, I offer into evidence this letter which is marked for identification as Employer's Exhibit 6 and which the witness has just identified." Hearing Officer: "Mr./Ms. B, any objection?" Attorney B: "May I voir dire the witness about the letter first?" Hearing Officer: "You may."

This interruption in the offering party's examination is permitted in order to clear up any questions the opposing party has about the authenticity of the exhibit. Voir dire questioning about an exhibit should be limited to the admissibility of the exhibit. Voir dire examination should be limited to a few basic questions about the document being offered:

- who prepared the document?
- was the witness present when it was prepared/signed?
- is the document kept in the normal course of business?
- where is it kept?
- if the document is a summary, is the summary based on documents that are kept in the normal course of business and what is the summary based on?

Voir dire examination may also be used to question the competency or qualifications of the witness. See Section A, 1, Foundation. The questioner should not be allowed to question the witness in other areas until his/her normal turn to examine

arises. Thus, voir dire questioning should not turn into cross-examination of a witness and the hearing officer should intervene in those circumstances.

C. Rejected Exhibits

If the hearing officer decides not to accept exhibits because they are not relevant or because they are cumulative, the offering party may request that they be placed in the rejected exhibit file. This should be permitted, as it will preserve the documents upon review to the Board. This may come up in the context of an offer of proof when exhibits accompany testimony or statements of the party.

D. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of any other witnesses. In preelection R cases, sequestration of witnesses is not appropriate because the proceeding is non-adversarial in character and credibility questions are not resolved by the hearing officer. It is, however, a decision within the discretion of the hearing officer. Compare Section IX, F, 6, Sequestration of Witnesses, concerning sequestration in postelection hearings.

E. Appeals of the Hearing Officer's Evidentiary Rulings

Parties may appeal the hearing officer's rulings by seeking permission to file a special appeal to any adverse rulings. Section II, H, Appeals From Rulings.

IV. SUBSTANTIVE ISSUES

A. Jurisdiction

The Board's statutory jurisdiction extends to all conduct that may constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. (For examples of constitutional problems, see the discussion of Religious Schools in Section 13 and Indian Reservations in Section 14 below). In the exercise of administrative discretion, the Board has adopted standards for the assertion of jurisdiction based on the volume and the character of business done by the employer. When drafting stipulations on jurisdiction, the hearing officer should refer to the standards listed below and use the sample stipulation language provided.

1. Definition of "Retail" and "Nonretail"

For purposes of applying the jurisdictional standards, retail sales are considered as including sales to a purchaser who desires to satisfy his/her own personal wants or those of his/her family or friends. Nonretail sales constitute sales of goods or merchandise to trading establishments of all kinds, to institutions, to industrial, commercial and professional users and to government bodies. *Bussey-Williams Tire Co.*, 122 NLRB 1146 (1959).

2. Nonretail Standard

\$50,000 outflow or inflow, direct or indirect.

Direct outflow refers to goods shipped or services furnished by the employer outside the State.

Indirect outflow refers to sales of goods or services to users meeting any Board standard except indirect inflow or outflow.

Direct inflow refers to goods or services furnished directly to the employer from outside the State in which the employer is located.

Indirect inflow refers to the purchase of goods or services which originated outside the employer's State, but which it purchased from a seller within the State who received such goods or services directly from outside the State. Direct and indirect outflow or direct and indirect inflow may be combined; however, outflow and inflow may not be combined. *Siemons Mailing Service*, 122 NLRB 81 (1958).

3. Retail Standard

\$500,000 annual gross volume of business (include evidence of statutory jurisdiction; see below for discussion of statutory jurisdiction). *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

4. Statutory Jurisdiction

In all cases involving gross volume standards, some proof of statutory jurisdiction must be made. *Longshoremen ILWU Local 13 (Catalina Island Sightseeing)*, 124 NLRB 813 (1959). Thus, there must be evidence that the employer's activity in interstate commerce exceeds the de minimis level. *Somerset Manor Inc.*, 170 NLRB 1647 (1968) (\$1800 more than de minimis); *W. Carter Maxwell*, 241 NLRB 264 (1979) (\$6000 more than de minimis).

5. Enterprises Engaged in Both Retail and Nonretail Operations

In cases involving enterprises engaged in both retail and nonretail operations which constitute a single-integrated business, the Board will assert jurisdiction if the employer's operations meet either its retail or nonretail standards. *Man Products*, 128 NLRB 546 (1960).

6. Period Used for Computation

(a) Generally, any preceding yearly period proximate to the filing of the representation petition will be utilized in the computation. *Jos. McSweeney & Sons, Inc.*, 119 NLRB 1399 (1958).

(b) In asserting jurisdiction over employers operating for less than 1 year, the Board will project the period involved to obtain an annual figure. *Marston Corp.*, 120 NLRB 76 (1958) (4-1/2 months); *Plumbers Local 106 (Columbia-Southern Chemical)*, 110 NLRB 206 (1954) (2 months); *American Television*, 111 NLRB 164 (1955) (1 week).

7. Employer's Refusal to Give Commerce Facts

The Board will assert jurisdiction in any case in which the employer has refused, upon reasonable request by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional standards where the record, developed at a hearing duly noticed, scheduled and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the employer's operations satisfy the Board's discretionary jurisdictional standards. *Tropicana Products*, 122 NLRB 121 (1958). In order to establish a proper basis for utilization of the *Tropicana* rule, commerce information should be subpoenaed for the hearing whenever the employer has refused to furnish such information or has indicated that it will not voluntarily do so at the hearing. (See sample *Tropicana* subpoena language in Appendix D). If the employer refuses to comply with the *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the Employer is engaged in more than de minimis interstate commerce. Such secondary evidence may include evidence from employees regarding the employer's operations (e.g., shipping and receiving information, utility bills) Dun and Bradstreet reports and information secured from the employer's website.

8. Capital Expenditures

The Board will not assert jurisdiction over an employer’s business on the basis of its nonrecurring capital expenditures alone. *Magic Mountain, Inc.*, 123 NLRB 1170 (1959).

9. Labor Organization

When a labor organization is acting as an employer vis-à-vis its own employees, the same jurisdictional standards are applied to the labor organization as to any other employer. *Oregon Teamsters’ Security Plan Office*, 119 NLRB 207 (1957).

10. Multiemployer Associations

All members of multiemployer associations who participate in or are bound by multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes. *Siemons Mailing Service*, supra.

11. Contracts with Governmental Entities

In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board announced that henceforth it would “only consider whether the employer meets the definition of ‘employer’ under Section 2(2) of the Act . . .” in deciding whether the Board will exercise jurisdiction over private sector employers who work under contracts with federal, state, or local governments. This policy reversed the Board’s prior practice of examining the relationship between the employer and the government entity to determine whether “the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.” *National Transportation Service*, 240 NLRB 565 (1979); *Res-Care, Inc.*, 280 NLRB 670 (1986). In announcing the test in *Management Training*, the Board reversed *Res-Care*, a policy which had itself overruled the “intimate connection” test of *Rural Protection Co.*, 216 NLRB 584 (1975).

12. Sample Commerce Stipulations

Businesses Requiring Gross Volume Standard and Statutory Standard:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer in the conduct of its operations derived gross annual revenues in excess of (insert standard).¹ During the same period, the employer purchased and received (or

¹ Amusement and Gaming—\$500,000
 Art museums, cultural centers & libraries—\$1,000,000
 Blood bank—\$250,000
 Building and Construction industry—retail or nonretail standards
 Businesses in DC—plenary standard
 Cemeteries—\$500,000
 Colleges, universities, private schools—\$1,000,000

sold

and shipped) goods, supplies and materials in excess of (insert standard) directly from (or to) points located outside the State of ____.

Direct outflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods valued in excess of \$50,000 directly to points located outside the State of ____.

Direct outflow—goods—projected:

The employer is engaged in (describe business operations). Based on a projection of its operations since about (date) , at which time the employer commenced its operations, the employer will annually sell and ship from its (indicate location) facility goods valued in excess of \$50,000 directly to points located outside the State of ____.

Indirect outflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods and materials valued in excess of \$50,000 to (name enterprise/s) located within the State of ____ . (Name enterprise/s) is/are engaged in (describe business operation) and (describe which

- Communications—\$100,000
- Cooperatives and condos—\$500,000
- Credit Union—retail or nonretail standard
- Day care centers—\$250,000
- Head Start—\$250,000
- Homemaker services—\$100,000
- Hospitals—\$250,000
- Hotel and Motels—\$500,000
- Instrumentalities Links, and Channels of Interstate Commerce—\$50,000
- Law firms and legal services—\$250,000
- National Defense—substantial impact
- Newspapers—\$200,000
- Nursing Homes—\$100,000
- Office buildings—\$100,000 of which \$25,000 from other entity engaged in commerce
- Private Clubs—\$500,000
- Private nonprofit educational institutions—\$1,000,000
- Private not for profit galleries—\$1,000,000
- Professional sports—no monetary standard necessary
- Public Utilities—\$250,000
- Radio and TV—\$100,000
- Residential Apartment Housing—\$500,000
- Retail—\$500,000
- Social service organizations—\$250,000, unless Board found lower standard
- Symphonies—\$1,000,000
- Taxicabs—\$500,000
- Territories—statutory
- Transit System—\$250,000
- Visiting nurse services—\$100,000

SUBSTANTIVE ISSUES

standard, other than an indirect standard, this/these enterprise/s meet/s).

Direct and indirect outflow—goods—combine:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer sold and shipped from its (indicate location) facility goods and materials valued in excess of \$____ directly to points located outside the State of ____ and directly to (name enterprise/s) located within the State of _____. (Name enterprise/s) is/are engaged in (describe business operation) and (describe which standard, other than an indirect standard, this/these enterprise/s meet/s).

Direct outflow—services:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer performed services valued in excess of \$50,000 in States other than the State of _____.

Direct inflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of \$50,000 directly from points located outside the State of _____.

Direct inflow—goods—projected:

The employer is engaged in (describe business operations). Based on a projection of its operations since about (date) , at which time the employer commenced its operations, the employer will annually purchase and receive at its (indicate location) facility goods and materials valued in excess of \$50,000 directly from sources located outside the State of _____.

Indirect inflow—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of \$50,000 from other enterprises, including (identify other enterprises), located within the State of _____, each of which other enterprises had received those goods directly from points located outside the State of _____.

Direct and indirect inflow combined—goods:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased and received at its (indicate location) facility goods valued in excess of \$____ directly from sources located outside the State of ____ and goods valued in excess of \$____ from other enterprises, including (identify other enterprises), located within the State of _____, each of which other enterprises had received those goods directly from points located outside the State of _____.

Direct inflow – services:

The employer is engaged in (describe business operations). During the year preceding the filing of the petition, a representative period, the employer purchased services valued in excess of \$50,000 which were furnished to the employer at its (indicate location) facility directly from points outside the State of _____.

13. Enterprises Regarding Which Board Jurisdiction is an Issue

(a) Religious Schools

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court found that the Board did not have jurisdiction over church-operated schools. The Board has interpreted *Catholic Bishop* to apply to the religious purpose of the school as the basis for exclusion of jurisdiction. Thus, the Board asserted jurisdiction in *University of Great Falls*, 331 NLRB 1663 (2000) on the basis that the school did not have a significant religious character. However, the DC Circuit denied enforcement; *University of Great Falls v. NLRB*, 278 F.3d 1335 (DC Cir. 2002). See also *St. Edmunds Elementary School*, 337 NLRB No. 189 (2002). Research the most recent Board cases on this issue prior to proceeding to hearing.

(b) Indian Reservations

The Board has held that Indian tribes and their self-directed enterprises located on tribal reservations are implicitly exempt as government entities within the meaning of the Act. *Fort Apache Timber Co.*, 226 NLRB 503 (1976). However, the Board has distinguished that and other cases and asserted jurisdiction where the tribal enterprise is located off the reservation. *Sac & Fox Industries*, 307 NLRB 241 (1992).

(c) Railway Labor Act Issues

Under Section 2(2) of the Act, the Board does not have jurisdiction over employers subject to the Railway Labor Act (RLA). The RLA covers common carriers such as railroads and airlines engaged in interstate or foreign commerce. When there is an arguable issue in a representation case as to whether the employer is a person subject to the Railway Labor Act, a hearing is held at the Regional Office level and the record is transmitted to the Executive Secretary. The Board may submit the record of the hearing to the National Mediation Board for a determination of this question. In *Federal Express Corp.*, 317 NLRB 1155 (1995), 323 NLRB 871 (1997), the Board referred the jurisdictional issue to the NMB and deferred to the NMB's determination that it had jurisdiction. To the contrary, the Board asserted jurisdiction in *United Parcel Service*, 318 NLRB 778 (1995), without referring the issue to the NMB, due to the primarily ground nature of the delivery service, as opposed to delivery by air. Relevant information needed to resolve this issue includes the following (see Memorandum OM 90-83):

a. Company Provides Transportation by Rail or Air

1. Is it a "Common Carrier"?

(a) Are the company's services "held out" to the public?

(1) Do they advertise, even if only to a small specialized

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market?

(2) Do they provide transportation for hire?

(3) Does the company provide railroad or airline work for only one customer? If not, enumerate the customers.

(b) Does the company have one or more established places of business? If so, where?

2. If the company is a "Common Carrier," is it also engaged in interstate or foreign commerce?

(a) Air Carriers

(1) Do they cross state lines or U.S. national borders in the course of providing either cargo or passenger service?

(2) Do they have interline or freight forwarding agreements with airlines? If so, with which airlines?

(3) Do they carry air cargo?

(4) Do they carry the U.S. mail?

(5) Do they have a contract to provide services for the U.S. Government?

(6) Do they have any substitute service agreements and, if so, with which airlines?

(7) Are they certified by the FAA? If so, what type of certificate do they hold and can it be submitted into evidence?

(b) Rail Carriers

(1) Are they a rail "carrier" pursuant to the National Surface Transportation Board jurisdiction (i.e., do they provide freight or passenger service by rail)?

(2) Does the company interact with other railroads, e.g., through the exchange of freight or passengers, or have rights of way over another railroad's routes.

(3) Are its tracks used by other railroads?

(4) Does it provide freight service?

(5) Does the company make contributions to the Railroad Retirement Fund?

b. The Company is Not a Common Carrier by Air or Rail Engaged in Interstate or Foreign Commerce, but is:

1. Directly or indirectly owned or controlled by or under common control with a rail or air carrier engaged in interstate or foreign commerce.

(a) Ownership by an Air or Rail Carrier

(1) Is the subject company directly owned by an airline or railroad?

(2) Is the company indirectly owned by an airline or railroad?

(b) Factors Indicating Direct Control

(1) The airline or railroad for which the subject company

performs services has the authority to:

- (a) Hire or fire employees.
- (b) Impose or effectively recommend discipline, discharge or screening of new hires.
- (c) Set wages and benefits.
- (d) Make assignments or transfers of personnel.
- (e) Directly supervise the employees' work.
- (f) Set staffing levels.

(c) Factors Indicating Indirect Control

- (1) Employees are trained by airline or railroad or follow airline or railroad's training procedures.
- (2) Employees are subject to the same hiring profile as a carrier.
- (3) Employees wear the airline or railroad carrier's uniforms.
- (4) Airline or railroad provides equipment or space to company.
- (5) Percentage of company's work which is for airline(s) or railroad(s).
- (6) Employees are held to same performance standards as similarly situated individuals at carrier.

2. Where the company is controlled by a common carrier and the company also performs services traditionally performed in connection with air or rail transportation, such as those listed below, address the issues set forth above in Section (b)1.

Airline Industry (this listing excludes the obvious jobs of pilot, mechanic, flight attendant, ramp service agent, customer service agent, office clerical employee).

- (a) Fuelers and refuelers.
- (b) Aircraft cleaners, ramp workers.
- (c) Skycaps, baggage runners, wheelchair attendants.
- (d) Security guards, security screeners.
- (e) Maintenance crew for airline ground equipment.
- (f) Bus drivers (transport of airline employees or passengers, usually on airport grounds).
- (g) Airline caterers.
- (h) Individuals responsible for pickup or delivery of air freight.

Railroad Industry (again this listing excludes the obvious categories such as locomotive engineers, firemen, carmen, clerks, conductors, trainmen, laborers, maintenance of way employees, signalmen, yardmasters).

- (a) Employees responsible for repair or maintenance of railcars.
- (b) Truckers, unless NSTB certified as a "motor carrier."
- (c) Intermodal loaders and unloaders.

B. Single Employer, Joint Employer, Alter Ego

1. Single Employer

The distinction between single and joint employer is often blurred. A “single employer” will be found to exist in circumstances when two nominally separate entities are in actuality a single-integrated enterprise. There are four principal factors examined by the Board in determining whether the various entities constitute a single-integrated enterprise. These factors deal with the extent to which there is:

- (a) Functional interrelation of operations.
- (b) Centralized control of labor relations.
- (c) Common management.
- (d) Common ownership or financial control.

Radio Union v. Broadcast Service of Mobile, 380 U.S. 255 (1965).

A finding that ostensibly separate entities constitute a single employer is not dispositive of the issue of whether employees of the various entities constitute a single appropriate unit for purposes of collective bargaining. The scope of such unit is determined primarily on the basis of community of interest among the various groups of employees involved including such factors as:

- (a) Bargaining history and the extent to which any exists.
- (b) A functional integration of operations.
- (c) Differences in the types of work and skills of employees.
- (d) A centralization of management and supervision, particularly as to labor relations and control of day-to-day operations.
- (e) Contact and interchange among the employees involved.

South Prairie Construction Co., 231 NLRB 76 (1977); *Edenwald Construction Co.*, 294 NLRB 297 (1989), and cases cited therein.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–500.

2. Joint Employer

In order to establish the existence of “joint employers,” it is not necessary to demonstrate that the various entities form a single-integrated enterprise. Rather, as described by the Third Circuit in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (1982), a finding that companies are “joint employers” assumes in the first instance that companies are what they appear to be—independent legal entities that have merely chosen to jointly share or codetermine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). See also *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000).

In “joint employer” situations, the scope of the unit will be determined based on a community of interest analysis. Consent of the employers is no longer required to combine in a single unit employees jointly employed with employees singly employed. *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000) (reversing *Lee Hospital*, 300 NLRB 947 (1990)). If the petitioner seeks to represent a bargaining unit consisting of one employer only, the Board does not require a petitioner to name the joint employers or to litigate the existence of a joint employer relationship. *Professional Facilities Management, Inc.*, 332 NLRB 345 (2000); *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001). If this issue is raised, see Section III, H, Contingent Employees.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–600.

If a party to the proceeding asserts that the employer is a joint employer with an exempt entity, see Section IV, A, Jurisdiction.

3. Alter Ego

Two enterprises will be found to be alter egos where they “have substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership.” *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric*, 268 NLRB 1001, 1002 (1984). It is also relevant to consider “whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.” *Fugazy Continental Corp.*, 265 NLRB 1301 (1982). Although alter ego issues often arise in an unfair labor practice context, the Board is not precluded from making such a determination in connection with the resolution of a representational issue. *Elec-Comm, Inc.*, 298 NLRB 705, 706 fn.2 (1990); *All County Electric Co.*, 332 NLRB 863 (2000).

Note: Although the questions below have been separated for single and joint employer, a party may take the position at the hearing that the employers are either single or joint employers. In those situations, the hearing officer must make sure that both sets of questions are covered.

See *An Outline of Law and Procedure in Representation Cases*, Section 14–700.

Single employer/alter ego

Relevant Questions:

1. Common ownership/management

- (a) Are the various entities separately incorporated or chartered?
- (b) Identify for each entity its respective officers, directors and stockholders, including the degree of ownership interest and any familial relationships.
- (c) Describe the managerial and supervisory hierarchy of each of the entities, the degree to which there is overlapping responsibility and authority among such individuals and any familial relationships.

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(d) Describe the extent to which the owners, officers, directors, stockholders, managers and supervisors play an active role in the operation of the entities.

2. Functional Interrelation of Operations

(a) What were the circumstances surrounding the formation of the various entities, including their purpose.

(b) What is the nature of the business of each of the entities? Are there any similarities or identical business purposes?

(c) Are the operations of each business functionally interrelated or integrated with one another?

(d) Are there any common customers?

(e) Do any of the entities have customers other than those asserted to be related entities?

(f) Are the various entities held out to the public as or operate in a manner that the public would perceive them to be one and the same entity? For example, do employees of the entity wear any uniforms or other identifying insignia of the other or drive vehicles or use equipment which bear the other's identity?

(g) What are the business locations of the various ostensibly separate entities? Do they share any of the following:

- (1) Business location
- (2) Office staff and services
- (3) Telephone/fax/computers
- (4) Accounting/bookkeeping services
 - (a) bank accounts
 - (b) insurance
- (5) Legal services
- (6) Advertising, including internet websites
- (7) Sales force
- (8) Supplies and equipment
- (9) Supervision
- (10) Maintenance and janitorial services

(h) What is the nature and frequency of interchange and/or transfer of employees between entities?

(i) What is the nature and frequency of interchange and/or transfer of supervision between entities?

(j) What is the nature and extent of work contact among employees of the various entities? Are there any shared locker and other facilities; common training and instruction?

(k) What is the frequency of any exchange or borrowing of equipment? Is the related entity the primary or sole supplier of such equipment to the other entity? Are there other sources available for it to use?

(l) Compare the following among the various entities—similarities/differences in:

- (1) Wages
- (2) Overtime compensation
- (3) Holidays
- (4) Vacations

- (5) Pensions
- (6) Health, welfare and other insurance plans
- (7) Hours of employment
- (8) Work rules
- (9) Layoff/recall policies

3. Labor Relations

- (a) Who is involved in the formulation and effectuation of labor relations matters for the various entities? Is there any overlap of responsibility?
- (b) Is there a common labor relations policy? What is such policy and how is it disseminated to employees of the various entities? Is there a common handbook or other material setting forth employer policies?
- (c) Who is involved in the negotiation of any labor agreements and the discussion and resolution of any grievances arising under such agreements?
- (d) Is there any sharing among the various entities of responsibility for determining matters governing essential terms and conditions of employment?
- (e) What is the extent to which agents or principals of one entity control or meaningfully affect matters relating to the employment relationship in another entity in such areas as the hiring, firing, discipline, supervision and direction of employees.
- (f) Is there any prior bargaining history among any of the various entities?

4. Financial Control

- (a) How are financial arrangements maintained by the various entities? Are there separate or common:
 - (1) insurance policies
 - (2) bank accounts
 - (3) payroll
 - (4) tax statements
 - (5) Social Security filings and records
 - (6) withholding tax filings and records
 - (7) workmen's compensation filings and records
 - (8) unemployment compensation filings and records
- (b) Have there been any loans extended from one entity to another? At a fair market rate of interest? Was one entity started as a result of capital provided by another? Any repayment or time table for such? Any security for the loan? Were loan agreements signed?
- (c) Does one entity charge and obtain payment for any goods/services provided by it for another? Are the costs and terms the same as those extended to "arm's length" customers/competitors?
- (d) Is credit extended for such goods/services provided and at the same terms and under the same arrangements as those established with "arm's length" customers/competitors?
- (e) What is the amount of purchases and/or sales between the various entities? Is there an actual exchange of moneys or is it merely a paper transaction?
- (f) Who owns the various real property and equipment? Is rent paid by one entity

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to another? At fair market rates?

(g) Are there any written/oral lease arrangements? What are the terms and conditions of such?

(h) Do any of the entities or their owners, officers, directors or stockholders serve as guarantors of loans/credit extended to any of the other entities by a third party source?

(i) How are each of the entities' bookkeeping, auditing, accounting, and other business records maintained and handled?

Joint Employer

Relevant Questions:

1. Describe the business of each entity.
2. Describe the relationship of the entities to each other.
3. What are the job duties and functions performed by the employees of the various entities?
4. Compare similarities. Are duties functionally interrelated?
5. Compare the following among the various entities - similarities/differences in:
 - (a) Wage rates
 - (b) Fringe benefits—both in types and amounts
 - (1) Working conditions
 - (2) Work rules
 - (c) Location of their work
 - (d) Supervision
 - (e) Schedule of hours
 - (f) Frequency and degree of contact
 - (g) Criteria for hiring
6. How are these terms and conditions of employment determined or controlled? Explore whether the two entities share responsibility for decisions concerning employees' wages, hours and other essential terms and conditions of employment, including decisions relative to:
 - (a) Hiring
 - (b) Firing
 - (c) Discipline
 - (d) Work schedules (including time off)
 - (e) Job duties and requirements
 - (f) Work rules

C. Successor Employer

In *NLRB v. Burns International Security Services*, 406 U. S. 272, 80 LRRM 2225 (1972), the Supreme Court resolved two major issues. First, it fixed the fundamental criteria for establishing if a new employer has an obligation to bargain with the representative of its predecessor's employees and second, it established that a successor's obligation to bargain does not bind it involuntarily to its predecessor's collective-bargaining agreement. These principles have certain applications in representation cases. For a discussion of contract bar rules as they relate to the assumption of a contract by a successor employer,

See *An Outline Of Law And Procedure In Representation Cases*, Section 9-224.

Relevant Questions:

1. The full and correct name of the predecessor employer and the alleged successor employer.
2. When did the alleged successor assume control of and begin operations? Dates of such? Was there a hiatus between the dates on which the predecessor ceased operations and the alleged successor resumed operations?
3. What were the circumstances under which former employees of the predecessor were offered employment by the alleged successor?
4. The type of business operations engaged in by the predecessor as well as by the alleged successor. Explore the similarities/dissimilarities between the two entities in terms of:
 - (a) Products produced
 - (b) Services performed
 - (c) Customers
 - (d) Equipment and machinery
 - (e) Business location(s)
 - (f) Classifications of employees
5. Are a majority of the alleged successor's employees in the involved bargaining unit former unit employees of the predecessor? Describe the bargaining unit.
6. Did the alleged successor take over only a portion of the predecessor's business, facilities and work force? If so, do the employees of that portion of the predecessor's operations constitute a separate appropriate unit?
7. Do the terms of the agreement of sale involve a sale of assets or of stock? Enter into the record a copy of any written sales agreement and take testimony as to its terms, including:
 - (a) The dates when the agreement was negotiated and signed

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- (b) The effective date of transfer of ownership
 - (c) The disposition of inventory, equipment and machinery, real property, customer orders and contacts, bills receivable and established goodwill
8. After the sale, did the predecessor entity continue to exist and be actively involved in the ongoing operations of the alleged successor enterprise? Did the predecessor terminate its legal existence or otherwise cease to have any relationship to the ongoing operations of the alleged successor?
9. Does the sales agreement refer to the existence of a collective-bargaining agreement and any rights or obligations on the part of the alleged successor either to reject or adopt same?
10. Did the alleged successor extend voluntary recognition to the union? If so, what were the circumstances, including whether, and to what extent, the alleged successor employed any of the predecessor's employees at that time.
11. Did the alleged successor by word and/or action expressly adopt the predecessor's collective-bargaining agreement or adhere to its terms, including paying contractual wages and benefits, making benefit fund contributions and/or deducting union dues? Specifics.
12. Did the alleged successor expressly refuse to adopt the predecessor's collective-bargaining agreement? If so, describe the refusal.
13. Did the successor maintain "substantial continuity of the employing industry"? Establish this by questions as to whether and to what extent:
- (a) The business continues in the same form
 - (b) The successor operates out of the same location(s) as the predecessor
 - (c) The same or substantially the same work force is employed by the alleged successor
 - (d) The same jobs exist under the same working conditions
 - (e) The same management and supervision have been retained
 - (f) The same machinery, equipment and methods of production are used
 - (g) The same products are manufactured or the same services are offered
14. Describe changes instituted by the alleged successor in such matters as:
- (a) Employees' working conditions
 - (b) Wages and benefits
 - (c) Working rules and employee policies
 - (d) Other terms and conditions of employment
15. Did the alleged successor merge or combine the operations of the predecessor employer with other preexisting operations? If so, were the employees involved in such preexisting operations already represented by a labor organization other than that which previously represented employees of the predecessor?
16. How many employees were there in each group or unit prior to such merger or

combination?

17. Following such merger or combination, have the predecessor's former employees retained or lost their identity as a separate appropriate unit for purposes of collective bargaining? Explore whether and to what extent the two groups of employees have been integrated with one another in terms of:

- (a) Job duties and responsibilities
- (b) Supervision
- (c) Interaction and contact
- (d) Interchange
- (e) Common working conditions and facilities
- (f) Similarities in benefits and applicable policies and work rules

D. Status as a Labor Organization

Section 2(5) of the National Labor Relations Act states:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

See *An Outline Of Law And Procedure In Representation Cases*, Section 6-110.

The employee group need not have a formal structure, constitution, bylaws, charter, written agreement, officers nor need it collect dues or fees to be a labor organization. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Steiner-Liff Textile Products Co.*, 259 NLRB 1064 (1982). For additional information on what constitutes a labor organization, see *Electromation, Inc.*, 309 NLRB 990 (1992) and *E.I. du Pont & Co.*, 311 NLRB 893 (1993). See also GC Memorandum 93-4, Guideline Memorandum Concerning *Electromation, Inc.*

Relevant questions for standard labor organization issues:

1. Name of representative and official position with organization
2. Full and correct name of organization
3. Affiliation, if any.
4. Do employees participate in the organization, e.g, do they attend meetings or vote in internal union elections? In what manner and to what extent?
5. Does the organization exist, at least in part, for the purpose of dealing with employers concerning "conditions of work" or concerning other statutory subjects such as

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grievances, labor disputes, wages, rates of pay or hours of employment. Ask the witness to give specific examples of such activity.

Relevant questions for specialized labor organization situations:

1. If a guard unit is involved, ask if the union admits to membership or is affiliated directly or indirectly with organizations which admit to membership employees other than guards (for this to be an issue, the employees other than the guards must be statutory employees). *Children's Hospital of Michigan*, 299 NLRB 430 (1990). See Section VI, C, Guards and Watchmen.

2. If an issue is raised that participation of supervisors in the union disqualifies the union from being certified, ask:

(a) whether a supervisor(s) employed by the employer is in a position of authority within the labor organization and, if so, identify that person's role in the affairs of the labor organization.

(b) in the instance of a supervisory nurse employed by a third-party employer and holding a position of authority, whether there is some demonstrated connection between the employer of the unit employees concerned and the employer or employers of those supervisors which might affect the bargaining agent's ability to single-mindedly represent the unit employees. *Sidney Farber Cancer Institute*, 247 NLRB 1 (1980); *Sierra Vista Hospital*, 241 NLRB 631 (1979).

(c) if supervisors are officers of the petitioning labor organization, what steps, if any, has that organization taken to insulate its bargaining activities from supervisory influence. *Highland Hospital*, 288 NLRB 750, 752 (1988).

E. History of Collective Bargaining

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective bargaining which is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Red Coats, Inc.*, 328 NLRB 205 (1999). The rationale for this policy is based on the statutory objective of stability in industrial relations. If any party contends that an existing contract constitutes a bar, develop facts as outlined in Section F, Bars to Conduct of Election.

See *An Outline of Law and Procedure in Representation Cases*, Sections 12–220 through 12–229.

Relevant Questions:

1. How long has there been a collective bargaining relationship?

2. Introduce in evidence existing collective-bargaining contracts or prior contracts if they affect the issues.

3. If no copies of the contracts are available, obtain testimony and documents that show the following:

- (a) Type of agreement: oral, written, signed or unsigned.
- (b) Correct names of parties to the contract.
- (c) Execution date, effective date, terms, termination date.
- (d) Provisions for automatic renewal, opening, termination.
- (e) Terms of recognition provisions.
- (f) Terms of any union-security provisions.
- (g) Describe unit covered and give classifications of employees covered by unit.
- (h) Description of contract's substantial terms and conditions.
- (i) Differences between classifications of employees covered by the contract and those affected by petition.
- (j) If contract contains express provision for ratification, details of when ratification was obtained and employer was notified.

4. Has notice to terminate or modify been given pursuant to Section 8(d) of the Act? If so, when; by whom to: employer, labor organization, FMCS and relevant state agency; in what manner?

5. Was there a prior unit determination through voluntary recognition or election agreement?

6. Was this unit subject to any prior Board determination (official notice may be taken)?

- (a) Citation
- (b) Nature of proceeding
- (c) Disposition by the Board
- (d) If parties object to introduction of any evidence from prior record, witnesses should be called. If witness testified in prior proceeding, that record may be used to refresh their memories or for purposes of impeachment.

7. Has the bargaining history been conducted on a basis that is contrary to established Board unit policy, which may cause the history to be disregarded?

- (a) Members only contracts
- (b) Bargaining history based upon sex
- (c) Bargaining history based upon race
- (d) Inclusion of employees by agreement, despite lack of community of interest

8. Is there any history of collective bargaining in similar units at other facilities of this employer or in the same industry? If so, get all details of the composition of the bargaining units in comparable facilities. (Note - this factor is not controlling in unit determinations but will be considered.)

F. Contract Bar

The major objective of the Board's contract bar doctrine is to achieve a reasonable balance between the frequently conflicting claims of industrial stability and freedom of employee choice. This doctrine is intended to afford the contracting parties

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and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The burden of proving that a contract is a bar is on the party asserting the doctrine. There are many facets to the Board's contract bar doctrine. In order to constitute a bar, a contract must be written, signed by all parties, cover substantial terms, cover the petitioned-for unit, be of definite duration and not exceed 3 years. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

See *An Outline of Law and Procedure in Representation Cases*, Sections 9–100 through 9–1000.

Relevant Questions:

General contract bar principles:

1. Introduce into evidence contract asserted as bar.
2. Have parties state their contentions regarding why the contract is or is not a bar.
3. Timeliness of petition or rival claim.
 - (a) Date contract was executed by both parties.
 - (b) Date and manner in which notice to terminate or modify was given pursuant to Section 8(d) of the Act.
 - (c) Termination date.
 - (d) Effective date.
 - (e) Was the contract executed at a time when there was a rival claim, i.e., when another union was claiming representative status or organizing? Explain and give facts.
 - (f) Was the contract executed when an incumbent union continued to claim representative status?
 - (g) Was the contract executed at a time when a nonincumbent union had refrained from filing a petition in reliance on the employer's conduct indicating that recognition had been granted or that a contract would be obtained without an election? *Greenpoint Sleep Products*, 128 NLRB 548 (1960).
 - (h) If the contract was executed on the same date that the petition was filed, had the employer or the incumbent union been informed at the time of execution that a petition had been filed?
 - (i) If it is contended that the contract does not represent the parties' actual agreement because of subsequent changes in its provisions, were the changes substantial and material or were they merely refinements of contractual language?
 - (j) Agreement or evidence indicating that automatic renewal has been forestalled.
 - (k) If a party contends that the contract has not been enforced, obtain evidence as to how it has been administered. Obtain evidence that contract has been administered. Obtain examples (e.g., dues deducted, pension and health insurance remittances, wage increases, sick and annual leave granted in accordance with the

contract).

4. Adequacy of contract.

- (a) Is the contract written and signed or initialed by all parties?
- (b) Does the contract contain substantial terms and conditions of employment? Specify.
- (c) Does the contract contain an express provision requiring ratification? Has ratification been obtained? Date and manner.
- (d) Was the employer notified that the contract had been ratified? Date and manner. Introduce copies of any written notification of ratification.

5. Duration of contract.

- (a) Does the contract have a fixed term? What is the term of the contract? Is the current contract an extension of the prior contract?
- (b) Did the contract get extended? If so, when? Was a new contract signed prior to the expiration of the prior contract? If so, when? What were the effective dates of the prior contract? Introduce copies of all pertinent contracts. If there is a premature extension of an earlier contract, inquire into the effective dates of both contracts so that the appropriate open period can be calculated.

6. Union security and checkoff provisions.

- (a) Introduce the contract provisions in question.
- (b) Extrinsic evidence as to the legality of the clause should not be received.

Special Situations:

1. Merger, Schism or Defunctness—change in contractual representative, internal union conflicts or when a labor organization ceases to function.

- (a) If these issues are raised in a contract bar context, obtain evidence as set forth in Merger or Affiliation (Section H), Schism in Labor Organization, (Section I), or Defunctness of Labor Organization, (Section J), *infra*.

2. Expanding Units

A contract does not bar an election if executed before any employees have been hired or prior to a substantial increase in personnel. When the question of a substantial increase in personnel is in issue, a contract will bar an election only if at least 30-percent of the complement employed at the time of the hearing had been employed at the time the contract was executed and at least 50-percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. *General Extrusion, Inc.*, 121 NLRB 1165 (1958).

See An Outline of Law and Procedure in Representation Cases, Section 9–212.

- (a) Was the contract executed before any employees had been hired?
- (b) What percentage of the present work force was employed at the time the contract was executed?
- (c) What percentage of the present job classifications existed at the time the

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contract was executed? Even if the job classifications were not formally defined until some later time, were the work or job functions of such classifications in existence and being performed by unit employees at the time of the hearing?

(d) Ascertain the date upon which the parties agreed to apply the contract (i.e., retroactively, prospectively or upon execution).

3. Plant Shutdown, Merger, Relocation

A change in the nature of the unit can affect whether the contract continues to be a bar. Examples of such a change include plant shutdown, merger and relocation. In *General Extrusion Company, Inc.*, 121 NLRB 1165 (1958), the Board set forth the standard to be applied in each of these situations. With respect to a plant shutdown for an indefinite period of time, where employees have no reasonable expectation of reemployment, a contract does not serve as a bar. *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989). With respect to a merger of operations, the contract does not continue to be a bar if the merger results in a new operation with major personnel changes. *Kroger Co.*, 155 NLRB 546, 548–49 (1965). With respect to a full relocation (i.e., where an employer relocates the entire bargaining unit to a new facility), the contract continues to be a bar if the operations at the new facility are substantially the same as those at the old facility and if transferees from the old facility constitute at least 40-percent of the new facility's employee complement. *Rock Bottom Stores*, 312 NLRB 400, 402 (1993).

See *An Outline of Law and Procedure in Representation Cases*, Sections 9–221 through 9–223.

- (a) Describe the locations of all operations and their geographic proximity.
- (b) Describe in detail the old operations.
- (c) Describe in detail the new operations.
- (d) Is the operation an entirely new one or a continuation of one or more of the old operations without substantial integration?
- (e) What was the number of employees at the old operation?
- (f) What is the number of employees at the new operation?
- (g) Does the business transaction involve one employer or two or more employers? If so, describe the entities and the transactions involved, including any agreements related to the transaction.
- (h) Was a new plant constructed or did one operation simply move to the location of the other? Was there a hiatus in operations?
- (i) Is the same operation being resumed in the same or a new location?
- (j) If there was a shutdown, how long was it?
- (k) At the time of the closing, was a date fixed for reopening? When did the business reopen?
- (l) What percentage or number of prior employees was recalled or transferred at the time of reopening?
- (m) What percentage or how many of the present work force are new employees?
- (n) Have the character of jobs and the functions of employees changed in the new operation?
- (o) Details of changes in personnel that accompanied the change? (Obtain personnel facts before and after the change which will throw light on whether it is

“an entirely new operation with major personnel changes.”)

(p) Is one or more of the incumbent unions seeking to represent the employees at the new operations?

(q) Were employees at the old operations represented and covered by a collective-bargaining agreement? Obtain contracts.

(r) If there is a purchaser, has it bound itself to assume the existing contract? Is the assumption expressed in writing? At the time of the assumption of the contract, did the employer employ at least 30-percent of those employed on the date of the hearing?

(s) Are there unrepresented employees? How many unrepresented employees are there in relation to the represented employees?

(t) Has the existing contract been amended to reflect the change in operations?

(u) Have management and supervisory personnel remained the same?

(v) On what date was the transfer process substantially completed?

(w) Where there is a merger of different groups of employees based a on change in the employer's operations, ask community of interest questions in Section V, A, Community of Interest.

4. Construction Industry

Section 8(f) of the Act provides that, in the construction industry, it is not unlawful for an employer to enter into an agreement covering construction employees, even though the union has not established majority status. An 8(f) agreement is not a bar to a petition. *John Deklewa & Sons*, 282 NLRB 1375 (1987). In the construction industry, a contract will constitute a bar if the union has achieved 9(a) status by contract language (*Central Illinois Construction*, 335 NLRB 717 (2001)) or by voluntary recognition (*Reichenbach Ceiling & Partition Co.*, 337 NLRB No 17 (2001)). The burden of proving the existence of a 9(a) relationship rests with the party asserting it. *John Deklewa & Sons*, supra, fn. 41.

See An Outline of Law and Procedure in Representation Cases, Section 9–1000.

(a) Describe the employer's operations.

(b) Is the employer engaged primarily in the building and construction industry?

(c) Place the contract in the record. Obtain parties' positions re: 8(f) or 9(a) contract status.

(d) Are the employees who are covered by the agreement engaged in the building and construction industry?

(e) If a party asserts 9(a) status:

(1) Has the union been certified by the Board as the representative of the unit employees?

(2) Did the union request recognition as the majority or Section 9(a) representative of the unit employees? Specifics.

(3) Did the employer voluntarily recognize the union? On what basis? Specifics.

(4) Was the employer's recognition based on the union's having shown or offered to show evidence of its majority support?

G. Recognition Bar²

When an employer has lawfully recognized a union, the parties are accorded an opportunity to bargain and a petition is barred for a “reasonable period of time” following the recognition. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Despite the existence of active and simultaneous organizing campaigns, an employer’s voluntary recognition of a union bars the processing of a subsequent petition unless the petitioner demonstrates that it had a 30-percent showing of interest at the time of recognition. *Smith’s Food & Drug*, 320 NLRB 844 (1996). The determination of whether the 30-percent showing existed at the time of recognition is an administrative matter not subject to litigation. *Smith’s Food & Drug*, supra, at 847, fn.5. If this determination was not made prior to the hearing, the hearing officer should conduct an administrative investigation of the showing of interest by inspecting in camera the number of cards secured and their dates. The hearing officer should state on the record his/her findings in the administrative investigation, i.e., whether the union has an adequate showing of interest.

In the construction industry, voluntary recognition as a 9(a) representative must be based on a contemporaneous showing of majority support or an employer’s acknowledgement of such majority support. Any challenge to the validity of a grant of 9(a) recognition based upon lack of majority status must be made within 6 months after the grant of recognition. *Reichenbach Ceiling*, 337 NLRB No. 17 (2001); *Casale Industries*, 311 NLRB 951 (1993).

See *An Outline of Law and Procedure in Representation Cases*, Section 10–500.

Relevant Questions:

Recognition:

1. When was recognition extended? If there is a written agreement, secure a copy. If more than 6 months have passed since the grant of recognition, no litigation should be permitted regarding the validity of the recognition.
2. On what basis was recognition extended?
3. Was the recognition based on a majority showing? Conduct an administrative investigation of the showing of interest, inspect in camera the number secured and the dates of the signed cards. If this has not been handled prior to the hearing, the hearing officer should state on the record his/her findings in the administrative investigation.
4. Did the employer extend recognition at a time when another union was organizing?

² In *MV Transportation*, 337 NLRB No. 129 (2002), the Board overruled *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), and determined that there is no longer a successor bar when a successor employer is obligated to or recognizes the union that previously represented the unit employees.

Has the rival union secured a showing of interest from employees in the petitioned-for unit? If so, conduct an administrative investigation of the showing of interest, inspect in camera the number of cards secured and their dates. If this determination was not made prior to the hearing, the hearing officer should state on the record his/her findings in the administrative investigation.

Reasonable Period of Time:

1. Are parties bargaining for an initial contract?
2. Who asked to bargain and when did they ask to bargain? Include telephonic and written correspondence between the parties relating to the request to bargain and the proposals of the parties.
3. When did the bargaining between the employer and the recognized union commence?
4. How many bargaining sessions have there been? Dates of the sessions? How long the bargaining sessions lasted?
5. Topics covered during bargaining—include proposals by the parties, counter proposals, agreements reached on issues and what issues remain.
6. What are the parties' positions as to whether impasse has been reached? If a claim of impasse is made, what is the basis for that claim?

H Merger or Affiliation

In considering the validity of a merger or affiliation between two unions or a union's affiliation with another labor organization, the Board considers whether the bargaining unit members were accorded due process and whether there has been a fundamental change in the identity of the selected representative which disrupted the continuity of representation. Where a merger or affiliation fails to satisfy the Board's due process requirements, a question concerning representation exists. The key inquiry in determining whether unit members were afforded due process is whether the members received adequate notice and opportunity to discuss the merger or affiliation, question the proposed course of action and vote on the matter by secret ballot. *Mike Basil Chevrolet, Inc.*, 331 NLRB 1044 (2000). In determining the issue of continuity of representation, the Board looks to the totality of the circumstances to determine whether there is a change in the identity of the representative as a result of the merger or affiliation. *Western Commercial Transport*, 288 NLRB 214 (1988).

See *An Outline of Law and Procedure in Representation Cases*, Sections 7–240 and 11–100.

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Relevant Questions:

1. What entities were merged or affiliated? Size of units and locations of units merged or affiliated.
2. What changes resulted from the merger or affiliation? Were there changes in structure? Identity? Number of representatives? In the manner of unit member participation in the day to day issues arising at the workplace? Changes in stewards and/or officers or local officials? Bargaining representatives? Shop committees or negotiating committee members? Contract ratification procedures? Strike votes? Constitution? By-laws? Initiation fees? Dues? What changes were made in the unit employees' ability to have input regarding labor relations matters in their unit?
3. Were unit members given notice of the merger or affiliation? How? When? In what manner?
4. Was a meeting conducted? When? Where? How was notice of the meeting provided to the unit members?
5. How many unit members attended the meeting?
6. Were unit members given an opportunity to discuss the merger or affiliation at the meeting?
7. Was a vote conducted? In what manner? What was the outcome?
8. What additional changes were made as a result of the merger or affiliation?

I. Schism in Labor Organization

In *Hershey Chocolate Corp.*, 121 NLRB 901 (1958), the Board held that three conditions must be present in order to find that a schism exists:

1. There must be a basic intraunion conflict affecting the contracting representative, i.e., a conflict over policy at the highest level of an international union, whether it is affiliated with a federation or within a federation, which results in a disruption of existing intraunion relationships.
2. The employees in the unit seek to change their representatives for reasons related to the basic intraunion conflict and have had an opportunity to exercise their judgment on the merits of the controversy at an open meeting, called with due notice to the members in the unit for the purpose of taking disaffiliation action for reasons related to the basic intraunion conflict.
3. The action of the employees in the unit seeking to change their representatives took place within a reasonable time after the occurrence of the basic intraunion conflict.

See *An Outline of Law and Procedure in Representation Cases*, Sections 9–410 through 9–413.

Relevant Questions:

1. What is the nature of the basic intraunion conflict causing schism? When did the conflict begin?
2. Did the conflict include policy at the highest level of the union? Or is it merely the result of disaffection among members of a local with action taken by an international? *Georgia Kaolin Co.*, 287 NLRB 485 (1987).
3. Was disaffiliation action taken at a meeting? Was it for reasons related to the policy conflict?
4. If a special meeting, who called the meeting?
5. Method of notification to members? Usual method?
6. Was notice given to all members? Was purpose of meeting made clear?
7. Location, time, and date of meeting? If not usual place or time, why?
8. Who presided? Number present? Number usually present?
9. Nature of vote and results.
10. Was disaffiliation action by local or overall group? Details.
11. Was the local union an amalgamated local or was it limited to the employer's employees?
12. Has the local union been suspended or expelled? Details.
13. If an amalgamated local, does the local group have autonomy?
14. Is the current action related to a suspension by the international? Details.
15. Has the contracting union continued in existence? Held meetings, collected dues, negotiated contracts, incurred obligations, paid per capita tax to the international, dispensed funds, handled grievances?
16. Does the employer still recognize the incumbent union?
17. Is the alleged schism coextensive with the bargaining unit?

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18. Was the international notified of the intent and subsequent action to disaffiliate?
19. Did the disaffiliating union seek a charter from another international union? When, who, how handled?
20. Copies of minutes of meetings, contracts, disaffiliation resolution and pertinent correspondence.
21. How has the schism affected dealings with the employer in representing employees?
22. Who is the certified bargaining representative: the local, the international, or both?

J. Defunctness of Labor Organization

In *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958), the Board stated that a representative is deemed defunct if it “is unable or unwilling to represent the employees,” but made it clear that “mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees.”

See An Outline of Law and Procedure in Representation Cases, Section 9–420.

Relevant Questions:

1. Identify the allegedly defunct union.
2. Is the current contract in existence? If so, obtain copy.
3. Identify the union that is party to the contract: the local, the international or both? Is any other union a party to the contract?
4. Is the contract being enforced? In what manner? By whom? Concerning union-security requirements?
5. Details of any notice to terminate the contract and reply.
6. Has the employer unilaterally changed working conditions, wages, hours or benefits? Details. Extent of changes.
7. Are employees paying dues? Checkoff? If not, when did payments stop? If so, number paying?
8. Are grievances being processed? By whom? Manner? Describe.
9. Have employees withdrawn membership? Details.

10. Is the incumbent union unable or unwilling to represent the employees? Reason? Is this condition temporary or permanent? Since what date? Facts.
11. Have employees formed or become members of another union? Details.
12. If so, what action was taken regarding employees' withdrawal from the incumbent union and becoming members of the new organization?

K. Accretions to Existing Units

An accretion is an attempt to add a classification to the unit or exclude a classification from the unit in the absence of an election. The issue is normally raised in a unit clarification petition (UC). The issue can arise (1) where there is a newly created classification or (2) where an existing classification has undergone recent substantial changes in duties and responsibilities so as to create a doubt as to whether those individuals continue to fall within the category—included or excluded—that they occupied in the past. *Union Electric*, 217 NLRB 666 (1975). Where a new classification performs the same basic functions historically performed by the bargaining unit, a community of interest analysis may not be required.

The hearing officer must obtain evidence regarding the type of work performed by the employees involved as compared to the work performed by the unit. *Premcor, Inc.* 333 NLRB 1365 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001).

See *An Outline of Law and Procedure in Representation Cases*, Sections 11–200, 11–220 and 12–500.

Where the issues involve a new facility/operations, merged operations or a transfer of employees from one facility to another, see the questions set forth in Section F, 9.

Relevant Questions:

1. What is the name of the classification in issue? What are the skills, duties and responsibilities of employee(s) in that classification? What are the skills, duties and responsibilities of other unit employees?
2. What is the nature of the employer's business? Why was this classification created and how does this classification fit into the employer's organizational structure?
3. When was the classification created and how many employees are in the classification? When was the classification staffed?
4. What are the number and types of other classifications? How many employees are employed in these classifications?

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5. Who represents employees in the employer's other job classifications? Get the details of the history of bargaining. Introduce contracts.
6. Have there been any contract negotiations between the employer and the union at this facility since creation of this classification? If yes, when was the bargaining? Was there any discussion of this classification during the negotiations? What was the result of those negotiations?
7. Who hired the disputed employees? Under what circumstances?
8. If employees were transferred into this classification from existing classifications, how and why was this done? How have their duties changed?

Except in situations governed by *Premcor* (involving a newly created position performing the same basic functions historically performed by the bargaining unit), it is necessary to conduct a community of interest inquiry. See Section V, A, Community of Interest.

HEARING OFFICER'S GUIDE

V. UNIT ISSUES

The hearing officer must keep in mind the distinction between issues involving *unit scope* and those involving *unit composition*. The *scope* of the unit pertains to issues such as whether the unit should be limited to one facility rather than multi-facility or employer-wide or to one employer as distinguished from multiemployer. The *composition* of the unit relates to matters such as the inclusion or exclusion of disputed individuals or disputed employee classifications or categories or to unit placement in general. Issues relating to the scope of the unit are discussed below in Section B, while issues relating to the composition of the unit are discussed in Section C.

Note that unit scope and composition issues do not usually arise in decertification proceedings, where the unit for election purposes is the recognized or contractual unit. *Campbell Soup Co.*, 111 NLRB 234 (1955). For additional discussion of this principle, see *An Outline of Law and Procedure in Representation Cases*, Section 7–320.

Absent a relevant bargaining history, it is *essential* to examine scope and composition matters in the context of the unit in which a union seeks to be represented. Thus, there is nothing in the Act that requires the unit for bargaining be the *only*, *ultimate*, or *most* appropriate unit; rather, the Act requires only that it be *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). If the unit sought by the petitioner is an appropriate unit, an alternative appropriate unit will not be imposed. *Dezcon*, 295 NLRB 109 (1989). If the petitioned-for unit is *not* appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *An Outline of Law and Procedure in Representation Cases*, Section 12–100 et seq.

A. *Community of Interest*

In considering both unit scope and unit composition issues, the major determinant revolves around a community of interest inquiry. In general, employees with common interests may appropriately be included in a single unit. Parties seldom litigate the unit placement or inclusion of employees whose community of interest is identical to that of other unit employees. Rather, the issue usually arises in one of two situations: (1) when a party contends that an employee or group of employees possesses a community of interest so close with that of other employees that the disputed employee(s) must be included in the unit; or (2) when a party contends that an employee or group of employees possesses a community of interest so disparate from that of other employees that the disputed employees cannot be included in a single unit. The same community of interest factors are examined in making these distinct inquiries. A petitioning union's desire as to the unit is relevant but it cannot be a dispositive consideration. (Section 9(c)(5) of the Act). Thus, a petitioned-for unit *including* a particular classification may be found to be *an* appropriate unit, while a petitioned-for unit *excluding* that same classification may also be found to be *an* appropriate unit. *Overnite Transportation*, 322 NLRB 723 (1996) (petitioned-for units of drivers and mechanics are found appropriate in

some cases, while petitioned-for units of drivers excluding mechanics are found appropriate in other cases, notwithstanding similar facts).

Many considerations enter into an examination of community of interest. In general, all of the incidents of the employment relationship are relevant to a community of interest inquiry.

1. Stipulations on Unit Issues

Stipulations entered into by the parties and made a part of the record which are aimed at excluding certain groups or categories of employees should be supported by a statement of sufficient facts in order to justify their approval by the Regional Director.

2. Presumptively Appropriate Units

Unit presumptions apply only where the presumptively appropriate unit is that which is petitioned-for; if a petitioner seeks a different unit, the presumptions have no application. *Capital Coors Co.*, 309 NLRB 322 (1992); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986). When the unit sought is presumptively appropriate, the burden is on the party opposing that unit to show that the unit is inappropriate. *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999). Conversely, when the unit sought is *not* presumptively appropriate, the burden is on the petitioner to present at least some evidence establishing the appropriateness of the unit, even where the employer takes no position as to the unit. *Allen Health Care Services*, 332 NLRB 1308 (2000).

Presumptively appropriate units are those specifically authorized in Section 9(b) of the Act, including:

- (a) an overall (wall-to-wall) unit of all of the employer's employees, excluding only statutory and policy exclusions;
- (b) a unit of all professional employees employed by the employer (or, conversely, a unit of all non-professional employees of the employer);
- (c) a unit of all guards employed by the employer; and,
- (d) a single facility or plant where an employer operates multiple facilities or plants.

Community of Interest Questions

The following are general community of interest questions a hearing officer should ask when unit issues arise. This section is referenced in many other sections of the manual where the manual instructs the hearing officer to ask community of interest questions.

1. Describe the employer's organizational and administrative framework, including its departmental or divisional groupings and how they interact or interconnect with each other. Explore such evidence with a view of establishing whether there is a functional integration of the employer's operation revolving around the goal of producing its

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products or providing services. If possible, obtain for the record the employer's organizational chart.

2. Describe the physical layout of the employer's operations, including distances between facilities. For example, if the employer's maintenance employees work in a separate building, how and to what extent does this factor affect their contact and interchange with separately housed production employees?

3. Describe the employer's management and supervisory hierarchy, including whether and to what extent and at what level(s) there is any common supervision over the groups of employees involved in the proposed bargaining unit.

4. How many employees are employed at the facility? Which classifications do the parties seek to include and how many are in each classification? Which classifications do the parties seek to exclude and how many employees are in each excluded classification? If possible, secure the number of employees in each classification at the facility.

5. If any category of employees was excluded, would this result in employees being deprived of the opportunity for representation because they would not constitute a separate appropriate unit?

6. If any category of employees was excluded, ask the parties their positions as to the unit in which the excluded employees could obtain representation. Advise the parties to take a position about this issue, either at the hearing or in their briefs.

7. Compare the wages, hours and other terms and conditions of employment of any categories of employees whose unit placement is in dispute with those of the other categories of employees in the proposed bargaining unit, including in the following areas:

- (a) Work duties, including the degree of common or interrelated duties and location(s).
- (b) The nature of their supervision.
- (c) Extent of common supervision.
- (d) Work skills.
- (e) The type(s) of equipment operated/utilized by the employee.
- (f) The type(s) of products manufactured; similarities, differences.
- (g) Education, training, and experience.
- (h) Work schedules.
- (i) Compensation, including the method of compensation for both regular and overtime work (e.g., salaried or hourly) and the salary or wage rates.
- (j) Methods used to record their time (e.g., time clocks).
- (k) Benefits, including any distinctions based on categories or groupings of the employees involved.
- (l) The availability of the employer's facilities for their use.
- (m) Whether there is any progression or promotional advancement from one position to another. Obtain evidence of specific examples.
- (n) Degree of interchange and contact; describe the frequency and the type(s) of

interaction and contact (telephone, electronic, face-to-face, etc.). Obtain evidence of specific examples.

(o) Whether there is any substitution of one group of employees for another and the frequency of such. Obtain evidence of specific examples.

(p) Extent and frequency of interchange (transfers) from one position to another, both employees and supervisors, promotional opportunities from one group to another, permanent or temporary? If temporary, describe supervision, work performed and other terms and conditions of employment. Obtain evidence of specific examples.

(q) The nature and extent of similar or dissimilar working conditions.

(r) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.

(s) Any common seniority list(s).

(t) Work clothes, uniforms, insignia and badges.

(u) Have these employees been represented previously? If so, in what unit(s)? When?

B. Unit Scope

1. Multifacility Units

It is well established that a single-facility unit is presumptively appropriate for collective bargaining. However, a petitioner can alternatively seek a multifacility unit. Caution: a "single facility" can include more than a single building; e.g., a medical campus (*Child's Hospital*, 307 NLRB 90 (1992)) or a satellite facility. Where a multifacility unit is sought by a labor organization, the single-facility presumption does not apply. Hence, the presumption need not be overcome. *Capital Coors Co.*, 309 NLRB 322 (1992).

If a union petitions for a single facility and the employer seeks to rebut the presumption, the Board evaluates the following factors:

- (a) central control over daily operations and labor relations, including the extent of local autonomy;
- (b) similarity of skills, functions and working conditions;
- (c) degree of employee interchange;
- (d) distance between locations; and
- (e) bargaining history, if any.

New Britain Transportation Co., 330 NLRB 397 (1999).

If the union petitions for a multifacility unit, the Board evaluates the following factors:

- (a) employees' skills and duties;
- (b) terms and conditions of employment;
- (c) employee interchange;
- (d) supervision;
- (e) geographic proximity;

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- (f) centralized control of management and supervision;
- (g) functional integration; and
- (h) bargaining history.

Alamo-Rent- a Car, 330 NLRB 897 (2000).

Also see *An Outline of Law and Procedure in Representation Cases*, Chapter 13.

Extensive evidence is not normally necessary when *all* of the employer's facilities are sought in a combined unit, for an employer-wide unit is a presumptively appropriate unit. When less than an employer-wide grouping is sought, ask the list of relevant questions below.

Relevant Questions:

1. Ask the following questions about the employer's organizational and supervisory structure (e.g., does the unit sought constitute a recognized administrative grouping?):
 - (a) What is the supervisory hierarchy of this location?
 - (b) To whom do these supervisors report?
 - (c) What employee functions are supervised locally, what centrally? Are interviewing, hiring, discharging, promoting, transferring, laying off and recalling done centrally or locally?
 - (d) What is the authority of local supervision? Are decisions of local supervisors subject to review?
 - (e) Is there any general overall supervision? If so, what is its character?
2. The extent of functional and product integration among the employer's locations:
 - (a) How are purchases made for each facility?
 - (b) What records are kept centrally? What locally? (Inquire about clerical, payroll, accounting and personnel records).
 - (c) Is the interviewing, hiring, discharging, promoting, transferring, laying off and recalling done locally or centrally? Obtain evidence of specific examples.
 - (d) Who determines rates of pay for this facility? From which office or facility are employees paid?
 - (e) What operations does each facility perform? How are these operations integrated?
 - (f) Is the product or service the same at each facility and what is the product or service mix at each facility?
 - (g) Is there similarity in the nature of the work performed, skills used and job classifications at each facility? Obtain evidence of specific examples.
 - (h) Do any of the location's product go to other facilities of the employer? If so, how much and what?
3. The extent of centralized control over working conditions and labor relations policies:
 - (a) Who is in charge of labor relations? Overall and on a day-to-day-basis?
 - (b) Who sets labor relations policy, including terms and conditions of employment, for the location involved? Where is this person located? If not at the

facility involved, describe the frequency and nature of the individual's contacts with the facility.

(c) Are the same labor relations policies maintained at all locations?

(d) How is this enforced? Obtain evidence of specific examples.

(e) Who establishes policies concerning interviewing, hiring, discharging, promoting, transferring, laying off, recalling, etc.?

(f) Compare working conditions, wages, hours, privileges and benefits at facilities involved. Obtain evidence of specific examples.

(g) Compare opportunities for advancement and training programs for employees at the facilities.

4. Specific evidence regarding the extent of interchange or transfer of employees among facilities:

(a) How frequently does each occur? Obtain evidence of specific examples.

(b) What is the duration of the interchange or transfer? Obtain evidence of specific examples.

(c) If the interchange or transfer is temporary, how are supervision and terms and conditions of employment affected?

(d) Which and how many employees have been involved in each?

(e) What locations or departments have been involved?

(f) If job openings exist at a facility, are employees of that facility or other facilities given priority for bidding? Is there a common seniority list?

(g) Are there bumping rights or other transferable rights (e.g., seniority) between facilities? Obtain evidence of specific examples.

5. Describe the extent of employee contact among facilities. Describe the nature and frequency of this contact. Give specific examples. How frequently do employees of one facility have contact with employees at another facility? What is the nature of the contact (in person, by telephone, electronic, etc.)? What is the duration of the contact?

6. Is the unit a geographically cohesive unit?

(a) How far apart geographically are the locations?

(b) Is the unit coextensive with a recognized geographical boundary (e.g., a state, county, metropolitan area, etc.)?

7. Applicable bargaining history:

(a) Are any of the unit employees currently represented? Have any of the unit employees been represented previously?

(b) If so, in what unit(s)? When?

(c) Was the recognition based on a Board certification or a voluntary recognition? If by certification, was it via Stipulated Election Agreement or Decision and Direction of Election? Put the unit description and documents on the record, to the extent available.

8. Does a union seek to represent the employees in a broader unit?

9. Differences, if any, in the skills and functions of employees at the different locations, including:

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- (a) Work duties, including the degree of common or interrelated duties and location(s).
- (b) The nature of their supervision.
- (c) Extent of common supervision.
- (d) Work skills.
- (e) The type(s) of equipment operated/utilized by the employees.
- (f) The type(s) of products manufactured; similarities.
- (g) Education, training and experience.
- (h) Work schedules.
- (i) Compensation, including the mode of compensation for both regular and overtime work.
- (j) Benefits, including any distinctions based on categories or groupings of the employees involved.
- (k) The availability of the employer's facilities for their use (e.g., break room or locker room).
- (l) Whether there is any progression or promotional advancement from one position to another. Obtain evidence of specific examples.
- (m) Degree of interchange and contact; describe the frequency and the type(s) of interaction and contact (telephone, electronic, face-to-face, etc.). Obtain evidence of specific examples.
- (n) Whether there is any substitution of one group of employees for another and the frequency of such. Obtain evidence of specific examples.
- (o) Extent and frequency of interchange (transfers) from one position to another; permanent or temporary? If temporary, describe supervision, work performed and other terms and conditions of employment. Obtain evidence of specific examples.
- (p) The nature and extent of similar or dissimilar working conditions.
- (q) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.
- (r) Any common seniority list(s).

- (s) Have these employees been represented previously? If so, in what unit(s)? When?

2. Multiemployer Units

The Board has held as a general proposition that a multiemployer unit, unlike other types of bargaining units, is consensual in nature. The essential element warranting the establishment of multiemployer units is clear evidence that the employer unequivocally intends to be bound in collective bargaining by group rather than individual action. *W.L. Miller Co.*, 284 NLRB 1180, 1185 (1987); *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978); *Weyerhaeuser Co.*, 166 NLRB 299 (1967). However, a brief history of multiemployer bargaining may be insufficient to rebut the presumption in favor of single employer units. See *West Lawrence Care Center*, 305 NLRB 212, 217 (1991). Withdrawal from a multiemployer association (either by the union or by an employer) is permitted only when adequate written notice is given prior to the date set by the contract for modification or to the agreed upon date set for the commencement of multiemployer negotiations. *Retail Associates*, 120 NLRB 388, 395

(1958). Once the negotiations have begun, absent mutual consent or unusual circumstances, the Board will not permit withdrawal from multiemployer bargaining.

Note: A petition concerning a unit of a single employer's employees will not be dismissed on the ground that it is not coextensive with the multiemployer unit if a petition is filed after the employer's timely withdrawal. *Arrow Uniform Rental*, 300 NLRB 246 (1990). Moreover, an employer whose several locations were part of a multiemployer unit, but who timely withdrew from the multiemployer group, will not be bound by its prior bargaining history on a multilocation basis in circumstances where the several locations would not have constituted an appropriate unit in the first instance. *Albertson's, Inc.*, 273 NLRB 286 (1984), supplementing *Albertson's, Inc.*, 270 NLRB 132 (1984).

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board held that in cases involving employers governed by Section 8(f) of the Act, it would no longer automatically merge into a multiemployer unit the employees of a single employer who joins a multiemployer association for the purposes of collective bargaining. Rather, in processing petitions filed during the life of an 8(f) agreement, the appropriate unit normally will be the single employer's employees covered by the agreement. The Board specifically noted in footnote 42 of *Deklewa* that employees of a single employer would no longer be precluded from expressing their representational desires simply because their employer has joined a multiemployer association. See also *Stack Electric*, 290 NLRB 575 (1988). In *Comtel Systems Technology*, 305 NLRB 287, 291 (1991), the Board held that the merger of 9(a) and 8(f) bargaining units into a multiemployer unit does not convert the 8(f) relationship into a 9(a) relationship.

Also see *An Outline of Law and Procedure in Representation Cases*, Chapter 14.

Note: Multiemployer bargaining stands in contrast with situations involving contingent employees supplied by a supplier employer. See *Sturgis* discussion in Section VII, H, Contingent Employees.

Relevant Questions:

1. Is the employer a member of a multiemployer association that exists for the purposes of representing members in collective bargaining? Introduce into evidence any constitution/bylaws, as well as other relevant documentation, pertaining to the purposes of the association.
2. Develop in the record the details surrounding the employer's joining the multiemployer association.
3. Is the employer "an employer engaged primarily in building and construction industry" as defined under Section 8(f) of the Act? Develop particulars in the record. If any party contends that the employer is not engaged in the construction industry, see

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comments in Section VII, B, Construction Industry Formula.

4. Were there any Board-conducted elections or voluntary grants of recognition to a union premised on its demonstration of majority support in either a particular single-employer unit or in a multiemployer association's unit? Develop particulars in the record.
5. In the absence of any demonstration of majority support, describe the circumstances surrounding the voluntary grant of recognition.
6. In cases not involving building and construction industry employers, develop the history of multiemployer bargaining.
7. With respect to a merger of single-employer units into a single multiemployer association unit, develop in the record the facts necessary to determine whether there was an unequivocal intention to be bound by group bargaining. Be as precise as possible, including developing all relevant dates and circumstances.
8. How was the union put on notice concerning the employers' intent to engage in group bargaining? Develop for the record the parties' actions supporting or belying the conclusion that there was an unequivocal intention to be bound by group bargaining. By the union's actions, did it consent to such a relationship?
9. Is there a designated representative or committee established to represent the group? How are the representatives selected? Do all members of the association participate in negotiations?
10. By whom is the agreement executed? Is a single contract document executed by a representative on behalf of all association members; or is a single contract signed by each of the association members?
11. In circumstances in which there are individually executed agreements, has the union been informed that these agreements would be binding on all association members? Develop the particulars for the record.
12. To what extent, if at all, have employers in the group refused to accept the agreement negotiated by the group? What was the outcome? Develop the particulars in the record.
13. Does the contractual recognition clause describe the unit as being a multiemployer unit?
14. Is there any history of strikes/lockouts? Were such actions taken simultaneously against/by all members of the multiemployer group?
15. Does any employer claim to have left the multiemployer group or rescinded its delegation of bargaining authority to the association? Develop for the record the

particulars involved in the rescission of such delegation of authority. For example:

- (a) In what manner was rescission accomplished?
- (b) Did the rescission occur prior to the established date for the commencement of negotiations for a new agreement and before the date on which such negotiations actually began?
- (c) Were all parties, including the union, notified of the rescission? If so, how and when?
- (d) Are there any contractual requirements or requirements established by virtue of constitution/bylaw provisions? Were they met?

16. Did the other parties expressly consent or acquiesce in the withdrawal from multiemployer bargaining? If so, how and when? Develop for the record the particulars of the parties' actions and reactions.

17. As in all cases where the unit is in dispute, ensure that the record reflects information dealing with the particular job classifications, the numbers of employees in each such classification for each employer and the numbers of employees in the asserted multiemployer unit.

C. Unit Composition

The following categories may not be included in bargaining units determined by the Board:

- (1) Confidential employees.
- (2) Statutory supervisors.
- (3) Independent contractors.
- (4) Agricultural laborers.
- (5) Domestic servants of any family or person at his home.
- (6) An individual employed by his parent or spouse.
- (7) An individual employed by an employer subject to the Railway Labor Act.
- (8) An individual employed by a person who is not an employer as defined in Section 2(2) of the Act.
- (9) Temporary and casual employees. (But see Section VII, H, Contingent Employees, and (F) Temporary Employees).

The following categories of employees typically are excluded from a unit including other employees, but may be represented in a separate unit:

- (1) Office clerical employees (see Section VIII, F, Clerical Employees).
- (2) Professional employees, unless the union seeking to organize the employees seeks a combined unit of professional and nonprofessional employees and the professional employees choose to be represented in a combined unit after being afforded a self-determination (*Sonotone*) election (see Section VIII, A, Professional Employees).
- (3) Guards (see Section VI, C, Guards).

Questions as to whether employees in any particular classification should be included in a petitioned-for unit are determined by applying the community of interest

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test. (see Section V, A, 2, for community of interest questions). Whether or not the petitioned-for unit seeks to exclude employees in a particular classification, any excluded employees must have an opportunity to be represented. Since it is Board policy not to create a residual unit, any excluded employees must either constitute or be able to be part of an appropriate unit. Part of the hearing officer's responsibility is to consider the unit placement of *all* employees of the employer. Thus, in cases where the petitioned-for unit does not include all of the employer's nonprofessional employees (except for categories excluded by statute or Board policy), it is incumbent on the hearing officer to ensure that the record includes a full description of all excluded classifications, sufficient to allow the Regional Director and the Board to determine their unit placement.

When a classification's inclusion in or exclusion from the unit is an issue for the hearing, cover the questions in Section V, A, Community of Interest.

D. Residual Units

A residual unit is a grouping of employees that does not itself constitute a separate appropriate unit. Groups of employees omitted from established bargaining units constitute a residual unit appropriate for an election, provided the unit includes all the unrepresented employees of the type covered by the petition.

See An Outline of Law and Procedure in Representation Cases, Section 12–400.

Relevant Questions:

1. Do one or more established bargaining units exist? Is the incumbent representative(s) for those established units a participant in this proceeding? What is its position?
2. Does the proposed residual unit include all the unrepresented employees of the type sought by the petition?
3. Are there any unrepresented employees at the facility or facilities in question who are not included in the proposed residual unit? If so, describe in detail. What is the basis for their exclusion?
4. Is there more than one person in the proposed residual unit?
5. Would denying fringe or residual employees representation in a separate unit preclude their opportunity to vote on being represented?
6. If the established unit is a multiemployer one, is the proposed residual unit also premised on a multiemployer basis?

E. Board Rule on Health Care Units

In 1989, the Board set out the appropriate units for acute care hospitals in a

rulemaking procedure, reported at 284 NLRB 1515 et seq. The Rule (Section 103.30) applies only to initial organizing in RM and RC situations; it does not apply to RD petitions. The Rule provides that except in extraordinary circumstances, the following units and only these units are appropriate in an acute care hospital:

- (1) All registered nurses
- (2) All physicians (including residents and interns—*Boston Medical Center Corp.*, 330 NLRB 152 (1999))
- (3) All professionals except for registered nurses and physicians
- (4) All technical employees
- (5) All skilled maintenance employees
- (6) All business office clerical employees
- (7) All guards
- (8) All other nonprofessional employees

GC Memorandum 91-3, dated May 9, 1991, contains guidelines concerning the application of the Health Care Rule and the issues which must be determined prior to hearing. Hearing officers should carefully review this memorandum prior to the hearing and bring it to the hearing.

GC Memorandum 91-4, dated June 5, 1991, provides a discussion of Health Care Unit Placement Issues, including case law citations as to specific placement issues. See Appendix C for a copy. Also see *An Outline of Law and Procedure in Representation Cases* for unit and placement issues involving health care institutions (Sections: 15-170, Health Care Institutions; 1-315, Jurisdiction; 15-146, Health Care Institution Drivers; 16-300, Skilled Maintenance; 17-511, Health Care Supervisory Issues; and 19-510, Technical Employees-Health Care).

Various sections in this manual also contain relevant questions concerning professional employees (Section VIII, A), technical employees (Section VIII, E), guards (Section VI, C) and supervisory issues (Section VI, E).

1. Existence of an Acute Care Hospital

Pursuant to the Board's Rule, an "acute-care hospital" is either:

- (a) a short-term care hospital in which the average length of stay is less than 30 days *or*
- (b) a short-term hospital in which over 50-percent of all patients are admitted to units where the average length of stay is less than 30 days (the average length of stay is determined by reference to the most recent 12-month period preceding receipt of a representation petition for which data are readily available).

Facilities that are primarily nursing homes, psychiatric hospitals or rehabilitation hospitals are excluded from the definition of acute care hospital. See 284 NLRB 1597.

If it is necessary to develop a record as to whether the facility is an acute care hospital, the hearing officer should formulate questions based on the above definition.

If there is disagreement as to whether the health care facility is an acute care hospital and the employer will not produce records sufficient for the Board to determine these facts, the hearing officer should issue a subpoena. (This should be discussed with your supervisor prior to the hearing.) If after the issuance of a subpoena, an employer does not produce records sufficient to determine the facts, the Board may presume the employer is an acute care hospital. Final Rule, 284 NLRB at 1591–1592.

2. Scope Issues

Except in “extraordinary circumstances,” the above-described units are the appropriate units in an acute care hospital. The following are not considered to be “extraordinary circumstances” and deviation from the rule is not appropriate:

- (a) Diversity of the industry, such as the sizes of various institutions, the variety of services offered, including the range of outpatient services and differing staffing patterns.
- (b) Increased functional integration of and a higher degree of work contacts between employees as a result of the advent of the multi-competent worker, increased use of “team” care and cross-training of employees.
- (c) Impact of nationwide hospital “chains.”
- (d) Recent changes within traditional employee groupings and professions, e.g., increase in specialization of RNs.
- (e) Effects of various governmental and private cost containment measures.
- (f) Single institutions occupying more than one contiguous building.

Examples of extraordinary circumstances where the Rule might not apply are described below. Final Rule, 284 NLRB 1573–1574. If a party argues that extraordinary circumstances exist requiring units that do not conform with the Rule, the party should make an offer of proof on the record. To keep the record short, offers of proof relating to extraordinary circumstances should not normally be presented through witnesses. The offers may be oral or written and should consist of a statement that, “if allowed to testify, the witness would state” The following are some examples of extraordinary circumstances where the rule might not apply:

- (a) Is this a unit of five or fewer employees? If so, develop a record on the appropriateness of this unit, since it is considered to be an extraordinary circumstance and the Rule is inapplicable.
- (b) Consolidation of two or more of the above-listed units (absent a statutory restriction, e.g., guards and nonguards in the same unit); such a combined unit may be found appropriate. In some circumstances, evidence as to the appropriateness of the combination may be required. Hearing officers should research Board law and consult with their supervisors in case of uncertainty.
- (c) Residual units in the health care industry raise other issues. For a discussion of residual units under the Rule, see *St. Mary’s Duluth Clinic Health System*, 332 NLRB 1419 (2000) (non-incumbent union may petition for separate residual unit of all unrepresented employees where there is a nonconforming unit); *Kaiser Foundation Health Plan*, 333 NLRB 557 (2001); *St. John’s Hospital*, 307 NLRB 767 (1992).

3. Issues Which May be Litigated Notwithstanding Board Rule

- (a) The placement of employee classifications within the appropriate units, e.g., whether laboratory technicians are technical or professional employees. (See GC Memo 91-4 for placement issues.)
- (b) Supervisory and managerial status of certain classifications.
- (c) Contract bar issues.
- (d) Labor organization status.
- (e) Eligibility issues (e.g., relatives of management, part-time employees).
- (f) Single facility appropriateness. [**Note:** In *Manor Healthcare Corp.*, 285 NLRB 224 (1987), the Board announced that it would apply the single facility presumption to health care facilities. The presumption, however, can be “rebutted by a showing that the approval of a single-facility unit will threaten the kinds of disruptions to continuity of patient care that Congress sought to prevent when it expressed concern about proliferation of units.” (See *Mercywood Health Building*, 287 NLRB 1114 (1988), for an application of this standard. Compare *West Jersey Health System*, 293 NLRB 749 (1989)). Under the Board’s Rules on health care bargaining units, this issue is left to adjudication. 284 NLRB 1527, 1532 (1987). See also *Child’s Hospital*, 307 NLRB 90 (1992) (hospital campus consisting of multiple buildings found to be a single facility).]

F. Craft Units/Construction Units

Issues concerning craft units may arise in two distinct situations: (1) when the petition seeks initial establishment of a craft unit; and (2) when the petition seeks to sever a craft group from an existing unit historically represented by a different union.

See *An Outline of Law and Procedure in Representation Cases*, Chapter 16.

Relevant Questions:

1. Does the proposed unit consist of a distinct and homogeneous group of journeymen craftsmen performing the functions of their craft?
2. What is the craft group sought?
3. What work is done by the craft employees?
4. Does their work require full use of craft skills?
5. Is any noncraft work done?
6. Do other employees do any of the alleged craft work?
7. What qualifications does the employer require for employment in the craft positions?
8. Have members of the proposed unit participated in an established apprenticeship

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program?

9. Have members of the proposed unit been certified as journeymen craftsmen or been licensed or certified in any other manner?

10. Has a formal apprenticeship program been established by the employer?

11. Does the employer maintain any other training programs for employees in the proposed unit?

12. Are they required to pass a test?

13. What is the rate of employee turnover in the work force of the proposed unit?

14. What is the history of collective bargaining of the employees sought to be represented?

(a) Were the employees represented in the past and, if so, in what type of unit were they included?

(b) How long were they represented in this manner?

(c) Who represented them?

15. Have the employees in the proposed unit established and maintained their separate identity?

(a) Do they have different wage rates, mode of payment, fringe benefits or hours of work?

(b) Do they have the same working conditions as other employees?

(c) Do they have separate immediate supervision?

(d) Does their immediate supervisor belong to some craft?

(e) Do different degrees or standards for supervision exist?

(f) Are their work assignments similar to those of each other, yet different from those of other employees?

(g) Is there any interchange or overlapping of job duties with other employees?

(h) Are they required to wear different uniforms, use different equipment or handle different products?

(i) Do they have a separate seniority list or promotion system?

(j) What is their relationship with customers compared to that of other employees?

(k) What is their position in the company's organizational scheme? Do they make up a separate department?

(l) During slack periods of work can the employees "bump" other employees or be "bumped" by other employees?

16. What is the history and pattern of collective bargaining in the industry involved?

(a) Has a similar unit previously been separately represented in the same industry?

(b) Has bargaining in such units been unsuccessful?

(c) Is such unit representation prevalent in the industry or are other such units looked on as unique situations?

(d) Has the industry enjoyed a stable bargaining situation under the pattern of

- representation it has followed?
- (e) What is the bargaining history at the employer's other plants?
 - (f) What is the bargaining practice in the area?
17. What is the degree of integration of the employer's production processes?
- (a) To what extent does the production process depend on the performance of the employees in the proposed unit?
 - (b) How large is the plant?
 - (c) What is the size of the proposed unit?
 - (d) Do the employees work separately or among other groups of employees? To what extent do the employees have contact with other employees at facilities provided by the employer and/or by being mobile in the plant?
 - (e) How frequent is the interchange or transfer between employees of the proposed unit and other employees?
 - (f) How frequent is the interchange of equipment?
18. When the petitioner is seeking to sever a craft group from an existing larger unit, what is the history of collective bargaining in the existing unit?
- (a) What has been the length of the bargaining history in the existing unit?
 - (b) Have there been successive collective-bargaining agreements between the employer and the incumbent union throughout this period?
 - (c) Has there been a stable bargaining relationship?
 - (d) Have there been any strikes or other interruptions to the stability of the bargaining relationship? When and for what duration?
19. When the petitioner is seeking to sever a craft group from an existing larger unit, have the petitioned-for craft employees participated substantially in maintaining the existing pattern of representation?
- (a) How long have the craft employees been included in the existing unit?
 - (b) Have they joined the incumbent union and participated in its affairs?
 - (c) Have craft employees held positions as officers of the incumbent union?
 - (d) Have they served as stewards or in other similar positions?
 - (e) Have they been represented on the incumbent union's negotiating committees?
 - (f) Did the proposed unit have a chance to vote in a self-determination election?
 - (g) Have there been past efforts by the craft employees to obtain separate representation?
 - (h) Have the petitioned-for employees been members of a craft union? For how long?
 - (i) Have the petitioned-for craft employees acted as a separate group in dealing with the employer or the incumbent union?
20. When the petitioner is seeking to sever a craft group from an existing larger unit, have the petitioned-for craft employees been adequately represented by the incumbent union?
- (a) Have the petitioned-for employees received periodic improvements in wages and benefits during the time they have been included in the existing unit?
 - (b) Has the incumbent union processed grievances on behalf of the petitioned-for employees?

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- (c) Does the incumbent union have a structure within its organization, such as a skilled trades department, for dealing with the special interests of employees of the type sought by the petition?
21. When the petitioner is seeking to sever a craft group from an existing larger unit, is the production process functionally dependent on the work of the craft employees?
- (a) Would an interruption in production occur if the petitioned-for employees ceased their work?
 - (b) Does the employer contract out any of the craft work (thereby limiting the extent to which the production process is functionally dependent on the work of the craft employees)?
22. What are the qualifications of the union seeking severance, if such is the case?
- (a) Is the union newly formed?
 - (b) What is the union's experience in representing employees like those in the proposed unit?
 - (c) What is the union's experience in the industry involved?
 - (d) Is the union considered a "traditional union" for the situation presented?
 - (e) Is the union particularly qualified to deal with the special problems of the skilled employees involved?

G. Departmental Units

The hearing officer should review case law regarding departmental units in certain industries (e.g., meat departments in grocery stores; maintenance departments in hotels, universities and health care institutions; departmental units in the newspaper industry; selling and nonselling departments in the retail industry; and service and warehouse departments in the retail industry).

See *An Outline of Law and Procedure in Representation Cases*, Chapters 15 and 16.

Relevant Questions:

1. Name or designation given the department by the employer.
2. List all the classifications within the department and the number of employees in each classification.
3. Are all the employees in the group or department included in the proposed unit? If not, explain any exclusions.
4. Describe the functions or job duties of the group? Are these job functions and duties distinct from those of employees in other departments? If so, how?
5. Are employees in this group required to or do they in fact have any special skills or training?

6. Are employees in the group identified with trades or occupations distinct from those of other employees? Describe any duplication of skills or trades in other groups.
7. Who supervises the group? Are they separately supervised from other employees? To whom does that supervisor report and for what purpose?
8. Describe the relationship or flow of work between this group and other groups. Be specific.
9. Is the work performed by this group duplicated in other groups or departments? Explain.
10. Is there any interchange of employees in this group with employees in other groups or departments? If so, determine the reason for the interchange, the employees involved and the frequency of occurrence.
11. Describe any interchange or common use of tools and equipment and where these tools/equipment are located.
12. Describe the area where the employees work and if they are sent into other areas, identify these areas and the frequency of their being sent to these other areas.
13. Describe the prior bargaining history for the group, (e.g., have they been separately represented?)
14. Do employees in the proposed department share common fringe benefits, locker room, lunchroom?
15. How do wages of employees in the group compare with those of employees in other departments?
16. Do employees in this group wear uniforms? What about employees in other groups?

H. Expanding Units

In expanding unit cases, the test is whether the present complement is substantial and representative of the complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications. *MGM Studios of New York*, 336 NLRB No. 129 (2001). In addition, the Board examines whether the expansion was the result of a fundamental change in the nature of the employer's business. *Id.* In *Endicott Johnson de Puerto Rico*, 172 NLRB 1676 (1968), the Board stated that the yardsticks enunciated in *General Extrusion Co.*, 121 NLRB 1165 (1958) are applicable only to contract bar issues and were not intended to govern the propriety of granting an election in cases involving an expanding unit. Nevertheless, in general, the Board finds an existing complement of employees to be "substantial and representative"

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when approximately 30-percent of the eventual employee complement is employed in approximately 50-percent of the anticipated job classifications. *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000). In making this determination, the Board does not consider expansion that is too remote in time to be material. *Gerlach Meat Co.*, 192 NLRB 559 (1971).

See *An Outline of Law and Procedure in Representation Cases*, Section 10–600.

Relevant Questions:

1. Construction or operational changes:

- (a) How definite are the employer's plans to expand its operations? Are the plans merely speculative?
- (b) Are the projected changes within the control of the employer or a third party?
- (c) Did the employer already begin the construction or the operational changes? If so, when? Have prior delays occurred?
- (d) Will the size of the facility be expanded? Will additional facilities be added? When?
- (e) Describe in detail the operational changes being made, showing anticipated completion for each future 30-day or other period.
- (f) When will the final phase be completed?
- (g) What is the percentage of completion at this time?
- (h) Will all or part of the new operations be integrated with the old operations?
- (i) Will the changes result in a fundamental change in the employer's business operations?

2. Equipment:

- (a) Will the expansion of operations require the installation of new equipment?
- (b) Describe present machine installations.
- (c) Describe the machines to be installed.
- (d) Has any new equipment already been purchased?
- (e) Will the equipment be installed according to the construction phase?

3. Production:

- (a) Is the plant in production now? Describe.
- (b) What product is produced?
- (c) Will production increase on the installation of the new equipment?
- (d) Will a new product or products be produced? Will new services be provided?
- (e) Will the old product continue to be produced?
- (f) Describe fully any difference between the products now in production and the new product to be produced, i.e., method of production, skills involved.

4. Employees:

- (a) How many employees are presently employed in the unit?
- (b) What are the classifications of the present employees and the number of employees in each classification?
- (c) Describe the duties, qualifications and skills necessary for employment in the

present classifications?

(d) How many new classifications will be established as a result of the operational changes? What are they? Have any of the new classifications already been added? If so, which and how many? When will the rest of the new classifications be added?

(e) Describe the duties, qualifications, and skills necessary for employment in the new classifications. Will the duties, skills, and qualifications be significantly different from those required for the present classifications? What are the specific differences?

(f) Have new employees already been hired? Have prospective employees been interviewed? How many employees are expected to be hired? When will they come on?

(g) Will the new employees receive the same fringe benefits, such as vacations and holidays, as those employees presently employed? If not, what will their fringe benefits be?

(h) Will the new employees work substantially the same hours and receive the same rates of pay as those employees presently employed? If not, what will their hours and wages be?

(i) Will the new employees work under the same general supervision as present employees? If not, explain. Is there a projected increase in supervisory personnel?

(j) Will there be any interchange between the present employees and those expected to be hired? Explain fully.

(k) Will the new employees work in an area physically separated from the present employees?

I. Contracting Units

The Board has extended its expanding unit guidelines to cases where the unit is contracting; accordingly, with modification, the same questions will apply to both expanding and contracting units. *MGM Studios of New York*, 336 NLRB No. 129 (2001). In contracting unit cases, the test is whether a substantial and representative complement of employees will remain employed in a substantial and representative number of classifications. Thus, in general, the Board finds an existing complement of employees to be “substantial and representative” when approximately 30-percent of the present complement of employees and 50-percent of the present job classifications will remain after the contraction. In addition, the Board examines whether the contraction was the result of a fundamental change in the nature of the employer’s business. *Douglas Motors Corp.*, 128 NLRB 307 (1960).

See *An Outline of Law and Procedure in Representation Cases*, Section 10–700.

Ask questions covered in Section H, Expanding Units.

VI. UNIT EXCLUSIONS

A. *Independent Contractors*

Section 2(3) of the Act excludes from the definition of “employee” an individual having the status of an independent contractor. In *Roadway Package System*, 326 NLRB 842 (1998) and *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board adopted the common law test of agency to determine whether an employee is an independent contractor. The common law test is set forth in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The inquiry is generally fact-intensive; the factors to be considered in determining employment status include: (1) whether the work performed is an essential part of the company’s regular business; (2) whether the person is engaged in an occupation or business that is distinct from the company’s regular business; (3) the length of time for which the person is employed or contracted; (4) the skill required in the particular occupation; (5) whether the company provides the tools and instrumentalities necessary to perform the work; (6) the method of payment; and (7) the extent to which the company controls the details of the work. All factors regarding the parties’ relationship must be considered, not just those involving the right to control.

See *An Outline of Law and Procedure in Representation Cases*, Section 17–400.

Relevant Questions:

1. In what occupation is the individual employed?
2. What are the duties performed, and describe the skills required.
3. How was the relationship between the individual and the employer established? Have the parties entered into a contract? Oral or written contract? If written, obtain a copy for the record.
4. Is the individual free to reject work for the employer without breaking the terms of their agreement?
5. Is this individual’s work part of the normal business of the employer, i.e., does the employer regularly use this individual as part of the business operation? Is the individual employed for a particular length of time? Is the individual’s work continuous and regular? Is the individual’s work based on a particular “project” that is limited in duration?
6. What is the individual’s method of payment (e.g., hourly rate, by the job, salary, percentage of sales, percentage of load)? Compare method of payment with that of the employer’s employees.
7. Is the individual on the company payroll? Under what designation?

8. Who determines the amount and method of payment? Is it negotiated between the employer and the individual? Is it predetermined by the employer? Is there anything the individual can do to vary the amount of payment? If so, what?
9. Does the employer deducted FICA or withholding taxes on behalf of the individual?
10. Who controls the day-to-day work of this individual in the following areas (compare with the employer's employees):
 - (a) Who supervises the individual? What is the nature of the supervision? Obtain details.
 - (b) Does the individual have to report to employer officials on a daily basis? How does this communication take place?
 - (c) Are these individuals subject to disciplinary action? If yes, what kinds of disciplinary action, e.g., warnings, suspensions, discharge? What types of infractions warrant such disciplinary action?
 - (d) Does the employer mandate the number of hours worked per day or per week? Can the individual establish his/her own schedule?
 - (e) Does the employer require that the work be performed in a specific fashion? If the individual is a driver, are drivers required to run predetermined routes or can they vary from a route schedule?
 - (f) Is the relationship between the individual and the employer covered by any of the employer's rules and/or policies? If so, introduce rules/policy in the record. Are any of these policies required by State or Federal regulations? Identify which policies are government-regulated and by which government agency. Obtain a copy of the government regulations.
 - (g) Does the individual have to wear a company uniform? If yes, who provides it? Is the individual required to pay for the uniform?
11. Does the individual have the opportunity to affect his/her income by cultivating business or customers?
12. Does the individual purchase or own the equipment used in the work or is it provided to the individual? If the individual purchases or owns the equipment, has the employer loaned the individual money to purchase the equipment? Is the employer the seller of the equipment? What are the terms of the loan? Does the equipment used in performing the work bear any logo? Who carries the insurance on the property and equipment owned or used by these individuals?
13. Does the individual hire others to perform work for the employer? If others are hired to perform work, who hires, fires, supervises and pays them? How many are hired and what is their rate of pay and classification?
14. Compare the individual's fringe benefits with those of the employer's employees, e.g., vacation time, holiday pay, sick leave, unemployment compensation benefits, worker's compensation benefits.

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15. Does the individual use all or part of the employer's facilities?
16. Who pays any license fees or taxes?
17. Does the individual depend on this work for regular income? What are the individual's other sources of income?
18. Is the individual free to contact and perform work for, or sell goods of another employer using his employees or equipment? Is the individual subjected to any penalty, monetary or otherwise, if work is performed for any other employer?
19. Is the individual free to sell or transfer his job, lease or service area? Are there any penalties if the individual transfers, sells or leases the job or service area to another individual? If so, describe the nature of the penalties.
20. Can this individual extend credit to customers without the employer's permission? Is there a limit on the extension of credit?
21. What records are these individuals required to keep, who prepares them and where are the records maintained? Which records, if any, are required by government regulations?

B. Agricultural Employees

Section 2(3) of the Act excludes from the definition of employee any employee who is an agricultural laborer. The Board relies on Section 3(f) of the "Fair Labor Standards Act of 1938" (29 U.S.C. 201 et seq.) to define agricultural employees:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities...the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Board's lead case applying the definition is *Camsco Produce Co.*, 297 NLRB 905 (1990).

Whether an employee is an exempt agricultural laborer is determined either by the work he performs or by the work performed by his employer. The fact that the employer performs some phases of direct farming work falling within the primary definition of agriculture does not necessarily mean that it is a farmer within the meaning of Section 3(f). Further, employees who regularly perform any nonagricultural work are covered by the Act with respect to that portion of the work with is nonagricultural.

The burden of proving that individuals are exempt as agricultural laborers rests on the party asserting the exemption. *Agrigeneral L.P.*, 325 NLRB 972 (1998). The question of employee status is decided not on an employer wide basis, but on a classification by classification analysis.

See *An Outline of Law and Procedure in Representation Cases*, Section 17–100.

Relevant Questions:

1. Describe the employer's operations, including any related operations of the employer.
 - (a) Is the employer a farmer?
 - (b) Does the employer perform farming work on land owned, leased and controlled by it and devoted to its own use?
 - (c) Does the employer own and bear the risk of loss of the commodities while they are raised or produced?
 - (d) Is the work performed on the same farm on which the commodities are raised or produced?
 - (e) Does the employer control the method and means by which the commodities are raised or produced?
 - (f) What type of product results from the operation?
 - (g) Is the raw or natural state of the commodity changed and a value added?
 - (h) Does the operation entail only the preparation of the product for market?
 - (i) Does the employer have an extensive commercial operation with a substantial investment in processing equipment?
2. What is the relation of the work in question to the actual farming work? Is the work performed as an incident to or in conjunction with the actual farming operations?
3. Describe the employees' duties. Secure specific details.
 - (a) Is the employee involved in "cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities... the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."
4. Do the employees also perform any nonagricultural work:
 - (a) Describe such work.
 - (b) Do they perform nonagricultural work on a regular basis?
 - (c) How often do they perform nonagricultural work?
 - (d) What percentage of their working time is spent performing such work?
 - (e) Is there interchange with employees who perform no agricultural tasks? Frequency and reason.
5. Does the work in question involve handling, on a regular basis, any amount of

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commodities not raised or produced by the employer? If so:

- (a) Who raised or produced such commodities?
- (b) What is the amount of such commodities?
- (c) How frequently are such commodities handled?

C. Guards and Watchmen

Section 9(b)(3) of the Act defines a guard as “any individual employed...to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer’s premises.” *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996). Section 9(b)(3) of the statute has two elements: (1) it prohibits the Board from finding appropriate any bargaining unit that includes both guards and nonguards; and (2) it prohibits certification of a union representing a unit of guards if the union admits nonguards to membership or is directly or indirectly affiliated with a union that admits nonguards. Thus, a petitioned-for unit of guards must include only guards and the union seeking certification must admit only guards to membership. If possible, secure a stipulation from the parties that the labor organization(s) involved admits only guards to membership.

Employees who perform some guard-like duties that are “incidental” to their other duties are not guards under Section 9(b)(3). *Wolverine Dispatch, Inc.*, 321 NLRB 796, 798 (1996); *55 Liberty Owners Corp.*, 318 NLRB 308 (1995).

A union that receives direct or indirect assistance from a nonguard union can be disqualified from representing a unit of guards. This concept is sometimes referred to as “fronting.” The Board requires “clear and definitive evidence” to establish a union’s disqualification based on its affiliation with nonguard unions. *Wackenhut v. NLRB*, 178 F.3d 543 (D.C. Cir. 1999); *Lee Adjustment Center*, 325 NLRB 375, 376 (1998). Indirect and affiliation between a guard union and a nonguard union is established with the “extent” and “duration” of the dependence indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action. Where a union has received assistance from a nonguard union only in the formative stages of organizing, and no further assistance exists beyond the formative stages, the Board has found the union certifiable under 9(b)(3). *Wackenhut*, supra; *Lee Adjustment*, supra; and *Bally’s Park Place*, 257 NLRB 777 (1981).

See *An Outline of Law and Procedure in Representation Cases*, Sections 18–200–240.

Relevant Questions:

Status of Employees as Guards:

1. Describe, in detail, the duties of the employees and the employer’s operations.
2. Do the employees carry weapons, clubs or other security-type devices? What kinds?

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3. Do the employees wear uniforms, identification badges and/or name tags? Do such identify them as being security of guard personnel?
4. Are the employees' uniforms/badges different from those worn by admitted guard employees?
5. Are they given any specialized training or instruction? What are the particulars of such instruction? Obtain a written copy of the instructions.
6. Where are the employees physically situated, e.g., in a security booth, at a reception area or in front of closed circuit televisions or computer monitors?
7. What are the employer's instructions on actions to be taken if employees witness suspicious activities on the premises? What are they expected to do in the event that there is a threat to the security of the premises or property? Are they instructed/expected to use physical force or are they instructed/expected to leave such action to other persons and/or to the local police authorities? If instructions are in writing, obtain them for the record.
8. Do the employees enforce any rules regarding the employer's property, employees or other persons? Secure the employer's rules regarding the safeguard of the employer's property or the conduct of employees or other persons while on the property. How do the employees respond if they observe an infraction of the rules, e.g., is the infraction reported, to whom is it reported, what is done when a rules is violated?
9. Do the employees perform any other work for the employer? Who often do they perform these other tasks versus the alleged guard duties?
10. Do the employees make periodic rounds of the premises? How often? Do they complete reports of their rounds? Obtain copies of the reports. Do they use a two-way radio or other means to maintain contact with a central location or with each other?
11. Do the employees monitor the entrance and exit of persons at the premises? Do they issue visitor passes and/or require persons to sign-in to gain access to the premises? 12. Do they inspect items being carried by persons entering or exiting the premises? Are they involved in the "frisking" of persons entering the facility? Are they involved in "sweeps" or "Shake-downs" of the facility?
13. Do the employees have keys or other means to provide them access to secured or restricted access areas? For what purpose do they have such access?
14. Are the employees required to fill out incident reports Secure copies of incident reports, if any. What happens to the incident reports after they are completed?

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15. Are the employees required to be bonded?
16. Are the employees deputized?
17. Does the employer's insurance require that it employ guards?
18. Are the employees fingerprinted and/or photographed at the time of hire?
19. Is any security check or police check of their background performed at the time of hire?
20. Are the employees expected to play a role in performing security functions in the event of a strike? Are there any written plans or instructions which reflect their role in the event of a strike? Have they ever played such a role during the course of a strike? If so, obtain a copy of the instructions for the record.
21. By whom are the employees supervised? Compare such supervision with that of other admitted guard and nonguard employees.
22. Are there differences in the employees' terms and conditions of employment as compared to those of other employees or admitted guards? If so, describe.
23. Do the employees substitute for other admitted guard employees? When and how often?

Section 9(b)(3) Status of Labor Organization:

Where there is an issue as to whether a labor organization is certifiable under Section 9(b)(3) because it admits to membership one or more classifications of nonguards, ask the following:

1. Obtain classifications that are admitted to membership. If possible, obtain a stipulation as to whether these classifications are Section 9(b)(3) guards.
2. If the classifications are employed by another employer, identify the employing entity and whether it is an employer as defined in Section 2(3).
3. If there is an issue as to whether the employees employed by another employer are guards, ask:
 - (a) When and how were the employees in question admitted to membership? By stipulated election agreement, directed election, voluntary recognition?
 - (b) Secure an offer or proof as to how the party would establish that the employees admitted to membership are not guards under 9(b)(3). Contact Regional management for guidance, particularly if those employees are questionable, or "close-call" guards. Rapid Armored Corp., 323 NLRB 709, 710-711 (1997).

Claims of Affiliation with Nonguard Union:

Where a party claims that a guard union is directly or indirectly affiliated with a nonguard union, ask the following questions:

1. What kind of assistance did the petitioner (or other intervening labor organization) receive from the other union? Obtain details.
2. Was the assistance limited to an initial contact or meeting?
3. Were any financial aid or legal services provided? Were such in the form of a loan or a donation?
4. Was there assistance in security card signers, lending an office for meetings, etc.?
5. When did the assistance commence? Has the assistance ended? If so, when did it end?
6. Does the assisting labor organization admit nonguards to membership? If possible, secure a stipulation.
7. Is there any overlap between the guard union's officers and the nonguards union's officers? If so, explain in full.

D. Confidential Employees

Confidential employees are those who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or regularly substitute for employees having such duties. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981); *Associated Day Care Services*, 269 NLRB 178 (1984); *B.F. Goodrich Co.*, 115 NLRB 722 (1956). This is known as the "labor nexus" test. Mere access to confidential labor relations material is not sufficient to confer confidential status. *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981). Employees who have access to confidential financial or business information or personnel records are not considered confidential employees. *Fairfax Family Fund*, 195 NLRB 306 (1972); *Brodart, Inc.*, 257 NLRB 380, 384, fn. 10 (1981).

See *An Outline of Law and Procedure in Representation Cases*, Sections 19–100.

Relevant Questions:

1. What are the duties of the employee? Get specific details?

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2. What are the duties of the employee's supervisor? Does the employee's supervisor handle the employer's labor relations, e.g., bargaining or handling grievances, with respect to employees of the entire plant, department or other group?
3. What is the nature of the confidential material handled? Get details of the type of material at issue, e.g., documentation relating to the employer's proposals during bargaining, minutes of meetings where bargaining strategy is discussed, grievance investigation reports, employer's policy on grievances, etc.
4. How does the employee come into contact with the confidential material?
 - (a) Is the employee present during management meetings regarding labor relations, e.g., preparation for bargaining sessions or discussion of grievances? If so, how often is the employee present (all the time or isolated incident)? Develop details of employee's responsibilities during meetings.
 - (b) Does the employee assist in preparation of the confidential material? If so, describe how.
 - (c) Where is the confidential material maintained and how does the employee have access to it?
5. Does this employee substitute for a confidential employee? If so, how often?
6. Do other employees also have access to the alleged confidential material? If so, who? Develop details including the nature of the access to the material.
7. Does employee have access to labor relations policy data regarding the entire plant, one department or other group?
8. Does the employee have access to confidential material prior to the time that material is available to any labor organization or to other employees?

E. Supervisors

Section 2(11) of the Act states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The traditional test for determining supervisory status used for *all* employees, including health care professionals, is:

- (1) whether the employee has the authority to engage in any one of the twelve criteria listed in Section 2(11) of the Act;

(2) whether the exercise of such authority requires the use of independent judgment; and

(3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573–574 (1994).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if the authority has not yet been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001), 167 LRRM 2164. Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). Mere inferences or conclusory statements without detailed, specific evidence are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

In *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001), 167 LRRM 2164, the Court rejected the Board's interpretation of "independent judgment" in finding that registered nurses do not use "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. In discussing the tension in the Act between the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." On September 29, 2006, the Board, in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37; *Croft Metals, Inc.*, 348 NLRB No. 38; and *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB No. 39, defined "assigning" work to, and "responsibly directing" employees (or effectively recommending such actions). The Board also provided the definition of "independent judgment" in exercising those authorities.

See *An Outline of Law and Procedure in Representation Cases*, Chapter 17.

Relevant Questions:

General Questions:

1. Describe the duties of the individual in question. What is his or her correct title?

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How and where does this individual fall in the employer's organizational and operational structure?

2. For what is the individual held responsible by the employer? Describe in detail.
3. Where does the individual fit in the employer's supervisory hierarchy?
4. Is the individual the highest ranking individual present at any time or on any shift?
5. Which classifications report to the individual?
6. Compare the individual's duties with those of persons working immediately over and under him or her. To whom does the individual report?
7. How many disputed individuals are there compared to the number of employees in each of the other classifications in the unit?

HIRE

1. Is the individual involved in hiring?
2. Describe the hiring process and the individual's role in that process.
3. Does the individual interview job applicants?
4. Is any other supervisor or member of management present at such interviews? If not, do other supervisors or managers interview the applicant thereafter?
5. Does the individual have the authority to make the final decision regarding hiring? Give specific examples.
6. Does the individual assess the applicant's technical ability to perform the work by tests or other means? If so, describe the process.
7. Does the individual make recommendations whether the applicants should be hired?
8. What happens to that recommendation? Is the recommendation accepted? Give specific examples.

TRANSFER

1. Is the individual involved in transfers?
2. Who makes the decision to transfer employees?
3. Under what circumstances are transfers made?
4. Are there procedural guidelines for transferring employees?
5. Are the transfers at issue the result of preexisting staffing criteria or guidelines?
6. Are the transfers voluntary or involuntary?
7. Are the transfers permanent or temporary?
8. If the person in question makes a decision, what factors are considered in making the decision to transfer? (Skills, seniority, employee preference, operating needs, etc.)

9. Does the transfer affect the wages or working conditions of the transferred employee?
10. Does the individual have the authority to make the final decision regarding transfer?
11. Does the individual make recommendations whether the transfer should take place?
12. What happens to that recommendation? Is the recommendation accepted?
13. What is the process of review of the recommendation? Does any other supervisor or member of management consider the transfer request? Get specific examples and names of individuals transferred.

SUSPEND/DISCIPLINE

1. Does the individual suspend or discipline employees?
2. Does the individual issue oral or written warnings to employees?
3. Under what circumstances are warnings issued? Under what circumstances are employees suspended? Is a progressive discipline system involved?
4. Who signs written warnings or suspension notices? Describe the process followed in issuance of a warning/suspension?
5. Does a superior review the warning or the suspension? Specifically, what does the superior do when reviewing the warning or suspension? Does the superior investigate the underlying events that gave rise to the warning/suspension? Based on the review, does the superior affirm or reject the recommendation?
6. Do such warning notices affect employees' jobs?
7. Do warnings and/or suspensions serve as a basis for more serious disciplinary action under a system of progressive discipline?
8. Do suspensions affect employees' wages, e.g., are there paid or unpaid suspensions?
9. Are warnings or suspensions taken into account for evaluation purposes?
10. Are warnings or suspensions placed into employee personnel files?
11. Describe the circumstances under which employees are suspended. Is it automatic for certain kinds of misconduct? Describe that conduct.
12. Does the individual have the authority to make the final decisions regarding warnings or suspensions?
13. Does the individual make recommendations whether warnings or suspensions should take place?
14. What happens to those recommendations? Are those recommendations accepted?

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LAYOFF/RECALL

1. Does the individual layoff or recall employees?
2. Is he/she involved in the decision to layoff or recall employees?
3. Is he/she involved in selecting employees for layoff or recall?
4. What system is utilized to determine which employees are laid off or recalled, e.g., by department, seniority, performance, skills.
5. Does the individual have the authority to make the final decision regarding layoff or recall?
6. Does the individual make a recommendation whether the layoff or recall should take place?
7. What happens to that recommendation? Is the recommendation accepted?
8. What is the process of review of the recommendation? Does any other supervisor or member of management consider the layoff or recall? Get specific examples and names of individuals laid off or recalled in the past.

PROMOTE/REWARD (INCLUDING EVALUATIONS, OVERTIME ASSIGNMENTS, TIME OFF, WAGE INCREASES)

1. Does the individual promote or reward employees, including granting time off, overtime, wage increases, bonuses or evaluations?
2. Are there established guidelines governing the promotion of employees? If written, obtain them.
3. Describe the circumstances under which the individual has promoted other employees? Give specific examples.
4. Does the individual have the authority to grant time off to employees, including sick leave and vacation time?
5. In what circumstances does the individual have the authority to grant time off, including vacation and sick leave? Has that authority been exercised? Give specific examples. Describe the procedures utilized and the standards applied when granting time off?
6. Does the individual have the authority to grant or authorize overtime to employees? In what circumstances does the individual have the authority to authorize overtime? Has that authority been exercised? Give specific examples. Describe the procedures utilized and the standards applied when authorizing overtime? If written, obtain them.
7. Does the individual have discretion to determine to whom the overtime is assigned?

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8. Is there an established procedure for assignment of overtime? Are overtime assignments based on seniority or rotating lists? If written, obtain them.
9. Are overtime assignments voluntary? Does an employee have the right to reject overtime assignments?
10. Are there established guidelines governing wage increases or bonuses granted to employees? If written, produce the documents.
11. How are wage increases or bonuses determined? Are they automatic, based on merit, years of service, evaluations, productivity?
12. Does the individual prepare written evaluations? If so, how? Describe the nature of such evaluations.
13. Describe the employer's evaluation process/system. If there is a form, obtain it for the record. Describe how the individual evaluates other employees and describe what is done with the evaluation after it is completed. Give specific examples.
14. When preparing evaluations, do they include recommendations for specific personnel actions? If so, what kind of personnel action?
15. Do evaluations affect employees' job status, wage increases, promotions or disciplinary action? Give specific examples.
16. How much weight does the employer place on these evaluations?
17. Do higher-level managers obtain information from other sources for evaluation purposes?
18. Does the individual make recommendations regarding the evaluations?
19. What happens to that recommendation? Is the recommendation accepted?
20. What is the process of review of the recommendation? Does any other supervisor or member of management consider the evaluation? Get specific examples and names of individuals evaluated.

ADJUST GRIEVANCES

1. If the individual handles grievances, describe methods used and extent of involvement. If there is a written grievance procedure, attempt to obtain a copy for the record, if available.
2. Do employees typically come to this individual to resolve problems?
3. What types of grievances is he/she authorized to resolve without higher authority?
4. Give specific examples.

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DISCHARGE

1. Is the individual involved in discharging employees?
2. Are there established guidelines or policies that result in the discharge of employees?
3. Describe the discharge process and the individual's role in that process.
4. Does the individual have the authority to make the final decision regarding discharge? Give specific examples.
5. Does the individual make recommendations whether employees should be discharged?
6. What happens to that recommendation? Is the recommendation accepted?
7. What is the process of review of the recommendation? Does any other supervisor or member of management look into the basis for the discharge? Get specific names of individuals discharged.

ASSIGNMENT AND RESPONSIBLE DIRECTION

1. Is the individual involved in the assignment or direction of work? Who and which classifications report to the individual?
2. How is the individual involved in assignments? Are the assignments made in collaboration with others?
3. Does the individual make the decisions; if so, on what factors are those decisions based (skills, training, experience, availability, seniority, operational needs, etc.)? Does the individual have discretion to determine which among several employees should be assigned to an individual task?
4. What is the nature and duration of the assignments given by the individual?
5. Are there established guidelines (e.g. company policies or rules, verbal instructions of higher authority, or provisions of a collective-bargaining agreement) relating to these assignments?
6. In the event there is a change in work requirements, can the individual decide how to reassign employees without consulting anyone else? What factors does the individual consider in doing so?
7. Does the individual prioritize work?
8. Does the individual direct employees' work (The act of directing which job shall be done next or who shall do it)? Describe and give examples of the type of orders or instructions given and the tasks involved. Once a task is assigned, does the employee need any guidance?

9. Is the individual “responsible” for the directed work? (i.e. Is the individual held accountable for the overall performance of that task?) If so, describe how the person is held accountable, including the effects on his/her terms and conditions of employment.

10. Is there a prospect of adverse consequences to the person directing the work if the work is not performed properly, or if no corrective action is taken? If so, describe and give specific examples.

11. Does the individual have the authority to correct, or direct the correction of, any errors made by employees? If so, has such authority been exercised? Describe and give specific examples.

12. Does the individual inspect the work of employees? For what purpose?

13. Is the individual responsible for the training of other employees?

14. Does the individual assign employees to:

- a. a place (such as location, department or wing); give specific examples; or
- b. a time (such as shift or overtime); give specific examples; or
- c. a task (which must involve “significant overall duties,” not ad hoc instructions to perform a discrete task). Describe in detail the duties and/or tasks assigned.

15. In a health care setting, does the individual’s authority to “assign” encompass the responsibility to assign nurses and aides to particular patients? If so, what factors (e.g., an objective or subjective appraisal of the employee’s skills and training; the nature or severity of the patient’s condition; an assessment of the probable amount of nursing time required, and the allocation of available resources; employee and/or patient personalities; employer policies; etc.) are relied upon to make those decisions?

SECONDARY INDICIA

Indicia other than those enumerated in Section 2(11) are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

See *An Outline of Law and Procedure in Representation Cases*, Section 17–507

Relevant Questions:

1. Does the individual attend supervisory meetings? Regularly? If not, how frequently? What is the reason for such attendance? What is the extent of his or her participation?

2. Does the individual receive any benefits not granted to other employees? If so, describe.

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3. Compare with those of other employees and admitted supervisors the individual's rate of pay, manner of pay, overtime, vacations, insurance, pensions, bonus, use of facilities, incentive plans, parking areas, type of clothing worn while working, use of time-clock, restrooms, cafeteria, payment for time lost. Describe any special privileges or compensation given the individual by virtue of the position.
4. Is the individual designated on the payroll as a supervisor?
5. Is the individual regarded as a supervisor by other employees and admitted supervisors?
6. What is the ratio of supervisory to non-supervisory employees?
7. Where is the individual's work location? Does he or she work in an office or at a desk?
8. Does the individual keep time records for employees?
9. Obtain job descriptions.

SUBSTITUTION & INTERMITTENT

The test for determining the status of individuals who intermittently substitute for statutory supervisors is whether the part-time supervisors spend a "regular and substantial" portion of their working time performing supervisory tasks or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products Inc.*, 330 NLRB 1359 (2000). The sporadic assumption of supervisory duties when the statutory supervisor is on vacation or sick leave is not sufficient to establish supervisory status. *Jakel Motors*, 288 NLRB 730 (1988). Rotation in and out of supervisory positions, as in the construction industry, may be indicative that the individual is an employee and not a statutory supervisor. *General Dynamics Corp.*, 213 NLRB 851 (1974).

Relevant Questions:

1. If the individual in question is an employee who substitutes in a supervisory position, does he or she spend a regular and substantial portion of his or her time doing so? On the other hand, does the individual only sporadically assume supervisory duties during times such as annual vacation periods, rather than on a routine and regular basis?
2. If the individual substitutes for conceded supervisors, what authority does the individual possess during those periods? Specific examples should be provided as to the exercise of this authority.
3. Is the individual the highest ranking individual present at any time or on any shift? If so, does the individual have authority to make final decisions or must he/she check with other officials? If the individual makes recommendations, what further action is taken and by whom? Give examples.

4. Do employees work permanently or temporarily under the individual? If temporarily, describe the circumstances surrounding their assignment to work under him/her, including the frequency, type of work performed, duration and the extent of his/her authority and responsibility.

F. Managerial Employees

The Board has defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer’s established policy.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Also see *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

See An Outline of Law and Procedure in Representation Cases, Section 19–200.

Relevant Questions:

General

1. What is the employee’s job title and position?
2. What are the duties and responsibilities of the position?
3. To whom does he/she report? What is the extent of supervision of his/her work?
4. How is the employee compensated? Are there any differences in amount and/or kind of benefits paid to other employees?
5. Where is the employee’s work location?
6. Is the employee’s position considered to be an “executive” position?
7. Is he/she held out as being a representative of management? Does he/she consider himself/herself as such?

Polycymaking

1. Is the employee involved in the formulation and effectuation of management policies? Give specific examples of formulation or effectuation of management policies.
2. Does the employee have discretion in the performance of his/her job, independent of the employer’s established policies? Give specific examples of such discretion.
3. What types of decisions is the employee called on to make? Give specific examples.
4. Are such decisions subject to approval by others in management?
5. What and whom do such decisions affect?

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6. Does he/she attend/participate in meetings conducted to formulate and effectuate management policies?
7. Is the employee involved in labor relations matters, including the formulation or effectuation of policies? Does any other manager review the formulation or effectuation of that policy?
8. Does the employee have access to knowledge, data or records pertaining to labor relations? Identify specific records involved and the circumstances of that access.

Financial

1. Does the employee have the authority to pledge the employer's credit?
2. Does the employee have discretion or use independent judgment in committing the employer's credit? Are such purchases subject to review?
3. Are such purchases of a routine or non-routine nature?
4. Are there established or expressed dollar limitations placed on such purchasing authority?

Production/Scheduling

1. Does the employee have any responsibility for establishing production or other schedules?
2. How is that scheduling arranged or established? Is it reviewed by other managers?
3. What factors are used or considered by the employee to determine the schedule or distribution of work? Is this function routine, i.e., does the employee follow preestablished guidelines, or does it involve the use of independent judgment? If guidelines exist, obtain a copy for the record.
4. Does the employee participate in decisions regarding production changes or additions to or reductions in the size of the work force?
5. Is the employee involved in establishing or coordinating production or other business activities?

Training

1. Is the employee involved in training of employees or supervisors? If so, how?
2. Does such involvement include responsibility for developing training courses or manuals or for formulating or approving the content of such?

Editorial Policies

1. Is the employee involved in formulating or deciding editorial policies or content? If so, how?

Stock Ownership

1. Are the employees shareholders who collectively hold a majority of the stock in the employer's business?
2. In circumstances where the employee-shareholders do not hold a majority interest in the employer, are they nonetheless in a position to exert influence on management policy? E.g., do the employee shareholders select one or more members of the board of directors?

Note: In situations involving an Employee Stock Ownership Plan (ESOP), a contention may arise that all employees are managerial. In that instance, the hearing officer should ensure that the record fully reflects the extent to which employee-stockholders are involved in operational, personnel, entrepreneurial or other decisions; any limitations on such involvement; the exact nature of the decision-making process; and the exact types of decisions in which employees have participated.

G. Management Trainees

Determining the unit inclusion and/or placement of management trainees involves examining both the disputed individuals' supervisory or managerial status *and* their community of interest with unit employees. Management trainees generally are treated the same as other individuals who are in line for elevation to supervisory positions. Where a party seeks to exclude a management trainee on the basis that he or she is a supervisor, the hearing officer should refer to the supervisory status questions set forth in Section V, A, Community of Interest. Where a party seeks to exclude a management trainee on the basis that he or she lacks a sufficient community of interest with unit employees, the hearing officer should refer to the community of interest questions set forth in Section V, A, Community of Interest and ask the questions below. For cases demonstrating application of these factors, see *Nationsway Transport Service*, 316 NLRB 4 (1995), citing *Curtis Industries*, 218 NLRB 1447, 1452 (1975).

See *An Outline of Law and Procedure in Representation Cases*, Section 17–506.

Relevant Questions:

1. Was the trainee hired based on his or her possession of relevant education or experience?
2. Is the trainee's continued employment dependent upon his or her entrance into

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management, such that if not accepted, the individual must leave the employ of the employer?

3. Does the employer maintain a planned management trainee program? Describe.
4. Is there a distinction of wages and working conditions between management trainees and the employees with whom they work? Describe in detail.

H. Relatives of Management

The statutory definition of an employee in Section 2(3) of the Act specifically excludes “any individual employed by his parent or spouse.” In *Scandia*, 167 NLRB 623 (1967), the Board announced a policy of excluding from bargaining units the children and spouses of individuals who have substantial stock interests in closely held corporations. Clearly, the child of a sole shareholder is excluded. *Bridgeton Transit*, 123 NLRB 1196 (1959). Children of majority shareholders are also excluded. *Cerni Motor Sales*, 201 NLRB 918 (1973).

When the ownership is less than 50-percent, the Board applies a different test for determining eligibility. In *NLRB v. Action Automotive*, 469 U.S. 490 (1985), the Supreme Court affirmed the Board’s practice of excluding from a bargaining unit close relatives of the owners of a closely held corporation, even in the absence of special job related benefits. The Court also endorsed the Board’s policy requiring that eligibility of relatives in a non-closely held corporation depends on whether or not the employee enjoys “special status.”

Thus, although the standard for inclusion in the bargaining unit is community of interest, in cases of relatives of corporate shareholders, the inquiry as to community of interest is expanded to include consideration of the amount of stock owned by the relative shareholders, whether the employee is a dependent of the stockholder and similar considerations. The individual in question may also be excluded if his or her job duties reflect a special relationship. The special status test is also applied to determine the eligibility of relatives of nonowner managers. *Cumberland Farms*, 272 NLRB 336, fn.2 (1984); *Allen Services Co.*, 314 NLRB 1060 (1994).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–300.

Relevant Questions:

1. Is the individual employed by a parent, spouse or child in a sole proprietorship or partnership?
2. Is the individual employed by a corporation in which a member or members of his/her family own stock? If so, what percentage of stock in the corporation does the family member(s) own?

3. If the individual is employed by a corporation wherein his/her family owns more than 50-percent of the stock, ask the following:

- (a) How many shares are outstanding in the corporation? How many shares are owned by family members?
- (b) What is the relationship of the individual to the family member or members who own stock in the corporation?
- (c) If the individual is not an immediate family member (e.g., father, mother, son, daughter, brother, sister, spouse), ask the special status questions set forth below starting at question 4.

4. If the individual is employed in a corporation in which family members own 50-percent or less of the stock, ask the following:

- (a) What is the percentage of stock ownership?
- (b) What is the relationship to the family member/owner?
- (c) Does the individual live at home with the owner/manager?
- (d) Does the individual receive financial support (e.g., payment of tuition, free room and board) from the owner? If so, specify.
- (e) What are the person's duties and location of work?
- (f) What are the rates of pay, hours, supervision?
- (g) Are there benefits or privileges they receive that are not given to other employees?
- (h) Is there special consideration given by virtue of relationship?
- (i) Give examples, if any, of instances where relationship has affected the employment status of the individual.

5. If the individual is employed by an employer in which a family member is a nonowner but is in a management position, ask the following:

- (a) What is the relationship to the manager?
- (b) What is the manager's title? Position in the corporate hierarchy?
- (c) What authority does the manager have?
- (d) What opportunity is there for the manager to influence the individual's working conditions, wages, hours?
- (e) Is special consideration given by virtue of the individual's relationship to the manager?
- (f) Does the individual live at home with the manager? Does the manager provide any financial support to the individual? If so, specify.

VII. EMPLOYEE STATUS

A. *Seasonal Employees*

Regular seasonal employees are those who have a reasonable expectation of re-employment in the foreseeable future. If they have a reasonable expectation of recall and perform unit work, they are included in the bargaining unit. Factors to be considered include: whether the employer draws from the same labor force each season; whether former employees are given preference in rehiring; whether there are similar duties, working conditions and supervision for seasonal and permanent employees; and whether seasonal employees can become permanent employees. See *Maine Apple Growers, Inc.*, 254 NLRB 501 (1981).

Note: There is a difference between a seasonal employer and a cyclical one. If the employer, despite hiring some employees seasonally, is engaged in virtually year round production operations and the number of employees in the year round complement is relatively substantial, the employer's operation may be deemed cyclical and not seasonal. *Baugh Chemical Co.*, 150 NLRB 1034 (1965).

See *An Outline of Law and Procedure in Representation Cases*, Section 20–300.

Relevant Questions:

1. What classifications constitute the employer's permanent work force? Number of employees in each classification?
2. What classifications constitute the employer's seasonal peak work force? Number of employees in each classification?
3. When does the seasonal period begin, peak and end?
4. How many employees are added during the seasonal period? At various stages during the peak season?
5. Does the employer keep records of seasonal employees? Describe the kind of records used and how they are used.
6. Does the employer draw seasonal employees from the same labor force year after year? For instance, does the employer maintain a list of employees who worked in prior seasons and call employees from this list? Or, does the employer advertise to the general public each season?
7. Does the employer draw its seasonal employees from the same geographical area each year?
8. From what other sources does the employer obtain seasonal employees?

9. Is the labor force composed primarily of former employees? If so, how many employees are re-employed every season? Seek payroll records, over a number of seasons, to confirm the numbers and reduce lengthy testimony.
10. What percentage of seasonal employees return year after year?
11. What is the employer's policy regarding recall or hiring of seasonal employees? Are they given preference?
12. What notice is given to seasonal employees upon their hire? Are they told that they are hired only for the particular season or for a limited duration?
13. When the season is over, what have the employees been told about their prospects for future employment? Are any documents given to employees in this regard?
14. Have seasonal employees become permanent employees? If so, under what circumstances, how many and how often?
15. Ask questions on community of interest located in Section V, A, Community of Interest; compare terms and conditions of employment of permanent and seasonal employees.

B. Part Time, On-Call/Per Diem and Casual Employees

In determining unit placement and eligibility issues, the status of employees and their tenure are major considerations. Unit placement involves whether an employee or the classification shares a community of interest with others in the proposed unit. See Section V, A, Community of Interest. Eligibility involves, among other factors, the specific nature of employment, such as the frequency and regularity of work.

Regular part-time employees are included in a unit with full-time employees whenever part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing community of interest with the remainder of the unit. *Fleming Foods*, 313 NLRB 948 (1994). The test for determining whether an employee is a regular part-time employee involves an analysis of such factors as the regularity and continuity of employment, length of employment, degree of similarity of work duties performed by such employee in relation to those performed by bargaining unit employees, similarity of wages and benefits and other factors establishing whether such employee enjoys a community of interest with bargaining unit employees. *Pat's Blue Ribbons*, 286 NLRB 918 (1987). Regularity of work does not necessarily mean a fixed schedule; rather, this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that work is on a sporadic basis. Generally, infrequent employment can lead to a casual status finding. Where an

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employee is found to be an irregular part-time employee, the Board has excluded those employees as casual employees. *Royal Hearth Restaurant*, 153 NLRB 1331, 1333 (1965). However, an employee's option to turn down work and the fact that an employee does not necessarily call in every day does not preclude a finding of regular part-time status. *Mercury Distribution Carriers*, 312 NLRB 840 (1993).

On-call employees may or may not be considered regular part-time employees, depending on the specific nature of their employment. When they are employed sporadically, with no established pattern of continued employment, they are excluded from the unit, as are irregular part-time employees. But, where on-call employees have a substantial working history, with a substantial probability of employment and regular hiring, and meet any other criteria established by the parties, they are considered regular part-time employees.

See An Outline of Law and Procedure in Representation Cases Section, 20–100.

The suggested questions below cover part-time status, on-call/per-diem employees or those asserted to be casual employees:

Similarity of Duties/Community of Interest Questions:

First, establish that the disputed employees perform unit work similar to the work performed by the employees who are undisputedly included in the unit. If possible, the hearing officer should explore a stipulation that the disputed employees perform the same or similar work as other employees and receive similar wages and benefits. This way, the only remaining issue concerns the regularity of their employment. If it becomes necessary to call witnesses regarding community of interest issues, see Section V, A, Community of Interest, for suggested questions.

Regularity of Work:

Explore how often the employee(s) work for the employer over a specific period of time. Whenever appropriate, and certainly in lieu of lengthy testimony, the hearing officer should seek payroll records that may shortcut testimony from witnesses. If payroll records are available, they should be identified clearly on the record and submitted as evidence. The hearing officer should make sure that the records cover a sufficient period to establish the pattern of employment. If witnesses need to be called, here are some suggested questions regarding the regularity of work:

Relevant Questions:

1. How does the employee receive work opportunities?
2. How many hours does the employee in question work for the employer on a daily, weekly, monthly or other basis?

3. How many hours did he/she average per week during each of the two calendar quarters immediately prior to the hearing?
4. How long has the employee worked for the employer under this type of schedule or arrangement?
5. Is the employee employed elsewhere on a full-time basis?
6. Is the employee regularly scheduled to work a specific amount of time?
7. Is the employee free to reject work when it is offered?

**Eligibility Formulas Covering
Part-time, Per Diem and On-Call Employees:**

Even though regular part-time employees or per diem/on-call employees may be included in a unit, where these employees have varying hours of work, eligibility formulas have been devised to determine employees' eligibility to vote based on the hours worked during a particular period. Various standards, such as hours worked per day or week or days worked per calendar period, have been applied in different industries to determine whether part-time, per diem or on call employees are eligible to vote. Where there is a wide disparity in the number of hours worked by these employees, the Board has fashioned appropriate standards to assure an equitable formula. Parties may agree that part-time, per-diem or on-call employees should be included in the unit, but dispute which formula should be utilized in determining voting eligibility. Where the parties litigate the inclusion of part-time, per diem or on-call employees, the hearing officer should also ask the parties their positions regarding eligibility formulas. The hearing officer should encourage the parties to use a Board-approved formula appropriate for the circumstances of the case. If the parties stipulate to a different formula from one normally used by the Board, the record must contain an adequate basis upon which the Regional Director can determine the appropriateness of the proposed formula.

Davison-Paxon: The Frequently Used Standard

The most common eligibility formula for determining the eligibility of irregular part-time employees is the formula found in *Davison-Paxon*, 185 NLRB 21, 24 (1970), under which employees who average 4 hours per week for the calendar quarter preceding the election eligibility date are eligible to vote.

Health Care Industry Formula:

In the health care industry, the most commonly used standard is also the *Davison-Paxon* formula. *Sisters of Mercy*, 298 NLRB 483 (1990); *Beverly Manor Nursing Home*, 310 NLRB 538 (1993). The *Davison-Paxon* formula also has been applied to the home-health care industry. *People Care*, 311 NLRB 1075 (1993); *Five Hospital Elderly Program*, 323 NLRB 441 (1997). However, in a case where the facts showed a wide

disparity in the number of hours worked, the Board fashioned a different formula. *Marquette*, 218 NLRB 713 (1975) (on-call nurses who worked a minimum of 120 hours in either of the two quarters preceding the election eligible to vote).

The Construction Industry Formula:

Unlike all other industries, a special eligibility formula applies to all cases in the construction industry, unless the parties specifically stipulate to use the standard Board formula. In *Steiny & Co.*, 308 NLRB 1323 (1992), the Board returned to the voting eligibility formula established in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in *Daniel II*, 167 NLRB 1078 (1967), as being applicable to all elections conducted among employees of construction industry employers. Thus, the *Daniel* formula provides that, in addition to those employees who would be eligible to vote under standard Board criteria for eligibility, other employees will be eligible if:

- (1) they have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election: or,
- (2) if they have had some employment in the 12 months preceding the eligibility date for the election and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date.

Excluded from the *Daniel* formula are employees who have been terminated for cause or who have quit voluntarily prior to the completion of the last job on which they were employed. The *Daniel* formula does not apply to employers who clearly operate on a seasonal basis. *Steiny*, 308 NLRB 1323 (1992), at fn.16.

If the hearing officer is faced with the issue of whether the employer is an employer engaged in the building and construction industry, he/she should elicit specific testimony as to the employer's operations. An employer that is primarily engaged in construction of new work, additions, alterations, reconstruction, installations and repairs is considered to be an employer engaged in the construction industry. *South Jersey Regional Council of Carpenters, Local 623 (Atlantic Exposition Services, Inc.)*, 335 NLRB 586 (2001).

C. Probationary Employees and Trainees

Probationary employees who share the same duties and basic terms and conditions of employment with permanent employees and have an expectation of permanent employment upon the completion of their probationary period are eligible to vote. Employees attending training programs are eligible to vote, if they are performing unit work. *CWM, Inc.*, 306 NLRB 495 (1992); *Dynacorp/Dynair Services, Inc.*, 320 NLRB 120 (1995).

See *An Outline of Law and Procedure in Representation Cases*, Section 23–111.

Relevant Questions:

1. Describe the details of the training program or probationary period and its duration, purpose and content. Is the program or period subject to extension? How often does that occur? For how long may they be extended?
2. In what job or classification are individuals working?
3. What will be the assignment of the individuals on completion of the training or probationary period?
4. With which other employees do the individuals work?
5. Do individuals perform the same or similar duties as other unit employees?
6. How are individuals hired? Same or different from other employees?
7. What happens if an individual fails to complete training?
8. Percentage of these individuals who become permanent employees?
9. Do they attend meetings with other employees? What type of meetings? How often?
10. If disciplinary problems arise, how are these individuals treated? How does this compare with unit employees?
11. Ask community of interest questions located in Section V, A, Community of Interest and compare probationary employees or trainees with other unit employees.

D. Laid Off Employees

Temporarily laid-off employees are eligible to vote. Evidence is required to determine whether the laid-off employees have a "reasonable expectation" of being recalled to work in the foreseeable future. Objective factors that existed on or before the eligibility date must be considered, including the circumstances of the layoff, the employer's prior experiences with layoffs, the employer's future plans and what employees were told about the layoffs. There must be a reasonable expectation of recall on both the eligibility date and the date of the election. *Osram Sylvania, Inc.*, 325 NLRB 758 (1998); *Apex Paper Box Co.*, 302 NLRB 67 (1991).

See *An Outline of Law and Procedure in Representation Cases*, Section 23–115.

Relevant Questions:

1. Hiring date, classification, department, shift, supervisor, rate of pay, seniority.
2. Duties of the employee.

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3. Layoff date; by whom; reason given (details); temporary; written or oral?
4. Others laid off at the same time? Number, classification, department, shift, reason?
5. At the time of the layoff, what was said about recall? Subsequent conversations about recall?
6. Any memoranda issued by the employer regarding future employment needs, business lost or new business expected?
7. Has the employee been laid off before? When, why, how long?
8. Has the employer had layoffs before? When, how often? What is the employer's policy and past practice regarding recall of laid-off employees? What criteria did the employer use to determine who would be laid off and who would be recalled? How would these criteria be applied to the employees in issue herein?
9. Did the employer maintain a recall list? If so, obtain and put in evidence.
10. Have other employees been recalled? Who? When? Department, classification, shift, reason?
11. During the layoff period, was the employee continued on the payroll? Were insurance, seniority or other benefits continued?
12. Is the reason for the layoff of a temporary nature? Obtain details regarding the reason for layoff.
13. Will additional employees be needed? If so, when, number, classification, department, shift?

E. Discharged Employees, Alleged Discriminatees and Strikers

Discharged Employees or Alleged Discriminatees:

An employee is assumed to have been discharged for cause unless there is a pending grievance (*Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1365 (1962)) or unfair labor practice charge (*Dura Steel Co.*, 111 NLRB 590, 592 (1955)) alleging the contrary. During the course of a hearing, the hearing officer will not permit evidence to be presented in support of a pending charge or grievance. The **only** question is whether there is such a charge or grievance pending. If there is a pending charge or grievance, the alleged discriminatee may vote subject to challenge. *Curtis Industries, Inc.*, 310 NLRB 1212, 1213 (1993).

See *An Outline of Law and Procedure in Representation Cases*, Section 23–113.

Strikers:

Strikers are presumed to be economic strikers. *Bright Foods Inc.*, 126 NLRB 553, 554 (1960). If a charge has been filed alleging that the strike is an unfair labor practice strike, the hearing officer will not permit evidence to be presented in support of that charge. Economic strikers are eligible to vote if they have not been permanently replaced unless the opposing party establishes, by objective evidence, that the economic strikers have abandoned their interest in their struck positions. *Pacific Tile & Porcelain Co.*, 137 NLRB1358 (1962). This is an issue that may be fully litigated during the representation hearing.

Where the employer asserts that strikers have been permanently replaced and the petitioner contests such assertion, the hearing officer must inquire as to whether there is litigation pending regarding that issue. Permanently replaced strikers involved in pending litigation regarding their status shall vote subject to challenge. *Curtis Industries*, 310 NLRB 1212 (1993). If there is no pending litigation, strikers may be challenged during the election and their eligibility may be resolved postelection if those challenges are determinative. Replaced economic strikers are eligible to vote if the strike commenced less than 12 months prior to the election. *Tractor Supply Co.*, 235 NLRB 269 (1978). If the strike has been ongoing more than 12 months and the strikers have been replaced, they are generally not eligible to vote. Employees who are engaged in an economic strike and have not been permanently replaced are eligible to vote even if the strike has been ongoing more than 12 months. Permanent replacements are eligible to vote.

See *An Outline of Law and Procedure in Representation Cases*, Section 23–120.

Relevant Questions Pertaining to Strikers:

1. In general, what is the basis for the assertion that the employee(s) have abandoned their interest in their jobs?
2. Does the striker have a new job? Compare wages and benefits at new job vis-a-vis the struck work.
3. Is it a permanent or temporary position?
4. Did the striker move? When and under what circumstances? Was the move related to seeking other employment? Temporary or permanent?
5. Were any statements made by the striker regarding returning to the struck work, the move or whether the new job was temporary or permanent?

Permanent Replacements:

1. Describe the struck work and the positions held by the strikers and the replacements.

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2. When did the strike begin?
3. When were replacements hired?
4. How did the employer solicit applicants? Obtain copies of any written advertisements.
5. What were the replacements told about their anticipated duration of employment, either at the time of hire or at any other time? Obtain specifics.
6. What were the replacements told about the strike?
7. What do the replacements understand regarding the permanent or temporary nature of their employment?
8. Did the employer have any conversations with strikers about their employment and whether they would be recalled after the strike? Obtain specific details.
9. Do the employer's personnel records indicate the duration or nature of employment of replacements or strikers?
10. Have there been other strikes at the employer's facility? When? What was the employer's past practice regarding replacements and strikers during prior strikes?

F. Temporary Employees

Temporary employees are generally those without sufficient interests to be included in the unit. However, some employees who are classified as “temporary” may be eligible for inclusion in the unit. The test for determining the eligibility of individuals designated as temporary employees is whether they have uncertain tenure—the “date certain” test. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *MGM Studios of New York Inc.*, 336 NLRB No. 129 (2001). On the other hand, if employees are employed for one job only or for a set duration or have no substantial expectancy of continued employment and have been notified of this fact, then such employees are excluded as temporaries. *E.F. Drew*, 133 NLRB 155 (1961). This issue may also arise in the postelection challenge context; in those cases, hearing officers should be careful to inquire about the employees' status as of the eligibility date and not their status as of the election date or thereafter. *Apex Paper Box*, 302 NLRB 67 (1991).

See *An Outline of Law and Procedure in Representation Cases*, Section 20–200.

Relevant Questions:

1. Was the individual hired for a particular job or for a defined or limited duration? Was

he/she told by the employer the nature or duration of his/her employment?

2. Has the employee been retained in the past following the completion of a particular project for which he/she was hired? Have other temporary employees been retained past their projects' completion dates?
3. Do the employer's personnel records indicate the duration or nature of employment?
4. Does the employer have a history of recalling a substantial number of the same employees, even though they are described as temporary?
5. Even if employees were hired as temporary employees and with the understanding that their employment may be terminated at any time, did these employees remain in continuous service even after one year?
6. Has the employer continued to employ temporary employees beyond the original term? If so, for how long? What is the likelihood that their employment will end in the future?
7. Did the employee achieve permanent status prior to the eligibility date?
8. How is permanent status established?
9. Do these employees fill in for other employees? Who do they fill in for, on what basis, frequency?
10. Ask questions on community of interest located in Section V, A, Community of Interest, and compare temporary employees with other unit employees.

G. Dual Function Employees

Dual function employees are those who perform more than one function for the same employer. Dual function employees who spend part of their work time performing bargaining unit work may share a sufficient community of interest with the unit to be eligible to vote, even though they do not spend a majority of their time performing unit work. The same community of interest tests are applied to dual function employees as are applied to regular part-time employees. *Berea Publishing*, 140 NLRB 516, 519 (1963). Generally, dual function employees are included in the unit and are eligible to vote if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's terms and conditions of employment. *Ansted Center*, 326 NLRB 1208 (1998).

The dual function issue may arise in situations where employees have non-unit supervisory responsibilities. The Board has held that determinations of supervisory status are made based on a complete examination of all the factors present to determine the nature of the individual's alliance with management. *Rite Aid Corp.*, 325 NLRB 717

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(1998). Thus, where a party raises an issue that a particular employee performs unit work but also performs work as a supervisor, the hearing officer must delve into the 2(11) issues and obtain testimony in this regard.

Note: In *Otasco, Inc.*, 278 NLRB 376 (1986), the Board held that contract bar principles preclude the inclusion of a dual function employees in a unit if they are already included in another unit covered by a contract. In *Benson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), the court held that dual function employees were not entitled to vote in two separate units because it would require those employees to join two different unions to maintain their employment. Similarly, in *Nu-Life Spotless, Inc.*, 215 NLRB 357, 358 (1974), the Board held that in cases where elections are to be conducted in two units and some employees perform work in both units, those employees will be placed in the one unit in which their greater community of interest lies.

See *An Outline of Law and Procedure in Representation Cases*, Section 20–500.

Relevant Questions:

1. Does the employee perform non-unit work, as well as bargaining unit work?
2. Specify precisely the bargaining unit worked performed.
3. How much time does the employee spend performing bargaining unit as opposed to non-unit work? Are there payroll records or other documents that would show the number of hours worked in each area? If so, seek to have them introduced into evidence.
4. Who supervises the employee when he or she performs bargaining unit work? Same supervisor as other unit employees?
5. Where is employee physically located when performing bargaining unit work? Situated with other unit employees?
6. Wage rates when performing unit work? Similar to others in the unit?
7. Benefits provided when performing unit work? Similar to others in the unit?
8. Is the dual function employee included in a different bargaining unit of the same employer? If so, is there a current collective-bargaining agreement that already covers the dual function employee in that unit?
9. Is the dual function employee being sought in more than one unit simultaneously? If so, ask community of interest questions in Section V, A, Community of Interest, and compare their community of interest with that of employees in each of the other units in which the dual function employee works.

H. Contingent Employees

In *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), a divided Board overruled *Lee Hospital*, 300 NLRB 947 (1990) and held that a unit combining the user's solely-employed employees and the supplier's employees jointly-employed by the user and the supplier does not constitute a multiemployer unit and thus does not require the consent of the user and the supplier. The proper analysis to be applied in determining the appropriateness of a unit of user and supplier employees is a community of interest analysis. If an examination of all the factors establishes that the jointly-employed employees share a mutuality of interests in wages, hours and working conditions with the user's employees, then a single unit combining both sets of employees may be appropriate. *Interstate Warehousing of Ohio*, 333 NLRB 682 (2001). There is no inquiry into community of interest issues unless there is a joint-employer relationship between the user and supplier of the employees in issue.

A unit of the user's employees, excluding the jointly-supplied supplier's employees, may also be appropriate. *Holiday Inn City Center*, 332 NLRB 1246 (2000). However, where the jointly-employed supplier's employees share such a strong community of interest with the user's solely-employed employees, their inclusion is required, despite the union's desire to exclude them. *Outokumpu Copper Franklin*, 334 NLRB 263 (2001); *Engineered Storage Products Co.*, 334 NLRB 1063 (2001).

A union is not required to seek to bargain with both the user and the supplier; if the union names only the user in the petition, litigation of the possible joint employer relationship between the user and the supplier is not required. *Professional Facilities Management*, 332 NLRB 345 (2000).

See *An Outline of Law and Procedure in Representation Cases*, Section 14–600.

Relevant Questions:

1. If the parties do not stipulate to joint-employer status, the hearing officer must establish that the user and the supplier are joint employers. Refer to the questions on joint employer in Section IV, B, Single or Joint Employer. In particular, explore whether the two entities share responsibility for decisions concerning employees' wages, hours and other essential terms and conditions of employment, including decisions related to:
 - (a) Hiring
 - (b) Firing
 - (c) Discipline
 - (d) Work Schedules
 - (e) Job duties and requirements
 - (f) Work rules
2. What are the job duties and functions performed by the user employees and the supplier employees?
3. Compare their similarities. Are their duties functionally interrelated?

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4. Compare the two types of employees in terms of:
 - (a) Wage rates
 - (b) Fringe benefits—both in types and amounts
 - (c) Working conditions
 - (d) Location of their work
 - (e) Supervision
 - (f) Schedule of hours
 - (g) Frequency and degree of contact
 - (h) Criteria for hiring

Note: Ask questions on community of interest and compare the terms and conditions of employment of the user and supplier employees. See Section V, A, Community of Interest, for community of interest questions.

5. How are the above terms and conditions of employment determined or controlled? By which employer?

I. Undocumented Workers

The Supreme Court has determined that undocumented workers are employees under the Act, notwithstanding their immigration status. *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). As employees, they are entitled to vote in NLRB elections. *County Window Cleaning Co.*, 328 NLRB 190, fn.2 (1999); GC Memorandum 02-06. Accordingly, if a party raises the issue of an employee's immigration status at a representation case hearing, the hearing officer should not permit evidence to be adduced, but rather should allow the party to present a brief offer of proof. The offer of proof will provide the Board with the context to consider the relevance of the employee's immigration status, if it chooses to do so.

VIII. CLASSIFICATIONS OF EMPLOYEES

A. *Professional Employees*

Section 2(12) of the Act defines a professional employee as any employee engaged in work:

- (1) predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work;
- (2) involving the consistent exercise of discretion and judgment in its performance;
- (3) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual study in an institution of higher learning or a hospital.

Note that the statute defines a professional employee in terms of the work the employee performs; individual qualifications are not controlling (e.g., a medical doctor working as truck driver is not a professional employee).

See *An Outline of Law and Procedure in Representation Cases*, Section 18–100 et. seq., 21–400.

Relevant Questions:

1. Describe the employer's business.
2. What is the job classification of these employees? How many employees are in this classification?
3. What are the education, training and experience requirements?
4. What type of schooling did these employees receive? How long? Courses? Degree?
5. Do they possess a state license or membership in a professional association? If so, describe. Is that required for the job?
6. Describe their duties.
7. Describe, in detail any work performed by the employee which is intellectual and varied in character. How often does the employee perform this work?
8. Describe, in detail, any work performed by the employee which involves the exercise of discretion and judgment. If so, how often?
9. Is their work of such a character that the output produced or result accomplished cannot be standardized in relation to a given period of time? Explain.

10. Is there any special knowledge required to perform the job? Explain.
11. Describe the nature of their supervision.
12. Are they working under the close supervision of a professional employee as part of a requirement of becoming professional employees? If so, who?
13. Ask community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment of professional employees with other unit employees.

B. Truckdrivers

The unit placement of truckdrivers is decided primarily on community of interest considerations. Petitioned for separate units of truckdrivers have been found appropriate, as have petitioned for units combining truckdrivers and other employees. *Overnite Transportation*, 322 NLRB 743 (1996); *Transportation*, 325 NLRB 612 (1998). Unit determinations depend on the following factors:

- (1) the unit petitioned for;
- (2) whether the truckdrivers and the plant employees have related or diverse duties, the mode of compensation, hours, supervision and other conditions of employment; and
- (3) whether they are engaged in the same or related production processes or operations or spend a substantial portion of their time in such production or adjunct activities.

Local drivers and over-the-road drivers may constitute separate appropriate units, when requested, if it is shown that they are clearly defined homogeneous and functionally distinct groups with separate interests which can be effectively represented separately for bargaining purposes.

See *An Outline of Law and Procedure in Representation Cases*, Sections 15–140 through 144.

Relevant Questions:

1. Describe the employer's operations.
2. How many individuals are employed as drivers?
3. How many are employed as local or city drivers, how many as over-the-road drivers?
4. Describe their respective duties in detail. If the drivers spend only part of their time driving, determine the percentage of time spent driving and the percentage of time that they are engaged in other duties. What other duties do they perform? What other employees perform the same duties? Do these duties include selling the employer's

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products? If so, see Section D, Driver-Salesmen.

5. If the drivers spend part of their time in local and part of their time in over-the-road driving, what percentage of their time is spent in each type of driving?
6. Is special training or licensing required for the various driver positions?
7. Do the drivers wear uniforms? Are other employees required to wear uniforms? Compare.
8. How much of their time is spent on the employer's premises? What contact, if any, do they have with other employees? How frequent and of what duration is this contact?
9. What hours do they work? Do they punch a timeclock? How does this differ from other employees?
10. Who performs the maintenance service on the trucks they drive? What contact, if any, do they have with those individuals?
11. Do they load and unload their trucks? Are they given assistance? If so, by whom?
12. Can drivers bid on production and maintenance positions; can other employees bid on driver positions?
13. Compared to other employee, are the drivers engaged in the same or a related production process or operation? To what extent? Describe fully.
14. Do the drivers attend employer meetings? Where? With what group(s) of employees? How frequently?
15. What is the history of collective bargaining among the drivers and the other employees with whom they work?

Note: Where a party contends that drivers should be included with other classifications (e.g., mechanics, production and maintenance employees, warehousemen, shipping and receiving employees, etc.) refer to Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

C. Warehouse Employees

In non-retail situations or in combined retail and wholesale operations, the appropriateness of petitioned-for warehouse units is determined by application of a community of interest analysis. *Esco Corp*, 298 NLRB 837 (1990); *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999).

In the retail industry, separate units of warehouse employees are appropriate only where: (1) the warehouse operation is geographically separated from the retail operations; (2) there is separate supervision of employees engaged in the warehousing function; and (3) there is no substantial integration between the warehouse employees and those engaged in other functions. *A. Harris Co.*, 116 NLRB 1628 (1957).

See *An Outline of Law and Procedure in Representation Cases*, Section 15–270.

Relevant Questions:

1. Is this a retail, wholesale or combination retail/wholesale operation?
2. Where is the warehouse operation located? Where is the remainder of the employer's operations located?
3. Who supervises the warehouse operation? Who supervises the remainder of the employer's operations?
4. How many warehouse employees are there? How are they classified?
5. What are the duties of the warehouse employees?
6. How many other classifications of employees are there; how many employees are there in each other classification?
7. Compare with the duties of other employees.
8. Is there employee interchange? Degree of interchange? Frequency? Duration?
9. What skills are required of the warehouse employees? Compare with other employees.
10. What are the job functions of the warehouse employees? Compare with other classifications of employees.
11. Is there any bargaining history involving warehouse employees? When? In what unit? In a recognized or certified unit?

Note: Where a party contends that warehouse employees should be included in a unit with any other classifications, ask community of interest questions located in Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

D. Driver-Salesmen

Depending on their particular circumstances, driver-salesmen are included in production and maintenance units, in units with other drivers and in units with salesmen. Driver-salesmen have also been found to constitute a separate appropriate unit. The Board looks to community-of-interest considerations and whether their delivery duties are “an incident of their sales activities,” or whether their function is closely related to the production process. Employees who sell their employer’s products and deliver them “as an incident of [their] sales activity” have interests more closely aligned with salesmen than to drivers, production and maintenance or warehouse employees. *Plaza Provision Co.*, 134 NLRB 910, 911–912 (1961).

See An Outline of Law and Procedure in Representation Cases, Section 15–145.

Relevant Questions:

1. Describe the employer’s operations and describe the driver-salesmen’s place in the organizational structure.
2. How many individuals are employed as driver-salesmen?
3. Describe their duties in detail. What type of vehicles do they drive?
4. What percentage of their time is spent in delivering and stocking product? What percentage in sales activities?
5. Do the driver-salesmen have contracts of employment? Obtain a copy of the contract.
6. Does the employer employ other drivers? How many? How do their job duties compare to those of driver-salesmen?
7. By whom are the driver-salesmen supervised? Who supervises the other employees?
8. Does the employer employ any sales employees? How many? How do their job duties compare to those of driver-salesmen?
9. How are driver-salesmen paid? Compare to other drivers, sales force and production and maintenance employees.
10. Are there any special training or other job qualifications required for the driver-salesmen position?
11. Is there any history of collective bargaining at the facility in a driver, driver-salesmen or salesmen unit? Was it a recognized or a certified unit?

Note: Where a party contends that driver-salesmen should be included with any other classifications, refer to community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

Note: Where a party contends that driver-salesmen are independent contractors, refer to questions on independent contractor status, Section VI, A, Independent Contractor.

E. Technical Employees

Technical employees are defined as employees who do not meet the strict requirements of the term “professional employees” as defined in the Act but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of special training usually acquired in colleges, technical schools or through special courses. *Livingston College*, 290 NLRB 304, 306 fn.16 (1988). Unit placement of technical employees is based on all the factors relevant to a community of interest finding. *Virginia Manufacturing Co.*, 311 NLRB 992, 993 (1993); *Folger Coffee*, 250 NLRB 1 (1980).

See *An Outline of Law and Procedure in Representation Cases*, Sections 19–500 (technical employees) and 19–510 (for health care technical employees).

Relevant Questions:

1. What type of industry?
2. Where are the employees located within the employer's facility? Is this area a separately situated or controlled area?
3. To what department are technical employees assigned? With whom do they work?
4. Compare similarities between the skills and job functions of technical employees and rank-and-file employees.
5. Compare similarities between the skills and job functions of technical employees and professional employees.
6. What education, training or experience is required for the technical employees? Are they required to have any licenses or special certifications? How does this compare to professional employees? Do they actually possess the required education, training or experience?
7. What special tools or instruments do they use in the performance of their job duties?
8. Explore examples of the exercise of independent judgment.

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9. Do they have any inspection responsibilities for the work of rank and file employees? If so, what recommendations do they make and how effective are their recommendations?
10. Do they prepare any technical reports, data or handbooks?
11. What reports do they keep of their work?
12. Who evaluates their reports? To whom are they directed and for what purpose?
13. Who is their supervisor? What is the nature of their supervision?
14. Compare their supervision with that of rank-and-file and professional employees. Is their supervisor a professional?
15. What contact do they have with rank-and-file employees? With professional employees?
16. Is there any interchange with other employees? If so what is the nature, duration, and frequency of the interchange?
17. What is the bargaining history with respect to technical employees?
18. Does any union seek to represent technical employees separately?
19. Ask community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment of technical employees with unit employees and professional employees.

F. Clerical Employees

Office clerical and plant clerical employees are generally not joined in a single unit unless the parties agree to their inclusion in a single unit. Plant clerical employees are normally included in a unit of production and maintenance employees. The designation of employees as either office clerical or plant clerical employees is based upon community of interest concepts and the distinction is not always clear. *Hamilton Halter Co.*, 270 NLRB 331 (1984). Historically, workers who perform clerical duties in close association with the production process and production employees have been included in production and maintenance units as “plant clericals,” even though they may utilize secretarial skills or are classified as clerks. *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994). Clerical employees with duties related to general office operations do not share a community of interest with production employees and thus are not included in a production and maintenance unit. *Container Research Co.*, 188 NLRB 586, 587 (1971).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–410.

Relevant Questions:

1. How are they classified? How many employees are there in each classification in issue?
2. To which department are they assigned?
3. By whom are they supervised?
4. Describe duties, machines operated, reports prepared, records kept.
5. What is their location in the plant?
6. Describe the relationship between their duties and production functions.
7. Do they have any direct contact with customers? Describe their duties and functions in this regard.
8. Describe working contacts with production, warehouse and/or office employees.
9. Does the employer have a computerized information processing system? Establish the classifications of employees that make entries into and obtain information from this system.
10. Describe and show frequency of interchange with production, warehouse and/or office employees.
11. Establish the percentage of office or plant clerical and other duties.
12. Compare their use of facilities with production and/or office employees.
13. Describe any similarity of working conditions with production, warehouse and/or office employees.
14. Who establishes their pay? In which department are they classified for payroll purposes?
15. Method of compensation—hourly, salary, bonus, incentive, piece rate.
16. Method of recording time—do they use a time clock? Is it the same time clock used by the production and/or office employees?
17. Compare employee benefits received with those received by production and/or office employees.

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18. Compare their hours of work and lunch breaks with those of production and/or office employees.
19. Do they dress in a manner similar to the production employees or to the office employees?
20. What background, education and training are required for performance of their duties? Compare with those of production, warehouse or office employees.
21. What types of skills do they utilize in performing their jobs?
22. What is the progression schedule from and to the classifications in question?
23. Is there a history of collective bargaining in a unit including office clerical employees? Is there any history of collective bargaining in a unit including plant clerical employees? Has this group of employees ever been represented in another bargaining unit? When? Was this a certified or recognized unit?
24. Ask questions on community of interest located in Section V, A, Community of Interest, and compare terms and conditions of employment of the clerical employees in dispute with other classifications in the unit.

G. Faculty Units in Colleges and Universities

When faculty are found to have managerial status, employee status has been denied. The party seeking to exclude employees as managerial has the burden of establishing that exclusion is appropriate.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that the employer's college faculty were managerial employees excluded from the coverage of the Act. The court in *Yeshiva* noted that managerial employees "must exercise discretion within or even independently of established employer policy and must be aligned with management" and must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy."

The appropriate inquiry under the *Yeshiva* decision is to determine the authority of the faculty with respect to hiring, promotion and tenure and their authority in setting university policy, including standards for admission, retention and graduation. Since the Board's decision in *Yeshiva*, some faculty units have been found appropriate. See, e.g., *University of Great Falls*, 325 NLRB 83 (1997).

Part Time Faculty:

Part-time faculty members have been found to be significantly different from full-

time faculty and have been excluded from units of full-time faculty. *New York University*, 205 NLRB 4 (1973).

Graduate Students:

In *New York University*, 332 NLRB No. 111 (2000), the Board found that graduate students who are paid for teaching functions are employees. However, graduate students do not share a community of interest with regular faculty and constitute a separate unit. *Adelphi University*, 195 NLRB 639, 640 (1972).

See *An Outline of Law and Procedure in Representation Cases*, Section 15–261.

Relevant Questions:

1. What is the governing structure and administrative hierarchy of the college?
2. Are there defined areas of responsibility and authority vested at various levels from the faculty through the board of trustees?
3. Are the responsibilities of the faculty set forth in writing, in the college's bylaws or in any books or other publications? If so, obtain and put in evidence.
4. Are there any reports issued by any accrediting body, which recite the role of the faculty in governance of the college? If so, obtain and put in evidence.
5. To what extent is the college faculty (full and/or part-time) involved in the decision-making process (individually, ad hoc committees or standing committees) in such areas as:
 - (a) Curriculum
 - (b) Course schedules
 - (c) Course content
 - (d) Course credit hours
 - (e) New degree programs
 - (f) Degree requirements
 - (g) Teaching methods
 - (h) Grading policies
 - (i) Classroom conduct
 - (j) Matriculation standards, policies and requirements
 - (k) Admission standards, policies and requirements
 - (l) Retention standards, policies and requirements
 - (m) Graduation standards, policies and requirements
 - (n) Size of the student body
 - (o) Tuition and fees
 - (p) Distribution of financial aid
 - (q) Scholarship standards and recipients
 - (r) Matters relating to retention, suspension, probation and expulsion of students

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- (s) Location of a school
 - (t) Teaching loads
 - (u) Student absence policies
 - (v) Enrollment levels
 - (w) Faculty hiring
 - (x) Faculty tenure and promotions
 - (y) Sabbaticals
 - (z) Faculty terminations
 - (aa) Contract renewals for probationary faculty
 - (bb) Faculty reappointments
 - (cc) Tenure
 - (dd) Faculty evaluations
 - (ee) Filling of administrative positions
 - (ff) Hiring of academic deans and other administrative officials
 - (gg) Appointment of department or division chairpersons
 - (hh) Significant faculty benefit terms, e.g., pension and health insurance coverage
 - (ii) Budgetary matters
 - (jj) Long-term planning
6. Specify any standing committees and the following:
- (a) their composition
 - (b) areas of responsibility
 - (c) extent of authority
 - (d) exercise of authority (specific examples)
 - (e) effectiveness of committee recommendations (specific examples where recommendations were followed or not)
7. How are faculty selected to participate in such committees? Appointed by the administration? Elected by their peers?
8. Are the committees comprised of administrators and others in addition to faculty? What is the composition of the committee (identity of those on the committee, numbers of faculty and number of administrators and others on the committee)?
9. What is the frequency with which they meet? What are the results of these meetings, e.g., issuance of reports, recommendations of further action?
10. Is there a faculty-wide vote or review of their decisions/recommendations?
11. Are their decisions/recommendations subject to veto by the administration, including academic deans and the board of trustees? Obtain examples.
12. Is such veto power exercised? Obtain examples.
13. Has the administration taken action in any of the aforementioned areas without faculty input or approval? Obtain examples.

For graduate students and research assistants:

When issues arise regarding graduate students and research assistants, secure evidence by department relating to all aspects of their employment, including but not limited to the following:

1. Whether their teaching duties are required for their degree;
2. How often they teach and the anticipated duration of their employment; and
3. Source of their funding.

H. Quality Control/Production Control Employees

Based on traditional community of interest standards, quality control employees are generally included in a production and maintenance unit when the petitioning union seeks to include them. *Lundy Packing Co.*, 314 NLRB 1042 (1994), enf. denied 68 F.3d 1577 (4th Cir. 1995). In some circumstances, the Board has found appropriate a petitioned-for production and maintenance unit *excluding* quality control employees. *Lundy Packing Co.*, supra; *Penn Color*, 249 NLRB 1117 (1980); *Beatrice Foods*, 222 NLRB 883 (1976).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–600.

Relevant Questions:

1. Describe the duties of the employee(s) in question.
2. Does the employer have any educational requirements for individuals seeking to hold such positions?
3. Does the employee possess any specialized technical training?
4. Where does the employee physically perform his/her duties? Compare the amount of time spent working on the production floor with that spent elsewhere (e.g., in an office or laboratory).
5. Describe the types and frequency of contacts with other unit and non-unit employees.
6. Who supervises these employees? Who supervises the other unit employees?
7. Identify rates of pay compared to other employees.
8. Does the employee use any testing equipment or conduct any technical analysis?
9. Does the employee have the authority to reject defective products or to stop a

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production line to correct a problem?

10. Does the employee perform time or motion studies of other employees?
11. What does the employee do with the data or information gathered as a result of such studies?
12. Does the employee have any involvement in determining or making changes in production processes or techniques or in establishing/changing rates of pay or quotas for jobs? What is the extent of the employee's involvement?
13. Is the employee involved in the scheduling of work? How does the employee do the scheduling? Is such scheduling in accordance with any established formula or procedures for the completion of production?
14. Does the employee have the authority to rearrange or alter schedules in order to meet deadlines or customer demands?
15. Does the employee have any authority to determine or authorize overtime work or to effectively recommend such in order to meet a production or shipping deadline?
16. Ask questions on community of interest located in Section V, A, Community of Interest, and compare the terms and conditions of employment of quality control employees with other unit employees and non-unit employees.

Note: If any party asserts the employee in question is a technical or professional employee, ask questions in Section VII, E, Technical Employees, or Section VIII, A, Professional Employees. If any party asserts that the employee(s) is supervisory, ask questions in Section VI, E, Supervisors.

IX. POSTELECTION

A. *Role of Hearing Officer*

The role of the hearing officer in a postelection challenges and/or objections hearing differs from the role of the preelection hearing officer because in a postelection hearing, the hearing officer makes credibility resolutions, findings, conclusions and recommendations. In other respects, however, the roles are similar. The postelection hearing officer conducts the hearing, opens, adjourns and closes the hearing and maintains order while the hearing is in session. The hearing officer listens to and passes on the admissibility of oral testimony and arguments concerning documentary evidence offered. It is to the hearing officer's advantage that a complete record is made because it forms the basis for the Hearing Officer's Report.

The parameters of the hearing on objections/challenges is the Regional Director's Supplemental Decision or Report on Objections/Challenges or Notice of Hearing, which sets forth the objectionable conduct asserted and/or the challenges in issue. The hearing officer must limit the hearing to the matters that the Regional Director has set for hearing. The hearing officer has the authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. *Iowa Lamb Corp*, 275 NLRB 185 (1985); *Precision Products Group*, 319 NLRB 640 (1995); *FleetBoston Pavillion*, 333 NLRB 655 (2001).

The hearing officer does not have access to the Region's investigatory file, nor direct or indirect knowledge of its contents; he/she is only furnished with the Supplemental Decision or Report on Objections/Challenges or Notice of Hearing in advance. Therefore, although the hearing officer should make sure that the record contains all relevant and competent evidence, his/her effort will be without the benefit of the material elicited in any prehearing investigation.

The hearing officer is not an advocate of any position but must be impartial in his/her rulings and conduct both on and off the record. The hearing officer may actively participate during the hearing by asking questions of witnesses. However, the hearing officer should keep in mind that, in a postelection case, the parties have their respective burdens of proof. If necessary, the hearing officer may cross-examine, call and question witnesses and call for and introduce appropriate documents. Under some circumstances, the hearing officer's pursuit of the development of a full record may lead to an appearance of undue assistance to one party or another. The hearing officer should exercise self-restraint, should give the parties an opportunity to develop points and should refrain from needlessly taking over. The hearing officer, while exercising restraint, should also be cognizant that his/her primary responsibility is to see that the record is clear and contains all relevant and competent evidence concerning matters raised at the hearing.

Finally, it is the duty of the hearing officer, on consideration of the record, to make credibility resolutions when necessary, as well as to make findings, conclusions and

recommendations that are fully explained and supported by the facts and analysis contained in his/her report. The content of a hearing officer's report is set forth more fully below in Section L. Pursuant to the General Counsel's guidelines, a Hearing Officer's Report on Objections, Challenges or both should be given priority attention. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11360.1 and 11390.1.

B. Burdens of Proof

1. Objections

In an objections case, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election.

2. Challenges

Generally, the party seeking to challenge a voter's eligibility bears the burden of proving the voter is ineligible to vote. Thus, where a party challenges a voter on Section 2(11) grounds or on other exclusionary grounds (confidential employee status, managerial employee or an employee that should be excluded from the unit), the challenging party bears the burden of proof. It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

(a) Challenges Based on Statutory or Policy Exclusions

As to challenges based upon the purported supervisory status of employees, the burden is on the party who seeks to exclude the employee. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). Additionally, any party challenging voters on the ground that the voter is a manager, confidential employee or independent contractor bears the burden of proof.

(b) Challenges Based on Unit Placement

Certain challenges are based upon the wording of the unit description in the stipulation or Decision and Direction of Election. The Board has held that an agreement for an election is a binding contract and the parties are bound by the "clear and

unambiguous” terms of the agreement. *Caesar’s Tahoe*, 337 NLRB No. 170 (2002); *Laidlaw Transit, Inc.* 322 NLRB 895 (1997). The hearing officer should not permit extrinsic evidence in these circumstances. *Id.* However, certain challenges may require an interpretation of the intent of the parties in entering into the unit stipulation. *Gala Food Processing, Inc.*, 310 NLRB 1193 (1993). In this regard, where the unit stipulation is unclear, the Board examines the parties’ intent. *NLRB v. Barker Steel Co., Inc.*, 800 F.2d 284, 286 (1st Cir. 1986). In doing so, it may be necessary to resort to extrinsic evidence. *Local Union 1395, International Brotherhood of Electrical Workers, v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). Where the parties’ intent remains unclear, community-of-interest principles apply.

(c) Not-On-List (NOL) Challenges

In order to be eligible to vote, the employee must be employed in the unit set forth in the stipulated election agreement or Decision and Direction of Election, employed on the payroll period cutoff date and employed on the day of the election. *Plymouth Towing Company, Inc.*, 178 NLRB 651 (1969). An NOL challenge may be easily resolved with payroll or other personnel records that the hearing officer may view prior to opening the record. The hearing officer must ascertain the reason that the voter was left off the eligibility list. If the employer provides no basis for having left the employee off the list or maintains that the voter is not eligible to vote, but nonetheless refuses to provide payroll records or other determinative evidence, the hearing officer should call witnesses or subpoena the information to resolve the challenge.

(d) Notification to Parties of Burdens of Proof

Prior to the hearing, the hearing officer should specify whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

C. Procedural Matters

1. Motions

(a) Adjournments or Postponements

It is the General Counsel’s policy that postelection hearings are to be conducted

on consecutive days wherever possible. Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should be issued as expeditiously as possible and the hearing scheduled at the earliest practical date with notification that it will be held on consecutive days until completed.

If a party requests a postponement at some point during the hearing, authority to grant such a request rests with the hearing officer. However, since the parties were advised prior to the hearing of the matter's urgency and that it would continue on consecutive days until completion, such a request should rarely be granted and only under the most compelling circumstances. When possible, the hearing should proceed on those issues where progress is possible. In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

If an adjournment or postponement is granted, it should be to a specific date, with the proviso that the hearing will continue on consecutive days thereafter until completed. The hearing officer should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption.

(b) Motions to Strike Testimony

Parties may submit a motion to strike testimony during a hearing. FRE Section 611(a) provides authority for striking direct-examination testimony where the witness was non-responsive on cross-examination. Motions to strike also may be based on incompetent testimony or answers to questions that are opinions rather than facts.

2. Subpoenas

The hearing officer should provide subpoenas to any party making a written request after the opening of the hearing. Subpoenas are available to the parties, subject to the standards set out in Section 102.66(c), Rules and Regulations. Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry. *Perdue Farms*, 323 NLRB 345, 348 (1997) (the information needs to be only 'reasonably relevant').

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph or by leaving a copy at the principal office or place of business of the person required to be served. See Section 102.113(c) and (e), Rules and Regulations. *Best Western City View Motor Inn*, 327 NLRB 468 (1999) (the attorney's affirmation of service is sufficient, without the postal return receipt card). The date of service is the day that the subpoena is deposited in the mail or with a private delivery service that will provide a record showing the date it was tendered to the delivery service or is delivered in person. See Section 102.112, Rules and Regulations.

(a) Petitions to Revoke

Pursuant to Section 102.66(c), Rules and Regulations, parties may seek to revoke subpoenas, either in whole or in part. Petitions to revoke should be in writing and filed within 5 working days after the date of service of the subpoena (also called the “5 day rule”). The date of service for the purposes of computing the time for filing a petition to revoke shall be the date the subpoena is *received*. See Section 102.112, Rules and Regulations. However, there are times when petitions to revoke are submitted orally to the hearing officer or the petition to revoke may not be timely filed. Even if the petition to revoke does not explicitly comply with the Rules and Regulations, the hearing officer should rule on the substance of the petition to revoke.

To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 working days. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995). This rule applies to both subpoenas ad testificandum and duces tecum.

The hearing officer must rule on petitions to revoke which are filed after the hearing opens. If the petition to revoke is submitted to the Regional Director prior to the opening of the hearing, the Regional Director may refer the petition to the hearing officer for ruling. At the commencement of the hearing, the hearing officer may immediately be faced with a petition to revoke and may be asked for a ruling without the benefit of testimony. The hearing officer may defer ruling until later in the proceeding when it becomes more apparent whether the subpoenaed information is necessary.

Some of the most common reasons for revocation of subpoenas are:

(1) relevancy and materiality: the hearing officer must determine if and how the evidence sought will aid in completing the record. The hearing officer should require that the parties discuss the relevancy of the subpoenaed documents. The hearing officer should secure the parties’ positions to see if there is room for compromise and an alternate source of information that may be satisfactory.

(2) burdensome and oppressive: a party asserts that accumulating documents is too difficult or the number of documents is too voluminous. However, it may be possible to narrow the request and eliminate the basis for the objection. This should be explored by the hearing officer.

(3) confidentiality: the subpoenaed party may contend that the documents to be produced are confidential because, for example, they contain confidential employee information, such as social security numbers or because the subpoena seeks proprietary information. Where confidentiality is asserted, the hearing officer may wish to consider the matter after an in camera inspection. Such an inspection allows the hearing officer to inspect the documents privately, apart from the involved parties, to determine whether the material is relevant, privileged or not producible for other reasons and whether portions of the documents may be redacted to satisfy confidentiality concerns.

(4) failure to tender the appropriate witness fees: if a witness fee was not served with the subpoena, the subpoena is invalid and must be re-served with the appropriate witness fee.

(5) proprietary information, such as production figures and profit and loss statements: The hearing officer may be faced with a claim that wage-related information is proprietary and confidential and not producible.

In sum, as noted above, if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection. The hearing officer should also look for areas of compromise, e.g., redaction of certain information or narrowing the scope of subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed.

Whenever the hearing officer rules on a petition to revoke, his/her rulings and the basis therefor should be clear and on the record, i.e., refer to each item in the subpoena and explain the decision to require production in whole or in part. If a hearing officer rules that some portions of the subpoenaed documents are not producible because, for example, they are irrelevant, or because they seek confidential information, he/she should grant the petition to revoke with respect to those portions of the subpoena and explain the basis for the ruling. The hearing officer may also choose to reserve ruling on all or part of petition to revoke the subpoena until after hearing some testimony, in order to determine whether the subpoenaed information is necessary for a determination of the issues. On occasion, continuation of the hearing, even with an outstanding petition to revoke, may resolve the issue because sufficient testimony is secured and the subpoenaing party is satisfied that production of the documents is no longer necessary. Where there continues to be a dispute about the subpoenaed documents, the subpoena, petition to revoke, the parties' positions and the hearing officer's ruling should be placed on a separate subpoena record. See Section 2(b), Subpoena Record.

(b) Subpoena Record

When there is an ongoing dispute regarding production of subpoenaed documents, a separate subpoena record should be established. To make a subpoena record, the hearing officer should inform the court reporter to stop the proceeding and begin a new transcript for the subpoena record. The subpoena record should include:

- (1) a separate copy of the formal papers
- (2) a copy of the subpoena at issue
- (3) proof of service, and
- (4) any written petitions to revoke the subpoena. If there are any written rulings on the petition to revoke, those documents should be included in a Board exhibit. On the record, the hearing officer should indicate the purpose of the proceeding, that a subpoena has been properly served and that the subpoenaed party is refusing to comply with the subpoena. All parties should state their respective positions regarding the subpoenaed documents and the hearing officer's ruling

should be made on the record.

The purpose of a subpoena record is to have a concise record of the dispute for the Regional Director, the Board and the district court.

(c) Subpoena Enforcement

Section 102.31(d), Rules and Regulations, requires the Regional Director to institute enforcement proceedings “unless in the judgment of the [Regional Director] the enforcement of such subpoena would be inconsistent with law and with the policies of the Act.” Thus, upon the failure of any person to comply with a subpoena issued and upon the request of the subpoenaing party for enforcement proceedings, the hearing officer should advise Regional management of the enforcement request. After consultation with the hearing officer, the Regional Director will decide whether the subpoenaed documents are necessary for a determination of the issues. If the Regional Director determines that the subpoenaed documents are necessary, then, upon the request of a party, the General Counsel, “shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for enforcement of the subpoena.” The Region should prepare the enforcement papers, but is not a party to the proceeding and does not assume responsibility for prosecution of the enforcement proceedings. See Section 102.31(d), Rules and Regulations. *Best Western City View Motor Inn*, 325 NLRB 1186 (1998).

(d) Contempt of Enforced Subpoena

If a district court orders compliance with the subpoena and the subpoenaed party continues to refuse to produce documents or to appear for testimony, then, upon request of the party on whose behalf the subpoena was issued, the Regional Director must institute contempt proceedings in U.S. District Court, upon noncompliance with an enforced subpoena. However, contempt proceedings need not be instituted by the Regional Director, absent a request by the party on whose behalf the subpoena was issued. The Regional Director is under no obligation to institute contempt proceedings sua sponte and need only do so upon request of the subpoenaing party. *Best Western supra*. Conversely, the party refusing to comply with the subpoena may be precluded from introducing secondary evidence on the matters covered by the dishonored subpoena. In such cases, the hearing officer should permit a brief offer of proof.

(e) Consequences of Refusal to Comply with Subpoena

When a party refuses to comply with a properly issued subpoena which requests the production of relevant material, the subpoenaing party can try to prove its case by the use of secondary evidence. *Bannon Mills*, 146 NLRB 611, 613 fn.4 (1964) (Board precluded a litigant from using records wrongfully withheld "and secondary evidence regarding matters provable by such records"). In addition, the hearing officer can strike defenses of a party who refuses to comply with subpoenas duces tecum and may also draw adverse inferences. See Section IX, C, 3, Adverse Inferences. In *Louisiana Cement Company*, 241 NLRB 536, 537 fn.2 (1979), the Board precluded the defiant party from

calling company officials and supervisors as its own witnesses where it had failed to comply with subpoenas calling for the testimony of these officials and supervisors.

In a postelection context, where a party has refused to produce documents that the hearing officer has deemed relevant to the issues for hearing, the hearing officer can rule that the refusing party cannot use the evidence it refused to produce to prove its case, either by way of cross-examination or during its case in chief. The hearing officer, on his/her own initiative, can also prevent the refusing party from introducing testimony relevant to issues covered by the material that was not produced. *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F3d 830 (D.C. Cir. 1998).

The appropriate time to raise an objection to the introduction of evidence (documents or testimony) that a party refused to produce pursuant to subpoena is when the evidence is proffered at the hearing. If a party raises, for the first time, an objection to the evidence in a post hearing brief, it may constitute a waiver of the objection. *Hudson Neckwear Inc.*, 306 NLRB 226 (1992).

3. Adverse Inferences

When a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Greg Construction Co.*, 277 NLRB 1411 (1985). Thus, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. When the missing witness is a supervisor or a manager who is still in the employ of the employer and that person would be the logical witness to testify regarding significant disputed matters, an adverse inference is properly drawn by the employer's failure to call that witness in its defense. The same can be said for a union-side witness. *International Automated Machines, Inc.*, 285 NLRB 1122 (1987). There is no requirement that prior notification be given to a party against whom an adverse inference may be drawn. *Douglas Aircraft Co.*, 308 NLRB 1217 (1992).

However, the Board will not draw an adverse inference where a potential witness is equally available to both parties and is a non-party witness. *Local 259 UAW (Atherton Cadillac)*, 225 NLRB 421, 422 fn.3 (1976); *Hudson Oxygen Therapy Sales*, 264 NLRB 61, 68 fn.11 (1982). Generally, employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling an employee witness. *Torbitt & Castleman Inc.*, 320 NLRB 907, 910, fn.6 (1996). However, there may be circumstances where the hearing officer may, in making credibility determinations, weigh the party's failure to call a potentially corroborating employee bystander to corroborate the party's witness. *C & S Distributors Inc.*, 321 NLRB 404, fn.2 (1996).

When dealing with a party who refuses to comply with a duces tecum subpoena, the hearing officer may draw an adverse inference. *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994). The hearing officer may also bar the non-

complying party from asking questions on direct or cross-examination about the subject matter sought by the subpoena. *Perdue Farms*, 323 NLRB 345, 348 (1997). Finally, the hearing officer may permit the introduction of secondary evidence by the party who has been disadvantaged. *Bannon Mills*, 146 NLRB 611, 614, fn.4 (1964). See the discussion of *Bannon Mills* in Section IX, C, 2 (e), above.

4. Factual Stipulations

During a hearing, the hearing officer may find that parties are prepared to enter into stipulations. If the outcome of a stipulation is that the matter, i.e., the challenges or the objections, is fully resolved, the stipulation need not be factual. NLRB Casehandling Manual, Part Two, Representation Proceedings Sections 11361.2 and 11391.2 note the circumstances under which such resolutions may be accomplished. Stipulations that do not fully resolve the matter, i.e., those that result in the continuation of the hearing to resolve other remaining challenges or objections, must be factual. For example, parties may enter into factual stipulations regarding the eligibility or unit placement of employees.

Hearing officers are encouraged to look for those situations in which, in order to avoid protracted testimony, the parties may be able to enter into factual stipulations resolving issues that are the subject of litigation. When parties are prepared to enter into such a stipulation, it should set forth specific facts and not simply legal conclusions. For example, where an individual's Section 2(11) status is in question, the hearing officer should elicit specific facts that establish that said individual is a Section 2(11) supervisor. All parties to the proceeding, including a decertification petitioner, must agree to the stipulation.

A stipulation of fact is conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted. It is not sufficient to secure a stipulation that involves a legal conclusion without supporting facts. Parties should be precluded from entering into stipulations simply agreeing that a particular employee "is a supervisor within the meaning of Section 2(11) of the Act." This holds true for all stipulations that involve eligibility issues.

In postelection proceedings, parties may enter into stipulations on eligibility for the limited purpose of the instant proceeding, i.e., with the understanding that the stipulation will not bind the parties for subsequent proceedings.

5. Admission of Statements or Affidavits In Postelection Hearing

Witnesses in a postelection proceeding may have provided a statement or an affidavit to the Regional Office. This may be an affidavit taken by a Board agent or one prepared by counsel. If the hearing officer is aware or has been advised that the witness provided an affidavit to any federal agency prior to the postelection proceeding, he/she should ensure that the Regional Office requests the agency possessing the statement to release it for use in the Board proceeding. NLRB Casehandling Manual, Part One, *Unfair Labor Practice Proceedings*, Section 10394.7; *Kawasaki Motors*, 257 NLRB 502 (1981). The hearing officer should be prepared to provide the parties with copies of any affidavits in possession of the Region from any pending or closed R or C case. The

affidavits from those case files should be reviewed by Regional Office personnel other than the hearing officer prior to the hearing. Copies should be appropriately redacted and readily available during the hearing. CHM, Sections 11426.1(b) and 11429.2-.3.

If a witness is called at a postelection hearing by the objecting party, another party may request a copy of the affidavit insofar as it relates to the subject matter about which the witness has testified. Such a request may be made only after the close of direct examination. See Section 102.118(b)(1), Rules and Regulations. A request for a witness' affidavit prior to the conclusion of the witness' direct examination is premature. Even if the witness gave a copy of the affidavit to a union agent, production cannot be required by subpoena prior to direct examination. *H. B. Zachary Co.*, 310 NLRB 1037 (1993). If a party subpoenas affidavits prior to the testimony of that witness, that portion of the subpoena should be quashed. Since the proper time for the request to produce an affidavit is at the close of direct examination, if a party seeks the affidavit after the witness has been excused, it is too late to require production. *Walsh-Lumpkin Drug*, 129 NLRB 294, 296 (1960).

If a party contends that portions of the affidavit do not relate to the subject matter of the witness' testimony, the hearing officer may exercise his/her discretion to inspect the affidavit in-camera and redact any portion of the affidavit that does not relate to the testimony. After the hearing officer has completed the in-camera inspection, he/she should note the findings on the record, along with the ruling regarding production of other affidavits.

Once the affidavit has been turned over to the requesting party, he/she may be given a reasonable period of time to examine the document before commencing cross-examination. Section 102.118(b)(1), Rules and Regulations provides that the affidavit can be used to impeach the witness's credibility. Normally, the portion of the affidavit that is inconsistent with the witnesses' testimony should be read into the record. If a party requests that additional sections be read or that the entire affidavit be admitted and if there is no objection to admission of the entire affidavit, it may be admitted into evidence. The hearing officer, when making credibility determinations, may weigh the witness' testimony at the hearing against the prehearing statement provided.

Unless the affidavit has been admitted into evidence, it must be returned to the hearing officer or Regional office representative upon conclusion of cross examination. Note that under Section 102.118(b)(1), Rules and Regulations, parties are not allowed to keep copies of affidavits for purposes other than cross-examination. Thus, parties may not use copies of affidavits for purposes of writing a posthearing brief. NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 10394.9.

6. Audio or Visual Tape Recordings in Postelection Hearing

Issues regarding admissibility of tape recordings (audio or visual) can arise, e.g., when meetings, conferences or other events are alleged as objectionable and they have been recorded. If a party seeks to introduce a tape recording, it is admissible even when

the recording was made without the knowledge or consent of a party to the conversation. *Williamhouse of California Inc.*, 317 NLRB 699 fn.2 (1995). The Board has found the tapes admissible even when the taping violates state law. *Wellstream Corp.*, 313 NLRB 698, 711 (1994). Nevertheless, the tape recording must be properly authenticated before its receipt into evidence. Proper authentication of a tape requires, in part, proof of chain of custody, further, an explanation of any editing must be provided by someone with knowledge of the editing. *Meditate of New Mexico Inc.*, 314 NLRB 1145, 1146 fn.7 (1994). Hearing officers should be aware that tape recordings are frequently of less than perfect quality and some passages may be inaudible. However, unless the defects are so substantial that they render the entire recording untrustworthy, defects go to weight and not to the admissibility of the recording. *U.S. v. Parks*, 100 F.3d 1300, 1305 at fn.2 (7th Cir. 1996). The *NLRB Division of Judges Bench Book* suggests that the best way to receive evidence of a tape recording is to obtain a stipulation of a written transcript for receipt into evidence, along with the tape if requested.

In postelection cases, parties may subpoena and seek to introduce either audio or visual tape recordings, e.g., a video of electioneering. Tape recordings, either audio or visual, are subject to production by subpoena and are admissible upon proper authentication. *Delta Mechanical Inc.*, 323 NLRB 76, 77 (1997).

7. Immunity

Under Section 102.31(c), Rules and Regulations, if any party desires to obtain testimony from a witness who has claimed a privilege under the 5th Amendment, the party may request an order requiring the witness to testify under a grant of immunity. The Agency must obtain the Attorney General's approval (and possibly that of other state or local enforcement agencies) for transactional immunity, which means for immunity for purposes of the particular proceeding. Under no circumstances may the hearing officer grant requests for immunity. Instead, a memorandum should be sent to the Division of Operations-Management requesting immunity, along with supporting reasons for the request. Operations-Management will handle the request thereafter.

8. Appeals from Rulings

A request for special permission to appeal to the Regional Director or the Board a ruling by the hearing officer on motions, objections and orders should be made promptly and in writing. The hearing officer does not have to adjourn the hearing immediately. The hearing officer may ask that the special appeal be prepared at an appropriate break time. A copy must be served on the Regional Director and the other parties. See Section 102.65(c), Rules and Regulations. The other parties should be given an opportunity to respond to the special appeal.

The request should set forth the ruling, the reasons special permission should be granted and the grounds relied on for the appeal, including the prejudice that resulted from the ruling.

The hearing officer should recess the hearing long enough for the preparation of the request. The hearing should then be resumed, even though the Regional Director or the Board has not passed on the request. Once all evidence is received (other than the issues raised by the special appeal), the hearing should be closed whether or not the Regional Director or the Board has ruled on the special appeal. After ruling on the special appeal, the Regional Director or the Board will take further action as is appropriate.

D. Evidentiary Matters

Representation case hearings are investigatory proceedings. Although it is not required that the rules of evidence and trial procedure be strictly followed, they serve as a guide for helping the hearing officer make a sound record. See Section 102.66(a), Rules and Regulations. The most common objections to evidence are based upon relevance, materiality and hearsay. These issues and other evidentiary matters are discussed below.

Considerations in Ruling on Common Objections

Hearing officers are frequently faced with objections to oral testimony, a line of questioning, types of questions (e.g., leading questions, beyond the scope of direct examination, hearsay, etc.) and documentary evidence. When an objection is raised, the hearing officer should ask the basis for the objection. The other parties' positions should be solicited, and the hearing officer should render a clear ruling on the record (either overruled or sustained) together with a brief statement of the basis for the ruling. The hearing officer should permit the party adversely affected by the ruling to make an offer of proof, if requested (see Section 9, Offers of Proof). Any documentary evidence, which is ruled inadmissible, may be placed in a rejected exhibit file.

1. Foundation

Before a witness testifies on a subject, the record should reflect the basis for his or her knowledge. The basis of the witness' knowledge goes to the competency of that witness to testify about a particular subject. The competency of the witness to testify goes to the weight given that testimony and not admissibility. For example, if a witness testifies about the job duties of employees in a specific classification, the record should clearly establish how the witness obtained the information. Does the witness supervise these employees? Is the witness employed in the job classification being discussed? Is the witness at the facility on a regular basis? When, where, what time and who was present are the types of preliminary fact questions which should be asked to establish the witness' ability and competency to testify. Foundation questions also may help determine if the testimony is going to be relevant. If a witness does not have personal knowledge of facts that are in issue, the hearing officer should ask the party presenting that witness whether a more competent witness is available to testify. Thus, hearing officers should pay attention to the testimony, and, if necessary, interrupt the testimony where it is not probative. In extreme cases, where a party insists on further questioning

of an incompetent witness, the hearing officer should ask for an offer of proof. See Section 9, Offers of Proof.

2. Relevancy

Evidence is relevant if it has a tendency to make more (or less) probable a fact of importance to the issue under consideration. See FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration it should be admitted. If not, then it should be excluded. Relevancy is a factor not only in oral testimony, but also regarding documentary evidence.

Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to the exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues. If the hearing officer determines that the documents are not relevant and should be excluded, the offering party may request that they be placed in the rejected exhibits file. See Section III, C, Rejected Exhibits. If voluminous documents are offered, the hearing officer should require the offering party to provide a full description and to designate with specificity the portions being relied on. Before ruling on admissibility, the hearing officer should request parties to analyze, preferably on the record, any documents offered; often, thereafter, there is no need to admit the documents. Additionally, the hearing officer should request that the parties submit a summary in lieu of voluminous documents. See Section IX, E, 6, Summaries.

3. Materiality

Materiality is related to relevance but is not identical. Materiality relates to the degree of importance of the evidence. If the evidence is relevant but of miniscule importance, it may be excluded.

4. Hearsay (FRE 801–807)

Hearsay is a statement (oral or written or non-verbal conduct), other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. This usually comes up in the context of a witness testifying about what someone else told him (e.g., “Joe told me he never works in the warehouse”). If the testimony is being offered to prove the truth of what is asserted—that Joe never works in the warehouse—this would be hearsay. The witness has no direct knowledge of the fact and the declarant, Joe, a non-party, is not on the stand to be cross-examined about the matter. Similarly, a document may be excluded from evidence as hearsay if it is intended by the person as an assertion of truth of the matter asserted in the document.

The following are *not* hearsay:

- (1) Prior inconsistent statements of the witness made under oath and now being

cross-examined;

(2) Consistent prior statements offered to rebut assertions that the statement has been fabricated;

(3) Statements which identify a person;

(4) Admissions of a party or its agents (if made during and relating to the agent's employment) and admissions adopted by a party. For example:

“My supervisor told me that Joe never works in the warehouse.” This is an admission by an agent of a party and is not hearsay. Such testimony can be received to prove the truth of the matter asserted.

Most common exceptions to the hearsay rule that hearings officers will encounter during a hearing are:

(1) Commercial publications. **FRE 803(17)**. For instance, Dun and Bradstreet reports and newspapers.

(2) Public records. **FRE 803 (8)**. For instance, Secretary of State documents, certificates of incorporation and court records. See Section 11, Official/Judicial Notice.

(3) Business records and other records regularly kept (must present testimony by custodian or other qualified witness and establish that such records are regularly kept in the ordinary course of business and relates thereto). **FRE 803 (6)**.

Note on Hearsay Evidence: Although there are many technical considerations about hearsay, it is important to remember that it may be received into evidence at an R case hearing in the discretion of the hearing officer. However, hearsay will probably be accorded lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). The hearing officer should encourage parties to produce other witnesses or evidence that will be more probative of the point.

5. Leading Questions

A leading question is one in which the questioner suggests an answer to the witness by his or her question and merely receives agreement. In effect, the examiner is doing the testifying. If the proponent of a witness is asking leading questions in significant areas, the witness' responses will be of little assistance. If the hearing officer finds that the questioner is asking questions like, "do charge nurses direct the work of CNAs," he/she should make sure that, on objection or on his/her initiative, the questioner is cautioned not to use leading questions. If the record reflects answers to leading questions, it is likely that the testimony will lack specificity and the hearing officer must obtain specific examples on the record when a witness has answered such leading questions.

In most representation case situations leading questions are acceptable in preliminary areas (e.g., “You are an employee of the Jones Co.?”). However, try to avoid leading questions during direct examination in critical areas (e.g., “Isn’t it correct that you have the authority to hire and fire?”). The value of the evidence is enhanced if the testimony provided is not an answer to a leading question. Leading questions on direct examination are permissible to refresh recollection of a witness who may have forgotten something (e.g., “Do you recall anything being said about a truck accident?”) During cross-examination, leading questions are permissible.

6. Common Objections

Here are some common objections raised in postelection hearings and some suggested responses by the hearing officer:

Objection to hearsay testimony:

- (a) Objection overruled. The testimony is not hearsay.**
- (b) Objection overruled. The testimony falls within a hearsay exception (delineate the exception).**

Objection to documentary evidence as irrelevant:

- (a) Objection overruled. The document is relevant and I will accord it whatever weight is appropriate.**
- (b) Objection sustained. The document is irrelevant and may be placed in the rejected exhibit file.**

Objections to leading questions or questions beyond scope of direct:

- (a) Objection overruled. The question is a preliminary or introductory question and thus a leading question is appropriate.**
- (b) Objection sustained. Counsel is excessively leading the witness and it appears that counsel, not the witness, is testifying.**
- (c) Objection overruled. This is an investigatory proceeding and, although the question goes beyond the scope of direct, I will allow the question in the interest of establishing a full and complete record.**

E. Evidence Issues

1. Best Evidence

Where the contents of a document are in issue, the document is the best evidence available and should be produced. The hearing officer may allow oral testimony about the contents of the document, but should demand the document be produced and question the witness about the document. A copy of the original document is sufficient if there is no dispute about its authenticity or accuracy (i.e., a copy of a signed collective-bargaining

agreement is sufficient). If a document is not available, secondary evidence should be admitted in lieu thereof.

2. Authentication (FRE 901–902)

If there is a question regarding the authenticity of a document, evidence should be obtained to verify that fact. The burden of proof for authenticating a document is slight. The person offering the document has that burden and usually establishes authenticity through a witness who can relate its origin (e.g., showing the letter to the witness, having him/her identify it, establishing the basis for his/her knowledge about the letter). It is common practice to use a copy of the original when there is no dispute about the document's authenticity. This includes allowing the withdrawal of an original document so that a copy may be substituted in the record.

FRE 902 sets forth the type of documents which are self-authenticating. These include, but are not limited to, certified copies of domestic public documents and records, official publications, newspapers and periodicals.

3. Parole Evidence

Parole evidence is oral testimony of a witness offered to contradict or modify the terms of a written agreement. For instance, when the terms of a contract have been embodied in writing, like a collective-bargaining agreement, evidence of contemporaneous or prior oral agreements is not admissible for the purpose of varying or contradicting the written contract. However, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining the correct interpretation of the agreement. *Don Lee Distributors*, 322 NLRB 470, 484–485 (1996).

4. Scope of Cross-examination Exceeds Direct Examination

Generally, in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. This has no application in R case hearings. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination.

5. Cumulative Testimony

Hearing officers should avoid permitting repetitious testimony on the record. If the hearing officer is satisfied that the record will not be enhanced by redundant evidence, it should be excluded. If the hearing officer finds that a party is eliciting testimony that is unduly repetitious, the hearing officer should ask for an offer of proof regarding the testimony. In such a case, the hearing officer may seek a stipulation that further witnesses would testify similarly. See Section 9, Offers of Proof. However, in a case involving close issues of fact, evidence that is corroborative and pertains to the issue in dispute is not repetitious testimony and should not be excluded. For example, where

charge nurses' 2(11) status is in issue, testimony from various charge nurses regarding the scope of their duties would not be repetitious and should be admitted if each nurse works in a different area of the facility or on different shifts.

6. Summaries

Voluminous documents are frequently reduced to summary form for better understanding. On request, the opposing party is given the opportunity to examine the underlying documentation on which the summary is based. See FRE 1006. The examination may have to be done at periods of time outside of normal hearing hours. The summary is typically received into evidence with the understanding that an objection will be entertained after examination of the underlying documents. In rare cases involving claims of privilege and when the parties agree to do so, the hearing officer may conduct an in camera inspection of the documents to confirm that the summary accurately reflects the underlying documents. If an in camera inspection is performed, the results thereof should be noted on the record.

7. Opinion Evidence

Opinion evidence proffered by witnesses is usually admissible. Opinion testimony commonly deals with such matters as time, distance, speed, etc. These are subjects that an observant person is competent to render an opinion about.

8. Offers of Proof

An offer of proof is generally a statement made by counsel or a representative setting forth the testimony of a witness if the party called that witness to testify. An offer of proof may be made when the hearing officer has ruled that a party may not examine a witness or offer exhibits on a topic to which an objection has been sustained. The party adversely affected by that ruling may ask permission of the hearing officer to make an offer of proof to show the content of the excluded evidence. This enables the reviewer of the record to determine whether it was appropriate to exclude the evidence. Normally, the offer is made in narrative form by counsel stating what the witness would testify to if permitted to answer a particular line of questioning. A question and answer offer of proof should generally not be allowed. On occasion, a party may wish to submit a written statement as an offer of proof. The written statement should be made part of the record as an exhibit.

Cross-examination does not follow the offer of proof. If the hearing officer determines, based on the proffer, that the testimony should be allowed, the hearing officer can reverse his/her earlier ruling on the objection and allow the party to elicit testimony in the area previously rejected by the hearing officer. However, if the hearing officer believes, based on the proffer, that his/her earlier ruling was correct, i.e., that the testimony was properly excluded to begin with, the hearing officer can receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

9. Proactive Use of Proffers

Offers of proof can be an effective tool for controlling and streamlining a hearing. Regional Office practices vary on the use of offers of proof and the circumstances under which their use is appropriate. When a hearing officer elicits offers of proof, he/she will have a better idea of the evidence to be presented and can maintain more effective control over the hearing. This way, the hearing officer can streamline the hearing and exclude potentially redundant or unhelpful testimony.

10. Judicial Notice/Official Notice

Judicial notice allows a court to shortcut the taking of testimony regarding matters that are common knowledge (e.g., Washington, D.C., is the capital of the U. S.). Official notice allows an agency to recognize its own proceedings and decisions (e.g., relevant jurisdictional facts in another Board transcript). Matters arising in a prior case may or may not be dispositive of the current issue. For example, where the Board has asserted jurisdiction previously and a party asserts that the facts have changed, additional evidence may be required. The hearing officer may take official notice at the request of a party or on his/her own motion.

On occasion, a hearing officer will be asked to take either judicial or official notice of other agencies' proceedings or a decision from another Regional Office. For instance, a party may seek to introduce state unemployment compensation proceedings, which may establish a particular employee's eligibility (i.e., an independent contractor finding by a state's agency). The Board admits into evidence and considers decisions in state unemployment compensation proceedings, but does not give the decisions controlling weight. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67, fn.2 (1997). If a party wishes to have official or judicial notice taken of any particular document, that party must produce a copy of the document.

11. Voir dire Examination

When a party offers an exhibit, the other parties may question the witness at that time concerning the exhibit. (E.g., Attorney A: "Mr./Ms. hearing officer, I offer into evidence this letter which is marked for identification as Employer's Exhibit 6 and which the witness has just identified." Hearing Officer: "Mr./Ms. B, any objection?" Attorney B: "May I voir dire the witness about the letter first?" Hearing Officer: "You may.") This interruption in the offering party's examination is permitted in order to clear up any questions the opposing party has about the authenticity of the exhibit. Voir dire questioning about an exhibit should be limited to the admissibility of the exhibit. Voir dire examination should be limited to a few basic questions about a document:

- who prepared the document?

- was the witness present when it was prepared/signed?
- is the document kept in the normal course of business?
- where is it kept?
- if the document is a summary, is the summary based on documents that are kept in the normal course of business; what is the summary based on?

Voir dire examination may also be used to question the competency or qualifications of the witness. See Section 1(a), Foundation. The questioner should not be allowed to question the witness in other areas until his/her normal turn to examine arises. Thus, voir dire questioning should not turn into cross-examination of a witness and the hearing officer should intervene in those circumstances.

12. Rejected Exhibits

If the hearing officer decides not to accept exhibits because they are not relevant or because they are cumulative, the offering party may request that they be placed in the rejected exhibit file. This should be permitted, as it will preserve the documents upon review to the Board. This may come up in the context of an offer of proof when exhibits accompany testimony or statements of the party.

F. Witnesses

1. Oath

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. The hearing officer should ask the following question: “Do you solemnly swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?” Affirmation may be used if requested. On recall, a witness need not be resworn but should be asked to signify that he/she understands that he/she is still under oath.

2. Witness’ Refusal to Answer Questions

If a witness refuses to answer a question that the hearing officer deems to be proper, the hearing officer can exercise his/her discretion to strike all testimony previously given by the witness on related matters. However, as an alternative, the hearing officer may advise the witness that refusal to answer the question may weigh against his/her credibility.

If a witness appears under subpoena but refuses to answer questions, it is as if the witness did not appear at all. Accordingly, subpoena enforcement proceedings may be appropriate where requested by the subpoenaing party. Under those circumstances, the district court judge should be notified that the subpoenaing party seeks an order compelling the witness to testify.

One way to avoid subpoena enforcement proceedings is to ask the subpoenaing party to wait until the end of the hearing to evaluate whether the subpoenaed witness remains a necessity. The subpoenaing party may find that, at the close of the hearing, there is sufficient record testimony in support of their position and that there is no longer

a need for the subpoenaed witness to testify. Thus, when faced with a request by a party to institute enforcement proceedings, the hearing officer should recommend too that the party await the completion of testimony and evaluate the need for the subpoenaed witness at that time. Note and advise the parties, that a request for subpoena enforcement must be made before the record closes.

3. Failure to Appear

If a subpoenaed witness fails to appear at the hearing and the Regional Director or the hearing officer believes that a decision cannot be made in the absence of that witness' testimony, the Regional Director may consider subpoena enforcement upon the request of the subpoenaing party. However, that process is a lengthy one and the Regional Director or the hearing officer may decide to avoid a protracted proceeding and decide the case without the subpoenaed witness if at all possible. The Regional Director or the hearing officer may also decide to call other witnesses instead of instituting subpoena enforcement proceedings.

4. Foreign Language Witnesses

Although non-English speaking witnesses have always appeared in representation cases, they now appear with greater frequency. Therefore, when preparing for a post election hearing, the Regional office and the hearing officer should be alert to any potential foreign language issue and should ask the parties to apprise the Regional Office promptly of a need for interpreter services. The hearing officer should ensure that appropriate arrangements for interpreters are made in order to avoid unnecessary expense or delay. In the event foreign language witnesses are required, the Regional Office must secure and pay for certified interpreter services. See *Solar International Shipping Agency*, 327 NLRB 369 (1998).

The Agency's limited budget is always a concern in regard to the expenses related to processing representation cases, particularly at hearings. The Regional Office and the hearing officer should take all reasonable steps to reduce costs, including interpreter costs. With respect to interpreter costs, hearing officers should exclude irrelevant and repetitious material from the record. In circumstances where it is unclear that a witness' testimony would be relevant or necessary and the witness would require a translator if called to testify, it may be appropriate for the Region Office or the hearing officer to request that the party which intends to call the non-English speaking witness identify, either through a formal offer of proof or any other satisfactory method, the nature of the testimony to be given by the witness. It may be possible to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and require that witness and an interpreter.

5. Board Agents as Witnesses

Parties may seek the testimony of Board agents regarding conduct that occurred during the election. See CHM Section 11429.1. However, under Section 102.118(a)(1),

Rules and Regulations, before a Board agent may testify, the General Counsel must authorize such testimony. In GC Memorandum 94-14, the General Counsel granted Regional Directors the authority to consider and decide whether or not to approve most requests for authorization to allow a Board agent to testify under Section 102.118. Accordingly, a party seeking Board agent testimony must make a request in writing to the General Counsel or, in the circumstances outlined in GC Memorandum 94-14, the Regional Director, pursuant to Section 102.118, Rules and regulations.

Note for the parties that in *Millsboro Nursing & Rehabilitation Center, Inc.*, 327 NLRB 879, fn.2 (1999), the Board held that there are important policy reasons for not involving Board employees as witnesses in Board litigation. See generally, *Sunol Valley Golf Co.*, 305 NLRB 493 (1991) supplemented by 310 NLRB 357 (1993).

6. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of other witnesses. Sequestration is a matter of right in C cases, not in R cases. *Hamilton Nursing Home*, 270 NLRB 1357 (1984); *Fall River Savings Bank*, 246 NLRB 831 fn.4 (1979) (R cases hearings not adversarial).

Accordingly, in a postelection hearing with multiple witnesses present where credibility of witnesses is at issue, the hearing officer should normally impose a sequestration order. Any request for sequestration should be made at the start of the hearing so it affects all witnesses and parties equally. If presented with such a request, the hearing officer should ask the parties whether the witnesses present in the hearing room are scheduled to or may testify. The hearing officer should then evaluate the position of the parties. If the hearing officer grants a sequestration request, the witnesses should be cautioned not to discuss their testimony with anyone and not to read the transcript testimony of other witnesses unless shown it by counsel for the purposes of rebuttal testimony. The sequestered witness(es) should leave the hearing room until called to testify. Use the following language when imposing a sequestration order:

I have granted a request to sequester witnesses. This means that all persons who are going to testify in this proceeding, with specific exceptions, may only be present in the hearing room when they are giving testimony. Each party may select one person to remain in the room and assist it in the presentation of its case. They may remain in the hearing room even if they are going to testify or have testified. The order also means that from this point on, until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any other potential witness until after the hearing is completed. Under the rule as applied by the Board, with one exception, counsel for a party may not in any manner, including by showing of transcripts of testimony, inform a witness about the content of the testimony given by a preceding witness, without express permission of the hearing officer. However, counsel for a party may inform counsel's own witness of the content of testimony and may

show to a witness transcripts of testimony given by a witness for the opposing side in order to prepare for rebuttal of such testimony. I expect counsel to police the sequestration order and to bring any violation of it to my attention immediately. Also, it is the obligation of counsel to inform potential witnesses of their obligations under the order. It is also recommended that as witnesses leave the witness stand upon completion of their testimony, they be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.

As witnesses leave the witness stand upon completion of their testimony, they should be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.

After a witness has testified, the witness can remain in the hearing room. However, if that witness is called on rebuttal after having heard the testimony of others, the hearing officer should inquire as to what testimony the witness heard. The hearing officer can exercise his/her discretion in permitting the witness to testify on rebuttal but evaluate the credibility of that witness based on the testimony that witness provides.

As indicated above, a party is normally allowed to have a representative present in the hearing room to assist counsel during the course of the hearing. This is true even if that representative will later be called to testify. In this regard, an RD Petitioner is also a party, even though he/she may be called as a witness, the RD Petitioner may remain in the hearing room and may have a person assist him or her.

7. Hostile or Adverse Witnesses-Section 611(c) Witnesses

A witness who is either hostile or has interests adverse to the calling party may be asked leading questions and is subject to cross-examination by the party that called the witness. Under FRE 611(c), a witness is considered a hostile or adverse witness when that witness' relationship to the opposing party is such that his or her testimony may be adverse to that party. On rare occasions, FRE 611(c) may arise in a postelection case. A foundation should be laid to establish that the witness falls within the parameters for invoking FRE 611(c). If a dispute arises regarding use of FRE 611(c) examination, seek guidance from Regional Office management.

G. Conduct of Representatives

The Board expects that the parties will conduct themselves in a professional manner at hearings. If a party at a hearing engages in misconduct, the hearing officer should request that he/she conduct him or herself in an acceptable manner. If the party persists in its misconduct, the hearing officer should remind him/her of potential consequences, including sanctions, which could result from his/her behavior.

The Board's rules provide for two sanctions that can be applied to parties who engage in misconduct at hearings. Those sanctions are exclusion from the hearing and suspension or disbarment from further practice before the Board. The conduct of the

party must be of an aggravated nature to justify such sanctions. In addition, the Board has sometimes issued a note of censure or condemnation for less serious misconduct. See Section 102.177, Rules and Regulations and OM 94-6, OM 97-2, OM 01-80; *In re: Stuart Bochner*, 322 NLRB 1096 (1997); and *In re: Joel I. Keiler*, 316 NLRB 763 (1995).

The hearing officer may exclude from the hearing any party or its representative that has engaged in misconduct. The type of misconduct which may justify a hearing officer's invocation of this sanction would include: violence or threats of violence; subornation of perjury; or using rude, vulgar and/or profane language, if egregious. Before invoking the exclusion sanction, the hearing officer should discuss the matter with Regional Office management, as serious due process concerns are raised in this circumstance.

H. Pro Se parties

Unrepresented parties (pro se) may not be familiar with our processes, the pertinent law or their burden of proof. The hearing officer should take the time to explain the process involved and the extent of their obligations, if any, and should be particularly sensitive to any language difficulty problems. The hearing officer should explain the nature of the hearing, burdens of proof (Section B, above) and that he/she has the right to seek subpoenas to compel the testimony of witnesses, to call witnesses and to question witnesses on cross-examination. The hearing officer may also develop areas of testimony which he/she deems critical to the case. However, the hearing officer is not obligated to advocate on behalf of a pro se party and is not required to develop extensive lines of testimony.

I. Prehearing Procedures

1. Research Issues

Prior to the hearing, the hearing officer should research the issues that are set for hearing. He/she should review the Regional Director's Report or Notice of Hearing and the challenges and/or objections to determine the legal issues and research those issues prior to the hearing. When prepared with the applicable case law, the hearing officer will know the evidence that is needed for a complete record. As a start, use *An Outline of Law and Procedure in Representation Cases* or *The Developing Labor Law*.

2. Formal Papers

In advance of the hearing, the formal papers should be prepared. They consist of the following:

- (a) Notice of Hearing with objections included or attached;
- (b) Regional Director's Report on Objections or Challenges or Notice of Hearing directing a hearing;
- (c) Exceptions to the Regional Director's Report on Objections or Challenges or Notice of Hearing;

(d) Any Board decisions on the Regional Director's Report on Objections or Challenges or Notice of Hearing;

(e) Any motions or requests on which prehearing rulings have been made that bear on the issues to be resolved by the hearing.

The formal papers should be placed in one legal backing, in chronological order, and marked as Board's Exhibit 1.

3. Prehearing Discussions

Prior to opening the hearing, the hearing officer should conduct an off-the-record conference to determine the positions of the parties and to discuss procedural matters. During the conference, the parties and the hearing officer can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, litigation of issues and the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. The hearing officer should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

The hearing officer should attempt to resolve all challenges prior to opening the record. For instance, if an employee was left off the list because he/she was hired after the eligibility cutoff date (set forth in the stipulated election agreement or determined in the Decision and Direction of Election) or voluntarily left the employer's employ prior to the date of the election, these matters may be easily resolved with payroll or other personnel records. In resolving the challenges, the parties should execute a written document explaining the resolution of the challenge (e.g., the parties agree that Mr. Jones is eligible to vote because he performs unit work, was employed as of the payroll period eligibility date, and was employed on the day of the election). The hearing officer should explain that the parties may limit their resolution of eligibility to only the purpose of this proceeding.

Prior to the hearing, the hearing officer should specify whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these grounds bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

4. Requests for Postponements

Once the hearing opens, the schedule for the hearing is determined by the hearing officer. It is the Agency's policy that hearings are to be conducted on consecutive days wherever possible. However, the hearing officer at his/her discretion may adjourn to a later date or to a different place. In so doing, he/she should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption. The hearing officer should insist upon an adequate basis for any adjournment request prior to ruling on the request. Motions of the parties for postponements may be granted for good cause, bearing in mind the importance of promptly processing the representation case. Unwarranted delay should be avoided and, when possible, the hearing should proceed on those issues where progress is possible. Adjournments or postponements should be to a specific date with the provision that the hearing will continue on consecutive days thereafter until completed.

5. Role of the Regional Director's Representative

The Regional Director may assign a Board agent, designated as representative of the Regional Director, to appear at the hearing to see that evidence adduced during the Region's administrative investigation becomes part of the record. If the Director appoints a representative, the Board agent should be thoroughly familiar with the contents of the Regional Office case file. The primary function of the representative is to see that the relevant evidence adduced during the investigation becomes part of the record. During the hearing, the file should be in his/her possession.

If a representative of the Regional Director is present during the hearing, he/she should make the following statement after entering his/her appearance at the hearing:

I am here as a representative of the Regional Director to see that the evidence adduced during the investigation is made available to the hearing officer. In this function, I may ask some questions and, if necessary, call witnesses. I am not here to advocate on behalf of any party to this proceeding. My services are equally at the disposal of the hearing officer and all parties.

The representative may voice objections, cross-examine, call and question witnesses and call for and introduce appropriate documents. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. However, the Regional Director's representative should not offer new material unless he/she is certain it will not be offered by one of the parties. If the representative finds it necessary to impeach the testimony of witnesses or contradict the evidence that has been presented, the representative must exercise self-restraint and display impartiality.

6. Statements of Witnesses

In preparation for the hearing, it is advisable to prepare copies of the relevant

portions of statements by witnesses. If there is to be a representative of the Regional Director at the hearing, these copies would enable him/her to provide the statements to the parties. In the event there is no representative, these copies should be provided to the hearing officer, prior to the hearing, in sealed envelopes labeled with the names of the affiants, to enable him/her to provide copies as the hearing progresses. These statements are not part of the record and should not be opened or examined by the hearing officer except in connection with their production under Section 102.118(c), Rules and Regulations. For the procedures to follow at the hearing for releasing the affidavits to the parties see Section C, 5, Admission of Statements or Affidavits In Postelection Hearing.

J. Opening the Record

1. General

The hearing officer should keep the record as short as is commensurate with it being complete. In this regard, the hearing officer should ask that the parties to the hearing succinctly state on the record their positions as to the issues to be heard. The hearing officer should also attempt to secure stipulations, wherever possible, in order to narrow the issues and to shorten the record. See Section C, 4, Factual Stipulations. The hearing officer should attempt to exclude irrelevant and cumulative material, including by utilizing offers of proof. See Section E, 8 and 9.

2. Opening Statement

At the commencement of the hearing, the hearing officer should make the following opening statement.

“The hearing will be in order.

This is a hearing before the National Labor Relations Board in the matter of _____ - Case No. _____ pursuant to the order of the Regional Director/Board dated _____.

The hearing officer conducting this hearing is _____.

The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, on appropriate request, be permitted to an entire line of questioning.

It appears from the Regional Director's/Board's order dated _____ that this

hearing is held for the purpose of taking evidence concerning _____.

In due course, the hearing officer will prepare and file with the Regional Director/Board, his/her report and recommendations in this proceeding and will cause a copy thereof to be served on each of the parties. The procedure to be followed from that point forward is set forth in Section 102.69, Rules and Regulations.

Will counsel and other representatives for the parties please state their appearances for the record? For the Regional Director? Are there any other appearances? Let the record show no response.

Will the parties please identify the issues for hearing and their positions on each issue?

**Employer?
Petitioner?
Intervenor?**

If the issue involves statutory exclusions, such as 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., supervisory status) involves a statutory exclusion; the party seeking to exclude employees on these grounds bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

K. Briefs

In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should be not be permitted. The hearing officer should encourage the parties to prepare closing statements in lieu of briefs, providing them with sufficient opportunity to prepare their statements. Closing statements may include the pertinent case law that each party claims supports its position.

Where a hearing officer permits the filing of briefs, the hearing officer sets the time limits for filing. It is assumed that in the interests of expeditiously resolving a representation question, generally no more than 7 days should be allowed for the filing of briefs.

Parties should be advised that requests for extensions of time to file briefs will not be granted by the hearing officer, except under the most unusual circumstances. A request for an extension to file briefs must contain the specific reasons that a party cannot submit the brief within 7 days.

It should be made clear that a party planning to order a transcript for the purposes of a brief must make arrangements with the reporting service contractor to obtain it on an expedited basis, by pick up, delivery or overnight mail. The hearing officer should also advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or the nonreceipt of a transcript will normally be denied in the event arrangements for expedited delivery were not made by the party.

L. The Hearing Officer's Report

1. General

The order directing the hearing always specifies whether the report should be served on the Regional Director or the Board. The form and content of the Hearing Officer's Report will vary according to the case. In general, it should narrate the background material, set forth the facts and apply the appropriate legal analysis. Questions of credibility should be resolved, with the basis for resolution cited. Appropriate recommendations should be made to the Board or the Regional Director. A copy of the Hearing Officer's Report should be served on all parties, including the Regional Director. If the Hearing Officer's Report is filed directly with the Board, eight (8) copies of the report should be sent to the Office of the Executive Secretary.

2. Due Dates

Pursuant to the General Counsel's guidelines, a Hearing Officer's Report on Objections, Challenges or both should be given priority attention. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11360.1 and 11390.1.

3. Credibility Determinations

A postelection hearing officer is required to evaluate the credibility of witnesses and explain his/her credibility findings in the Hearing Officer's Report. The Hearing Officer's Report should lay out credibility findings, including specifying the witnesses found to be credible and the basis for those findings. Where at all possible, they should not be based solely on the demeanor of the witness. It is critical that credibility findings and the basis for those findings be set forth in the report. Accordingly, it is recommended that credibility findings be as clear and explanatory as possible.

To this end, the hearing officer should not only pay careful attention to witnesses' substantive testimony, but also to their demeanor. The hearing office should take detailed notes while observing the witnesses, particularly where there are multiple witnesses, and look for the specificity of the witness' testimony; how detailed it was; its vagueness; whether the witness answered questions even on cross-examination in a direct non-combative manner; the witness' consistency on both direct and cross; whether the witness provided conclusionary responses or implausible explanations; to what extent the witness' testimony contradicted documentary evidence or the testimony of other witnesses; and internal inconsistencies. The hearing officer may evaluate the inherent

probability of events in assessing consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. *Universal Camera v. NLRB*, 340 U.S. 474 (1951). When assessing a witness' credibility, the hearing officer should keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony.

4. Structure of Report

(a) Introduction of the Issues

At the outset of the Hearing Officer Report, a short introduction should briefly explain the purpose of the hearing, the issues presented, and the hearing officer's recommendations with respect to those issues, e.g., "Based on my credibility resolutions and the evidence presented, I recommend overruling Objection No. 1 and 3, but sustaining Objection No. 2." See samples on the legal writing bulletin board.

(b) Procedural History of the Case

Thereafter, the Hearing Officer's Report should lay out the procedural history of the case, in particular, the date the petition was filed, the date the parties entered into a stipulated election agreement or the date of the Regional Director's Decision and Direction of Election, the appropriate unit, the date of the election, the Tally of Ballots, the objections/challenges and the Notice of Hearing.

(c) Substantive Organization of the Report

After the explanation of the procedural history of the case, the report should discuss the facts of the case. Objections and challenges should be discussed separately, or in appropriate groupings, including identifying the legal standard involved, the evidence presented as to each objection/challenge (either testimony of witnesses or documentary evidence), the credibility resolutions that relate to the objections/challenges, and the hearing officer's analysis regarding those issues. Do not discuss facts in the analysis unless were previously laid out in the factual section

(d) Conclusions

The hearing officer's recommendations should be clear with respect to each challenge and/or each objection. Here are examples of suggested language to use in challenges and objections cases:

Where the ballots would not be counted:

Suggested language: It is recommended that the challenge to the ballots of Mr. Jones and Mr. Smith be sustained.

Where the ballots would be counted:

Suggested language: It is recommended that the challenge to the ballots of Mr. Smith and Mr. Jones be overruled and that their ballots be opened and counted.

Where objections are found to have merit:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objections No. 1 and 4 be sustained and that the election be set aside.

Where the objections are found to lack merit:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objection No. 2 be overruled and that the appropriate certification issue.

Where some objections have merit and others do not:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objection No. 1 and 3 be overruled, but that Objection No. 2 be sustained and the election be set aside.

(e) Exceptions

CHM Sections 11366.2 (Challenges) and 11396.2 (Objections) set forth the appropriate language to be used regarding the parties' rights to file exceptions to or a request for review of the Hearing Officer Report. [Note: If the report is addressed to the Regional Director rather than the Board, the exceptions language should be modified accordingly.]

X. 10(K) HEARINGS

A. Prehearing Preparation for 10(k) Hearings

The hearing officer should:

1. Bring the following to the hearing:
 - (a) Board's Formal Exhibit - check for completeness and accuracy (see Section D).
 - (b) Appearance sheet and Form NLRB-856.
 - (c) Subpoena (both types).
 - (d) ULP Manual (See Section 10210 for information on 10(k) hearings).
 - (e) Rules and Regulations.
2. If 10(l) relief has been sought, the hearing officer should be familiar with the 10(l) record, including the transcript and exhibits.
3. Review the agenda minute or final investigative report.
4. Appendix A is a stipulation form for use as Board Exhibit 2. It should identify the correct names of the parties, jurisdiction and labor organization status. In addition, the following written stipulations should be secured. They may be added to Board Exhibit 2.
 - (a) Work in dispute and competing claims
 - (b) Prior Board orders
 - (c) To whom the work was assigned
 - (d) Voluntary adjustment mechanisms
 - (e) 10(l) court proceedings
5. Read recent Board 10(k) determinations, particularly those involving the same unions, the same kind of work that is disputed and the same kind of issues.
6. Prepare a list of questions to ask should the parties neglect to cover them. (See Section H, Relevant Areas of Inquiry, *infra*).
7. Call each of the parties' attorneys/representatives several days before the hearing opens to remind them of the hearing time, place and date. Explain what is needed in the record. Encourage the parties to resolve the dispute prior to the hearing, emphasizing that the Board's Decision will likely apply only to the job in question and oftentimes will issue only after the job is completed. This is not an *ex parte* communication prohibited by Section 102.128(d), Rules and Regulations (also see Section 102.131) because the hearing officer is not the decision-maker in the case.

B. The Hearing

The hearing officer should:

1. Before the hearing opens, show the parties the formal papers.

2. Have parties sign and fill out the appearance sheets.
3. Solicit as many stipulations as possible. (Make sure to get stipulation that employer is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the disputed work.)
4. Open the record using opening statement below.
5. Get the appearances stated on the record.
6. Ask for intervenors.
7. Get the correct names of all parties—amendments if necessary.
8. Ask the parties for their positions (after clearly defining the nature of the work in dispute).
9. Decide on the order of presentation of evidence, i.e., who will put on evidence first.
10. To the extent the matters below are not covered by the written stipulations of the parties in Board Exhibit 2, receive evidence, preferably in the following order:
 - (a) Jurisdictional facts (see Section IV, A, Jurisdiction).
 - (b) Evidence or stipulation establishing labor organization(s) status.
 - (c) Evidence on issue of “reasonable cause to believe” that Section 8(b)(4)(D) has been violated.
 - (d) Competing claims.
 - (e) Evidence in support of the various positions regarding the merits.
11. Give all parties opportunity to argue orally on the record.
12. Read closing statement.
13. Set the due date for briefs. Section 102.90, Rules and Regulations provides that briefs shall be filed within 7 days after the close of the hearing. Because Section 10(k) hearing transcripts have a 10-day delivery, parties will probably not have them by the due date. Thus, advise them that extensions of time must be filed with the Executive Secretary's Office. Also note that the Hearing Officer's Report is due within 48 hours after the close of the hearing. It is imperative that the report is timely in order to enable the Executive Secretary's Office to rule on the requested extensions of time.
14. Ask reporter for estimate of number of pages of transcript.

C. Opening Statement

At the commencement of the hearing, the hearing officer shall make the following opening statement:

“The hearing will come to order. This is a formal hearing pursuant to Section 10(k) of the National Labor Relations Act in the matter of (names of parties)

The case number is _____.

The hearing officer appearing for the Board is _____.

Will counsel please state their appearances for the record?

For the Charging Party?

For Employer?

For other unions involved?

For _____?

Are there any other persons in the hearing room at this time who claim an interest in this proceeding?

I wish to inform all the parties that the official reporter makes the only official transcript of these proceedings and all citations and briefs and arguments must refer to the official record. After the close of the hearing, one or more of the parties may wish to have corrections made in the record. All such proposed corrections, either by way of stipulation or motion, should be forwarded to the Board in Washington instead of to the hearing officer. The hearing officer has no authority to make any rulings in connection with the case after the hearing is closed. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. Statements of reasons in support of motions or objections should be as concise as possible. An original and two copies of all pleadings submitted during the hearing are to be filed with the hearing officer, with copies immediately served on the other parties. The role of the hearing officer is to ensure that the record contains as full a statement of the facts as may be necessary for a determination of the issues by the Board. All parties will be afforded a full opportunity to present their respective positions and to produce evidence in support of their contentions. It may become necessary for me to ask questions, call witnesses and explore avenues with respect to matters not raised or only partially raised by the parties.

The services of the hearing officer are equally at the disposal of all the parties to the proceeding in developing the material evidence.

D. Formal Exhibits

The formal papers consist of the following:

- (a) Copy of the charge and proof of service.
- (b) Notice of charge filed.
- (c) Notice of 10(k) hearing and affidavits of service.
- (d) Any request by the parties for postponements of the hearing.
- (e) Any 10(l) injunctions entered by the court.
- (f) Appearance sheet.

The hearing officer should state:

The formal exhibit in this matter has been marked as Board's Exhibit 1(a) through 1(____), the latter being the index of the exhibit. This formal exhibit has already been shown to the parties.

Are there any objections to the receipt of the Board's Exhibit 1(a) through 1(____)?

Ask each party and get his/her response clearly for the record.

Board's Exhibit 1 is received in evidence.

E. Intervention

Are there any motions to intervene in this proceeding at this time?

F. Stipulations

As set forth above in Section A, 4, receive into evidence Board Exhibit 2 containing the parties' written stipulations. If the hearing officer has not secured stipulations prior to the opening of the hearing, secure them at this time. If the parties refuse to enter into written stipulations, attempt to secure their verbal stipulations, on the record. Make sure that each party consents to enter into the stipulations you receive. The hearing officer must state on the record the precise stipulation and that it is received or rejected.

If the parties do not enter into written stipulations, the hearing officer must obtain the following oral stipulations:

1. Jurisdictional Information

See Section IV, A, Jurisdiction, for commerce standards.

Can it be stipulated that (here give the jurisdictional information, e.g., XYZ Co. is a Delaware corporation engaged in the business of _____ and annually sells and ships goods valued at in excess of \$___ from its facility located at

_____ to customers located outside the State of _____. The parties stipulate that the employer is engaged in commerce within the meaning of the NLRA.

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

2. Labor Organization

Will the parties stipulate that Local _____ is a labor organization within the meaning of Section 2(5) of the Act?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

3. Work in Dispute

Can it be stipulated that the work described in the Notice of Hearing is the work that is in dispute? [Note: If the parties will not stipulate that the Notice of Hearing is accurate, attempt to obtain a stipulation of the work that is in dispute. If no stipulation can be reached, evidence needs to be presented regarding this issue].

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

4. Board Orders

Can it be stipulated that the employer herein is *not* failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

5. Work Claims

Can it be stipulated that (Union A) and (Union B) both claim the work in dispute?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

6. Voluntary Adjustments

Will the parties stipulate that there is no agreed-on method for voluntary adjustment of the work dispute in question here which would bind all parties?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

7. Reasonable Cause

(Note: A party may object to entering into a stipulation on this issue. If so, evidence must be taken on the matter.)

Will the parties stipulate that on or about (date), the business agent for (union) told (employer), there would be (strike, picketing or other forms of

inducement, coercion) unless the work of (disputed work) was assigned to members of the (charged) union and that since or about (date), the employer assigned the disputed work to (members of other union or unrepresented employees) who are its employees?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

8. Court Proceedings

Can it be stipulated that on or about (date), a petition under Section 10(l) of the Act was filed with the U.S. District Court for the District of _____, seeking an injunction against (Respondent Union), Civil No. _____, and that on (date) the district court granted an injunction prohibiting Respondent Union _____ from _____ (i.e., status of 10(l) petition). The parties have no objection to the receipt in evidence of the petition and order. (If you cannot get this stipulation, official notice can be taken of the court's action.)

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received. The Board's injunction petition and court's order will be marked as Board Exhibit (____).

G. Presentation of Evidence

The parties should now state their positions and present their cases. Keep accurate notes and ensure that the record contains all evidence needed for the hearing officer's report.

H. Relevant Areas of Inquiry

Make sure that the parties cover the following areas of inquiry. If the parties do not cover these issues, the hearing officer must make sure that the record is complete.

1. Testimony to show that the work assignment is disputed by the unions.
2. Are the unions certified by the NLRB to represent any of the employer's employees?
3. Precise description of the disputed work.

4. Relative skills necessary to perform disputed work.
5. Do the members of the respective unions possess these skills?
6. Certification and collective-bargaining agreements.
7. Employer preference.
8. Area and industry practice.
9. Past practice of employer.
10. Economy and efficiency of operations.
11. Arbitration awards and grievances.
12. Evidence to show no agreed-on method of handling dispute.
13. Conduct violative of Section 8(b)(4)(D).
14. Current status of the dispute.

I. Concluding Remarks

When the parties have called all their witnesses and put in all the documentary evidence, state on the record the following:

Does anyone have more witnesses to call or any documentary evidence to submit?

Does anyone wish to argue orally on the record? (If so, give them the opportunity; if not:) That being the case, I will read the following closing statement into the record:

Should any party desire to file a brief with the Board in this case, such brief must be printed or otherwise legibly duplicated, double spaced on 8-1/2- by 11 inch paper. An original plus seven copies must be filed with the Board in Washington, D.C. within 7 days after the close of this hearing. A copy must also be served on each of the other parties and proof of such service must be filed with the Board at the time the briefs are filed. Any request for an extension of time must be made of the Board, through the Executive Secretary, in Washington, D.C. not later than 3 days before the date the briefs are due. Such request must be made in writing and copies must be served immediately on each of the parties. Is there anything further?

The hearing is now closed.

(Obtain number of transcript pages from the reporter.)

APPENDIX A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION __**

| |
|-----------------------------|
| Correct Name of Employer: |
| Case No. |
| Correct Name of Petitioner: |
| Correct Name of Intervenor: |

STIPULATION

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.

2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Intervenor is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

4. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar to this proceeding.

6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts:

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7. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

Included:

Excluded:

Upon receipt of this Stipulation by the hearing officer it may be admitted, without objection, as a Board exhibit in this proceeding.

For the Employer

For the Petitioner

For the Intervenor

RECEIVED:

Hearing Officer

Date: _____

Board Exhibit No. _____

APPENDIX B

HEARING OFFICER'S SCRIPT FOR RC/RD HEARING

1. OPENING STATEMENT

The hearing will be in order.

This is a formal hearing in the matter of _____, Case No. _____, before the National Labor Relations Board.

The Hearing Officer appearing for the National Labor Relations Board is:

All parties have been informed of the procedures at formal hearings before the Board by service of a Statement of Standard Procedures with the notice of hearing. I have additional copies of this statement for distribution, if any party wants more.

Will counsel please state their appearances for the Record?

For the Petitioner: _____.

For the Employer: _____.

For the Intervenor: _____.

Are there any other appearances? _____.

Let the record show no (further) response.

Are there any other persons, parties or labor organizations in the hearing room who claim an interest in this proceeding?

Let the record show no (further) response.

2. INTRODUCTION OF FORMAL PAPERS

- I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1-a through 1-__, inclusive, Exhibit 1-__ being an index and description of the entire exhibit. The exhibit has already been shown to all parties. Are there any objections to the receipt of these Exhibits into the record?**
- Hearing no objections, the formal papers are received in evidence.**

(If the parties agree to Board Exhibit 2, introduce that exhibit into the record as

follows and then proceed to the appropriate section below:)

- **The parties to this proceeding have executed and I have approved a document which is marked as Board Exhibit 2. That Exhibit contains a series of stipulations including, among other items, that the petitioner is a labor organization within the meaning of the Act, there is no contract bar and the Employer meets the jurisdictional standards of the Board. Are there any objections to the receipt of Board Exhibit 2?**
- **Hearing no objection, Board Exhibit 2 is received in evidence.**

(If Board Exhibit 2 is not agreed upon, proceed with section 3 below.)

3. PREHEARING MOTIONS

Are there any pre-hearing motions (e.g., motions to quash subpoenas) made by any party that need to be addressed at this time?

4. INTERVENTION

Are there any motions to intervene in these proceedings to be submitted to the Hearing Officer at this time? Are the parties aware of any other employers or labor organizations that have an interest in this proceeding? The Hearing Officer hears no (further) response.

(If there is a motion to intervene, then...)

M. _____, please state the correct and complete name of the Intervenor.

(if there is no objection)

The motion of _____ for intervention herein is granted (denied).

5. JURISDICTION

Will the Employer please state its full and correct name for the record?

(If necessary): **Are there any objections to having the petition and other formal papers amended so that the name of the Employer will correctly appear in the captions thereon as _____? Hearing no objection, the amendment is allowed.**

Can it be stipulated that the Employer is engaged in commerce within the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board and that commerce facts are as follows:

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

6. LABOR ORGANIZATION

M. _____, is the correct and complete name of the Petitioner that which appears on the petition filed in this case, _____?

(If necessary): Are there any objections to having the petition and other formal papers amended so that the name of the (Petitioner) will correctly appear in the captions thereon as _____?

Hearing no objection, the amendment is allowed.

Can it be stipulated that the Petitioner herein, _____, is a labor organization within the meaning of the National Labor Relations Act, as amended?

- M. _____, do you so stipulate for the Employer?
- M. _____, do you so stipulate for the Petitioner?
- M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

(Obtain the same stipulation for any Intervenor)

7. ISSUES AND BURDENS OF PROOF

Will the parties please identify the issues for hearing and their positions on each issue?

- Employer?
- Petitioner?
- Intervenor?

(If the issue involves a presumption under Board law, advise the party with the burden that the burden lies with it and say the following:)

Please be aware that because (e.g., single facility unit) involves a presumption under Board law, the burden lies with the party seeking to rebut the presumption. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

(If the issue involves statutory exclusions, such as 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:)

Please be aware that because (e.g., supervisory status) involves a statutory exclusion, the party seeking to exclude employees on these bases bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

8. COLLECTIVE BARGAINING HISTORY

(If there is no collective bargaining history, the record should reflect that fact. If there is a collective bargaining history, obtain details about the nature and origin of that relationship and include those facts in any stipulation. See Section 9 in Outline of Hearing. Read the stipulation into the record.)

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.

9. CASES PENDING IN OTHER REGIONS

Are there any petitions pending in other Regional Offices involving other facilities of the Employer?

10. BARS TO CONDUCT OF ELECTION

Can it be stipulated that there is no contract or other bar in existence that would preclude the processing of this petition?

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

11. APPROPRIATE UNIT

(If parties can stipulate to all or part of the unit description, use the appropriate stipulation below:)

A. (full unit:) - Can it be stipulated that a bargaining unit that includes _____ and excludes _____ is appropriate for the purposes of collective bargaining?

(Read from Petition or off-the-record discussion notes of unit)

B. (partial unit:) - Can it be stipulated that any unit found appropriate by the Regional Director should include _____ and exclude _____?

M. _____, do you so stipulate for the Employer?

M. _____, do you so stipulate for the Petitioner?

M. _____, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

(Sample supervisor stipulation language:)

Can it be stipulated that _____ is a supervisor within the meaning of Section 2(11) of the Act and as such possesses and exercises one or more of the following authorities: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; utilizing independent judgment in exercising such authority; and, therefore, should be excluded from the bargaining unit?

M. _____, can you so stipulate for the Employer?

M. _____, can you so stipulate for the Petitioner?

M. _____, can you so stipulate for the Intervenor?

12. FRAMING ISSUES

Frame the remaining issue(s) on the record. Get the parties to agree on the issue(s).

It is my understanding that the issue(s) to be litigated today are _____
_____ (i.e., supervisory status of Mr. John Wayne,
whether the quality control employees have a community of interest with the
plant employees, single versus multi-location unit, etc.)

Are there any other issues that I am not aware of? (If no response, proceed to
13,.. **Presentation of Evidence**; if a response, let the parties state their position
on that issue, then proceed to 13., **Presentation of Evidence**)

13. PRESENTATION OF EVIDENCE

(Generally the Employer should begin, but the hearing officer can use his/her
own judgment and have the parties present their evidence in whatever order
makes the most sense. A witness should be presented to testify about the overall
structure of the Employer's operations and organization.)

Employer, please present your first witness.

(Employer calls first witness.)

(Stand and Swear in each Witness:) **Please raise your right hand. Do you
solemnly swear that the testimony you are about to give will be the truth, the
whole truth and nothing but the truth, so help you God?**

(If the witness objects to swearing in the indicated fashion, ask the witness:)
Do you solemnly affirm that you will testify truthfully at this hearing?

(Swearing in an Interpreter:) **Please raise your right hand. Do you
solemnly swear that you are fluent in both English and _____
(foreign language) and that you will faithfully and truly, to the best of
your skill, knowledge and ability, translate from English to _____
(foreign language) and from ___ (foreign language) to English when called
upon to do so during the hearing, so help you God?**

(After they confirm, ask the witness to:) **Please state your name and spell it
for the record.**

(After Employer has rested, proceed to the next party.)

Petitioner you may call your first witness.

(After Petitioner has rested, proceed to the next party, if any.)

Intervenor you may call your first witness (if necessary).

14. COMPLETING AND CLOSING THE RECORD

(See Sections 15 and 16 of the Outline of Hearing, Section II A, for instructions on completing the record)

(To the extent that there are issues that have been resolved during the hearing, list those resolved issues at this point.)

M. _____, what is the Employer's final position regarding (unit contentions, inclusions or exclusions or other issues raised during the hearing)?

M. _____, what is the Petitioner's final position regarding (unit contentions, inclusions or exclusions or other issues raised during the hearing)? Is the petitioner prepared to proceed to an election in any unit found appropriate by the Regional Director or the Board?

M. _____, what is the Intervenor's final position regarding (unit contentions, inclusions or exclusions or other issues raised during the hearing, if necessary)? Does the Intervenor wish to appear on the ballot in any unit found appropriate by the Regional Director or the Board?

Any outstanding stipulations agreed to during these proceedings are now received.

Are the parties willing to waive the filing of briefs?

(If not:) Briefs are due by close of business on _____. Any motion for extensions should be addressed to the Regional Director.

The parties are reminded that they should request an expedited copy of the transcript from the court reporter. Late receipt of the transcript will not be grounds for an extension of time to file briefs if you fail to do so.

If there is nothing further, the hearing will be closed.

(Absent response) The hearing is now closed.

(If the hearing is being adjourned) If there is nothing further, the hearing will be adjourned to _____ (indefinitely).

APPENDIX C
OFFICE OF THE GENERAL
COUNSEL

MEMORANDUM GC 91-3

May 9, 1991

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jerry M. Hunter, General Counsel

**SUBJECT: Guidelines Concerning Application of Health Care Rule (29 CFR Part 103,
54 FR No. 76, 284 NLRB 1580)**

I. Introduction

On April 21, 1989, the Board issued its Final Rule on Collective Bargaining Units in the Health Care Industry. The Rule was to become effective on May 22, 1989, but was enjoined by the U.S. District Court for the Northern District of Illinois. As a result of the injunction, the Acting General Counsel circulated a memo to the Regional Offices (GC 89-7 dated May '30, 1989) informing them that they were to continue processing election petitions under current case law in cases involving acute-care facilities, but to suspend processing of cases pending further notice if the outcome would be decided differently under the Rule than under St. Vincent Hospital, 285 NLRB 365 (1987) (separate units for RNs, doctors, skilled maintenance employees, or business office clericals) and the Region could not secure a stipulation to the unit. On April 11, 1990, the Seventh Circuit, on appeal, reversed the District Court and found the Board's Rule to be valid. However, the Seventh Circuit stayed the effect of its Order. The Supreme Court accepted certiorari and on April 23, 1991, affirmed the Circuit Court decision. You will be advised shortly as to the Rule's effective date.

The Rule itself, and the various Notices of Proposed Rulemaking leading up to the Rule, are published in full in 284 NLRB 1515 to 1597. All Regional personnel should, as soon as possible, familiarize themselves with all aspects of the Rule. Each Regional office should undertake training sessions with respect to the Health Care Rule. However, in order to assist the Regions in their processing of these cases and in their training programs we provide you with the following summary.

II. Contents of the Rule

- A. The Rule is applicable only to "acute-care hospitals."
1. Hospital is defined in the same manner as defined under Medicare (currently 42 U.S.C. 1395x(e) (as revised 1990) attached).
 2. Acute-care hospital is either:
 - a. a short term care hospital in which the average length of patient stay is less than 30 days; or
 - b. a short term care hospital in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days.
- (1) The average length of stay shall be determined by reference to the most recent 12-month period preceding receipt of a representation petition for which data are readily available.

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3. The term acute-care hospital shall include those hospitals operating as acute-care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care (see 4, following).
 4. The following are excluded from the definition of acute care hospital:
 - a. facilities that are primarily nursing homes.
 - b. facilities that are primarily psychiatric hospitals.
 - (1) Psychiatric hospital is defined in the same manner as defined in the Medicare Act (currently in 42 U.S.C. 1395x(f) attached).
 - c. facilities that are primarily rehabilitation hospitals.
 - (1) The term rehabilitation hospital includes and is limited to all hospitals accredited as such by either the Joint Committee on Accreditation of Healthcare Organizations (JCAHO) or by the Commission for Accreditation of Rehabilitation Facilities (CARF).
 5. The Board may presume that an employer is an acute-care hospital where, after issuance of a subpoena, the employer does not produce records sufficient for the Board to determine the facts.
- B. In acute-care hospitals, the following shall be appropriate units, and the only appropriate units, for RC and RM petitions (see exceptions in "C" below):
1. All registered nurses.
 2. All physicians.
 3. All professionals except for registered nurses and physicians.
 4. All technical employees.
 5. All skilled maintenance employees (generally includes all employees involved in the maintenance, repair, and operation of the hospital's physical plant systems, as well as their trainees, helpers, and assistants). Classifications which should generally be included in such units are carpenter, electrician, mason/bricklayer, painter, pipefitter, plumber, sheetmetal fabricator, automotive mechanic, HVAC (heating, ventilating, and air conditioning) mechanic, maintenance mechanic, chief engineer, operating engineer, fireman/boiler operator, locksmith, welder, and utility man (53 FR No. 170, pp. 33923-24, 284 NLRB at 1561-62).
 6. All business office clerical employees.
 7. All guards.
 8. All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.
- C. Exceptions
1. Combined units.
 - a. If sought by labor organizations (not employers) various combinations of the eight units set forth above, may also be appropriate. See 53 FR 33932, 284 NLRB at

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1573. See also 54 FR 16348, 284 NLRB 1597. Appropriateness of particular combinations will be decided in each case by adjudication, except that the Board has stated some combinations -(e.g., "all professionals," or "all nonprofessionals") are obviously appropriate (53 FR 33932, 284 NLRB at 1573).

2. Existing nonconforming units.

- a. The Rule is aimed at initial organizing at acute care hospitals. Where there are already existing units, the Board contemplates that they will fall into two categories:

- (1) Existing units in conformity with the Rule (either one of the eight listed above or a combination among those eight units). In such a case, new petitions should be in conformity with the Rule.

- (2) Where there are existing nonconforming units, these cases will be decided by adjudication; the Board will find appropriate only units which comport, insofar as practicable, with the eight appropriate units or appropriate combinations thereof.

3. Residual units. The Board left for adjudication the issue of the continuing viability of Levine Hospital of Hayward, 219 NLRB 327 (1975), (53 FR 33930, 284 NLRB 1570-71).

4. Stipulations.

- a. The Board will approve agreements providing for elections in one of the eight units listed above.
- b. Where parties stipulate to a unit which is not one of the eight units, but is rather some other unit, nothing shall preclude Regional Directors from approving stipulations, as long as the stipulated unit does not violate any express statutory provision or established Board policy other than its rule on collective-bargaining units in the health care industry (53 FR 33931-32, 284 NLRB at 1572-73, Otis Hospital, 219 NLRB 164 (1975) remains applicable).

5. Extraordinary circumstances.

- a. Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication, to avoid "accidental or unjust application of the rule."
- b. A unit of five or fewer employees is automatically considered an extraordinary circumstance.
- c. Extraordinary circumstances are to be narrowly defined. The arguments raised in the course of the rulemaking proceedings, including but not limited to those listed below, alone or in combination, even in situations in which such variations may be highly unusual, normally shall not constitute an extraordinary circumstance justifying an exception to the rule.

- (1) Diversity of the industry, such as size of institution, variety of services offered, or staffing patterns.

- (2) Increased functional integration of, and a higher degree of work contacts among, employees as a result of multicompetent workers, "team" care, and cross training.

- (3) Impact of nationwide hospital chains.

- (4) Recent changes within traditional employee groupings and professions; for example, increased specialization among RNs.

- (5) Effects of various governmental and private cost-containment measures.

- (6) Single institution occupying more than one contiguous building.

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- d. A party urging "extraordinary circumstances" bears a "heavy burden" to demonstrate that its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding, as, for instance, that there are such unusual and unforeseen deviations from the range of circumstances already considered that it would be "unjust" or "an abuse of discretion" for the Board to apply the rule to the facility involved (53 FR 33933, 284 NLRB at 1574).

D. The following issues involving acute-care hospitals are still to be decided by adjudication.

1. Unit placement.

- a. The Rule does not determine the placement of employees in specific units, but leaves that to determination by adjudication.

2. Decertification petitions.

- a. Continue to apply *Campbell Soup Co.*, 111 NLRB 234 (1955), i.e., petition must be for an established unit. Technically, decertification petitions under 9(c)(1)(A)(ii) are not covered by the Rule. See 53 FR 33930, 284 NLRB at 1570, for explanation.

- E. Cases involving health care facilities that do not fall within the Rule's definition of acute-care hospitals shall continue to be decided by adjudication.

III. Procedure to be Followed Upon Receipt of RC or RN Petition

- A. The Rule is set forth at 54 FR No 76 pp 16347-48 (284 NLRB at 1596-97). Detailed explanations regarding each segment of the Rule are found in the Second Notice of Proposed Rulemaking, 53 FR No. 170 (9/1/88) pp 33900-35 (284 NLRB at 1528-78), and in Final Rule 54 FR 16336-47 (284 NLRB at 1580-1596).

- B. Upon receipt of an RC or RM petition involving health care facilities (note: the Rule does not apply to RD petitions):

1. Prior to initial contacts with parties, the Board agent should review definitions to determine whether the petition is governed by the Rule. If the petition is **governed by the Rule, standard representation** case handling procedures still apply unless superseded by the Rule.
2. The Board agent should advise the parties of the Rule.
3. With regard to whether the facility is an acute-care hospital, in the normal case it will be obvious. Stipulations on this issue should usually be obtainable.
4. If there is disagreement as to whether the health care facility is an acute-care hospital, the employer should be apprised that, since it has control of the records, it will have the burden, upon issuance of subpoena if necessary, of coming forward at the hearing with facts to enable the Board to decide this issue (54 FR 16344, 284 NLRB at 1591-92.) See *Tropicana Products, Inc.*, 122 NLRB 121 (1958).

- a. Employer may voluntarily produce these facts.

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b. If not, the Board agent should refer to the definition of "hospital" in the Medicare Act, and of "acute care" in the Rule; §103.30 (f) (2) (54 FR 16348, 284 NLRB at 1597). The Region should subpoena employer's books and records necessary to show at the hearing whether the facility meets the definition of acute-care hospital—a short-term care hospital in which the average length of patient stay is less than 30 days or in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days. Determine the average length of stay by referring to the most recent 12-month period preceding receipt of a representation petition for which data are readily available.

c. The facility is not an acute-care facility under the Rule if it is primarily a nursing home, primarily a psychiatric facility, or primarily a rehabilitation hospital. To determine if the facility is a psychiatric hospital, consult attached Medicare definition. To determine whether the facility is a rehabilitation hospital, check whether it is accredited by either the JCAHO or CARF (see 103.30 (f)(3) and (4)).

d. If, after subpoena, the employer does not supply sufficient facts to enable the Board to make a determination, the Board will presume that the facility is an acute-care facility.

5. If the case involves other than an acute-care hospital, the Region is to proceed in the normal manner, by stipulation or adjudication.

6. If the case involves an acute-care hospital, check whether the petitioned for unit is for more than five employees. A requested unit which conforms to the units set forth in the Rule but which nonetheless contains five or fewer employees is considered an extraordinary circumstance, and its appropriateness must be resolved by stipulation or adjudication.

7. If for more than five employees, see if the petition conforms to the units in the Rule. Encourage parties to stipulate to one of the eight units. The Board will approve consent agreements for elections in the eight units.

8. If a petitioning union is contending for a unit different from the eight established in the Rule, determine the basis for the position.

a. Combination units - if sought by union, a combination of some of the units may be appropriate.

b. Existing units.

(1) where the existing units conform to the eight established units in the Rule, the petitioned for new unit should conform to the Rule.

(2) where the existing units do not conform, proceed by adjudication or stipulation. The unit sought should comport, insofar as practicable, with units established by the Rule (see "c" below).

(3) where the unit requested is residual to an existing, nonconforming portion of one of the eight appropriate units proceed by adjudication, if no stipulation can be obtained. The Board will decide the continuing viability of Levine Hospital of Hayward, 219 NLRB 327 (1975); (53 FR 33930, 284 NLRB 1570-71).

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- c. Stipulation. The Regional Director may approve a consent agreement for a combination of the eight units. In addition, nothing precludes the Regional Director from approving a stipulation not in accordance with the eight units, as long as the stipulation is otherwise "acceptable." (I.e., does not "violate any express statutory provision or established Board policies other than the Rule." 53 FR 33931, 284 NLRB at 1572. Examples would be: guards being placed in units with nonguards; supervisors or managers being included in units, etc.)
- d. Extraordinary circumstances. This provision is to be narrowly construed. Apprise the party claiming extraordinary circumstances of the Board's determination that a number of circumstances (set forth in Second Notice, 53 FR at 33932, 284 NLRB at 1573-74) are not considered extraordinary.

Note: If none of the above exceptions appears to apply, the Region should consider dismissing the petition administratively, i.e., without a hearing.

C. Hearing

1. A hearing will be held if parties do not execute a stipulation or consent agreement form approved by the Region, and the petition is not dismissed for administrative reasons.
2. Issues to be determined.
 - a. Acute care hospital.
 - (1) Is the facility a hospital?
 - (2) Is there a sufficient number of its patients receiving acute care?
 - (3) Is the facility primarily a nursing home, psychiatric hospital or rehabilitation hospital?
 - (4) If records have not been previously subpoenaed by the Region, they should now be subpoenaed. The Board will presume the facility is an acute-care hospital if the material provided by the employer in response to the subpoena is not sufficient to allow the Board to make a determination.
 - b. The appropriateness of a unit of five or fewer employees.
 - (1) Consider the Board's concern with proliferation of °units, and other considerations. See 54 FR 16341-42, 284 NLRB at 1587-88.
 - c. Existing nonconforming units.
 - (1) A number of issues may arise in this area. The hearing officer may need to elicit evidence which will enable the Regional Director to determine whether, where the existing units are smaller than those encompassed by the Rule, an incumbent or a nonincumbent may petition for a residual unit. The Regional Director may ultimately need to address the continued viability of *Levine Hospital*, 219 NLRB 327 (1975).
 - (2) The Regional Director is to view requests for nonconforming units in light of the Board's concern with proliferation, as well as the other considerations set forth in the Rule and Supplementary Information.
 - d. Extraordinary circumstances.
 - (1) The party arguing that the case raises an extraordinary circumstance should normally make an offer of proof. In determining whether to accept the offer, the hearing officer should be familiar with those arguments which the Board has said

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it will not consider extraordinary circumstances, alone or in combination. See, e.g., 53 FR 33932-33, 284 NLRB at 1573-75; 54 FR 16344-45, 284 NLRB at 1592-93. The hearing officer will then either permit the requested evidence to be adduced or refer the issue to the Regional Director and, if requested, ultimately to the Board for ruling.

(2) The extraordinary circumstances exception is to be narrowly construed. Extraordinary circumstances exist only where a hospital is shown to be uniquely situated such that application of the Rule would be unjust or an abuse of discretion.

3. Addressing nonunit scope issues.

a. Of course, absent stipulation, hearings will need to be held to resolve disputed issues other than unit scope such as:

(1) The placement of employee classifications within the appropriate unit. During the rulemaking proceeding, disputes arose regarding the unit placement of several categories of employees: for example, the nurse anesthetist (RN-or physician unit), respiratory therapist (professional or technical unit), medical technologist (professional or technical unit), ward clerk (technical or service and maintenance unit). Questions also arose as to the placement of dual function employees (54 FR 16340, 284 NLRB at 1586). Disputes over these and other classifications may arise in the future.

(2) Supervisory and managerial status

(3) Contract bar.

(4) Labor organization status.

(5) Single facility appropriateness.

(6) Eligibility issues, etc.

If you have any questions regarding this memo, please contact your Assistant General Counsel.

/s/Jerry M. Hunter

Attachments

Distribution: Washington - Special Regional - All Professionals NLRBU

Legislative History. For legislative history and purpose of Pub.L. 101-239, see 1989 U.S. Code Cong. and Adm. News, p. 1906. See, also, Pub-L. 101-508, 1990 U.S. Code Cong. and Adm. News, p. 2017.

Library References

Social Security and Public Welfare «241.10, 241.65.
WESTLAW Topic No. 356A.
C.J.S. Social Security and Public Welfare §§ 131, 137, 138.

PART C-MISCELLANEOUS PROVISIONS

§1395x. Definitions

For purposes of this subchapter

(a) **Spell of illness**

The term "spell of illness" with respect to any individual means a period of consecutive days

(1) beginning with the first day (not included in a previous spell of illness) (A) on which such individual is furnished inpatient hospital services or extended care services, and (B) which occurs in a month for which he is entitled to benefits under part A, and

(2) ending with the close of the first period of 60 consecutive days thereafter on each of which he is neither an inpatient of a hospital nor an inpatient of a facility described in section 1395i—3(a)(1) of this title or subsection (y)(1) of this section.

(b) **Inpatient hospital services**

The term "inpatient hospital services" means the following items and services furnished to an inpatient of a hospital and (except as provided in paragraph (3)) by the hospital

[See main volume for text of (1) and (2)]

(3) such other diagnostic or therapeutic items or services, furnished by the hospital or by others under arrangements with them made by the hospital, as are ordinarily furnished to inpatients either by such hospital or by others under such arrangements;

excluding, however

(4) medical or surgical services provided by a physician, resident, or intern, services described by subsection (sx2XKxi) of this section, certified nurse-midwife services, qualified psychologist services, and services of a certified registered nurse anesthetist; and

[See main volume for text of (5)]

(6) an intern or a resident-in-training under a teaching program approved by the Council on Medical Education of the American Medical Association or, in the case of an osteopathic hospital, approved by the Committee on Hospitals of the Bureau of Professional Education of the American Osteopathic Association, or, in the case of services in a hospital or osteopathic hospital by an intern or resident-in-training in the field of dentistry, approved by the Council on Dental Education of the American Dental Association, or in the case of services in a hospital or osteopathic hospital by an intern or resident-in-training in the field of podiatry, approved by the Council on Podiatric Medical Education of the American Podiatric Medical Association; or

[See main volume for text of (7), (c)]

(d) **Repealed.** Pub.L. 98-369, Title III, § 2336(b)(I), July 18, 1984, 98 Stat. 1090

(e) **Hospital**

The term "hospital" (except for purposes of sections 1895f(d), 1395f(f) and 1395n(b) of this title, subsection (ax2) of this section, paragraph (7) of this subsection, and subsection (i) of this section) means an institution which

[See main volume for text of (1) to (3)]

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(4) has a requirement that every patient with respect to whom payment may be made under this subchapter must be under the care of a physician;

[See main volume for text of (5)]

(6)(A) has in effect a hospital utilization review plan which meets the requirements of subsection (k) of this section and (B) has in place a discharge planning process that meets the requirements of subsection (ee) of this section;

[See main volume for text of (7) to (9)]

For purposes of subsection (a)(2) of this section, such term includes any institution which meets the requirements of paragraph (1) of this subsection. For purposes of sections 1395f(d) and 1395n(b) of this title (including determination of whether an individual received inpatient hospital services or diagnostic services for purposes of such sections), section 1395f(f)(2) of this title, and subsection (i) of this section, such term includes any institution which (i) meets the requirements of paragraphs (5) and (7) of this subsection, (ii) is not primarily engaged in providing the services described in subsection (jx1XA) of this section and (iii) is primarily engaged in providing, by or under the supervision of individuals referred to in paragraph (1) of subsection (r) of this section, to inpatients diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, -or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. For purposes of section 1395f(f)(1) of this title, such term includes an institution which (i) is a hospital for purposes of sections 1395f(d), 1395f(fx2), and 1395n(b) of this title and (ii) is accredited by the Joint Commission on Accreditation of Hospitals, or is accredited by or approved by a program of the country in which such institution is located if the Secretary finds the accreditation or comparable approval standards of such program to be essentially equivalent to those of the Joint Commission on Accreditation of Hospitals. Notwithstanding the preceding provisions of this subsection, such term shall not, except for purposes of subsection (ax2) of this section, include any institution which is primarily for the care and treatment of mental diseases unless it is a psychiatric hospital (as defined in subsection (f) of this section). The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations. For provisions deeming certain requirements of this subsection to be met in the case of accredited institutions, see section 1395bb of this title. The term "hospital" also includes a facility of fifty beds or less which is located in an area determined by the Secretary to meet the definition relating to a rural area described in subparagraph (A) of paragraph (5) of this subsection and which meets the other requirements of this subsection, except that

[See main volume for text of (A) to (C)]

The term "hospital" does not include, unless the context otherwise requires, a rural primary care hospital (as defined in section 1395x(mm)(1) of this title).

(f) Psychiatric hospital

The term "psychiatric hospital" means an institution which

[See main volume for text of (1) and (2)]

(3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals entitled to hospital insurance benefits under part A; and

(4) meets such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution.

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(5) Repealed. Pub.L. 98-369, Title III, § 2340(ax3), July 18, 1984, 98 Stat. 1093.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "psychiatric hospital".

(g) Outpatient occupational therapy services

The term "outpatient occupational therapy services" has the meaning given the term "outpatient physical therapy services" in subsection (P) of this section, except that "occupational" shall be substituted for "physical" each place it appears therein.

[See main volume for text of (h) and (i)]

(j) Skilled nursing facility

The term "skilled nursing facility" has the meaning given such term in section 13951-3(a) of this title.

[See main volume for text of (k) and (l)]

(m) Home health services

The term "home health services" means the following items and services furnished to an individual, who is under the care of a physician, by a home health agency or by others under arrangements with them made by such agency, under a plan (for furnishing such items and services to such individual) established and periodically reviewed by a physician, which items and services are, except as provided in paragraph (7), provided on a visiting basis in a place of residence used as such individual's home

[See main volume for text of (1) to (4)]

(5) medical supplies (including catheters, catheter supplies, ostomy bags, and supplies related to ostomy care, but excluding drugs and biologicals) and durable medical equipment while under such a plan;

[See main volume for text of (6) and (7)]

excluding, however, any item or service if it would not be included under subsection (b) of this section if furnished to an inpatient of a hospital.

(a) Durable medical equipment

The term "durable medical equipment" includes iron lungs, oxygen tents, hospital beds, and wheelchairs (which may include a power-operated vehicle that may be appropriately used as a wheelchair, but only where the use of such a vehicle is determined to be necessary on the basis of the individual's medical and physical condition and the vehicle meets such safety requirements as the Secretary may prescribe) used in the patient's home (including an institution used as his home other than an institution that meets the requirements of subsection (ex1) of this section or section 13951-3(ax1) of this title), whether furnished on a rental basis or purchased; except that such term does not include such equipment furnished by a supplier who has used, for the demonstration and use of specific equipment, an individual who has not met such minimum training standards as the Secretary may establish with respect to the demonstration and use of such specific equipment. With respect to a seat-lift chair, such term includes only the seat lift mechanism and does not include the chair.

(o) Home health agency

The term "home health agency" means a public agency or private organization, or a subdivision of such an agency or organization, which

[See main volume for text of (1) to (5)]

(6) meets the conditions of participation specified in section 1395bbb(a) of this title and such other conditions of participation as the Secretary may

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(c) Inpatient psychiatric hospital services

The term "inpatient psychiatric hospital services" means inpatient hospital services furnished to an inpatient of a psychiatric hospital.

(d) Inpatient tuberculosis hospital services

The term "inpatient tuberculosis hospital services" means inpatient hospital services furnished to an inpatient of a tuberculosis hospital.

(e) Hospital

The term "hospital" (except for purposes of sections 1395f(d), 1395f(f) and 1395n(b) of this title, subsection (a)(2) of this section, paragraph (7) of this subsection, and subsection (i) of this section) means an institution which

- (1) is primarily engaged in providing, by or under the supervision of physicians, to inpatients (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;
- (2) maintains clinical records on all patients;
- (3) has bylaws in effect with respect to its staff of physicians;
- (4) has a requirement that every patient must be under the care of a physician;
- (5) provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times; except that until January 1, 1979, the Secretary is authorized to waive the requirement of this paragraph for any one-year period with respect to any institution, insofar as such requirement relates to the provision of twenty-four-hour nursing service rendered or supervised by a registered professional nurse (except that in any event a registered professional nurse must be present on the premises to render or supervise the nursing service provided, during at least the regular daytime shift), where immediately preceding such one-year period he finds that
 - (A) such institution is located in a rural area and the supply of hospital services in such area is not sufficient to meet the needs of individuals residing therein,
 - (B) the failure of such institution to qualify as a hospital would seriously reduce the availability of such services to such individuals, and
 - (C) such institution has made and continues to make a good faith effort to comply with this paragraph, but such compliance is impeded by the lack of qualified nursing personnel in such area;
- (6) has in effect a hospital utilization review plan which meets the requirements of subsection (k) of this section;

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(7) in the case of an institution in any State in which State or applicable local law provides for the licensing of hospitals, (A) is licensed pursuant to such law or (B) is approved, by the agency of such State or locality responsible for licensing hospitals, as meeting the standards established for such licensing;

(8) has in effect an overall plan and budget that meets the requirements of subsection (z) of this section; and

(9) meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.

For purposes of subsection (a)(2) of this section, such term includes any institution which meets the requirements of paragraph (1) of this subsection. For purposes of sections 1395f(d) and 1395n(b) of this title (including determination of whether an individual received inpatient hospital services or diagnostic services for purposes of such sections), section 1395f(f)(2) of this title, and subsection (i) of this section, such term includes any institution which (i) meets the requirements of paragraphs (5) and (7) of this subsection, (ii) is not primarily engaged in providing the services described in subsection (j)(1)(A) of this section and (iii) is primarily engaged in providing, by or under the supervision of individuals referred to in paragraph (1) of subsection (r) of this section, to inpatients diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. For purposes of section 1395f(f)(1) of this title, such term includes an institution which (i) is a hospital for purposes of sections 1395f(d), 1395f(f)(2), and 1395n(b) of this title and (ii) is accredited by the Joint Commission on Accreditation of Hospitals, or is accredited by or approved by a program of the country in which such institution is located if the Secretary finds the accreditation or comparable approval standards of such program to be essentially equivalent to those of the Joint Commission on Accreditation of Hospitals. Notwithstanding the preceding provisions of this subsection, such term shall not, except for purposes of subsection (a)(2) of this section, include any institution which is primarily for the care and treatment of mental diseases or tuberculosis unless it is a tuberculosis hospital (as defined in subsection (g) of this section) or unless it is a psychiatric hospital (as defined in subsection (f) of this section). The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations. For provisions deeming certain requirements of this subsection to be met in the case of accredited institutions, see section 1395bb of this title. The term "hospital" also includes a facility of fifty beds or less which is located in an area determined by the Secretary to meet the definition relating to a rural area described in subparagraph (A) of para

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graph (5) of this subsection and which meets the other requirements of this subsection, except that

(A) with respect to the requirements for nursing services applicable after December 31, 1978, such **requirements shall provide** for temporary waiver of the requirements, for such period as the Secretary deems appropriate, where (i) the facility's **failure to fully** comply with the requirements is attributable to a temporary shortage of qualified nursing personnel in the area in which the facility is located, (ii) a registered professional nurse is present on the premises to render or supervise the nursing service provided during at least the regular daytime shift, and (iii) the Secretary determines that the employment of such nursing personnel as are available to the facility **during such temporary** period will not adversely affect the health and safety of patients;

(B) with respect to the health and safety requirements promulgated under paragraph (9), such requirements shall be applied by the Secretary to a facility herein defined in such manner as to assure that personnel requirements take into account the availability of technical personnel and the educational opportunities for technical personnel in the area in which such facility is located, and the scope of services rendered by such facility; and the Secretary, by regulations, shall provide for the continued participation of such a facility where such personnel requirements are not fully met, for such period as the Secretary determines that (i) the facility is making good faith efforts to fully comply with the personnel requirements, (ii) the employment by the facility of such personnel as are available to the facility will not adversely affect the health and safety of patients, and (iii) if the Secretary has determined that because of the facility's waiver under this subparagraph the facility should limit its scope of services in order not to adversely affect the health and safety of the facility's patients, the facility is so limiting the scope of services it provides. And

(C) with respect to the fire and safety requirements promulgated under paragraph (9), the Secretary (i) may waive, for such period as he deems appropriate, specific provisions of such requirements which if rigidly applied would result in unreasonable hardship for such a facility and which, if not applied, would not jeopardize the health and safety of patients, and (ii) may accept a facility's compliance with all applicable State codes relating to fire and safety in lieu of compliance with the fire and safety requirements promulgated under paragraph (9), if he determines that such State has in effect fire and safety codes, imposed by State law, which adequately protect patients.

(f) Psychiatric hospital

The term "psychiatric hospital" means an institution which

- (1) is primarily engaged in providing, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons;
- (2) satisfies the requirements of paragraphs (3) through (9) of subsection (e) of this section:

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- (3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals entitled to hospital insurance benefits under part A;
- (4) meets such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution; and
- (5) is accredited by the Joint Commission on Accreditation of Hospitals.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "psychiatric hospital" if the institution is accredited by the Joint Commission on Accreditation of Hospitals or if such distinct part meets requirements equivalent to such accreditation requirements as determined by the Secretary.

(g) Tuberculosis hospital

The term "tuberculosis hospital" means an institution which

- (1) is primarily engaged in providing, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis;
- (2) satisfies the requirements of paragraphs (3) through (9) of subsection (e) of this section;
- (3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals covered by the insurance program established by part A;
- (4) meet such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution; and
- (5) is accredited by the Joint Commission on Accreditation of Hospitals.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "tuberculosis hospital" if the institution is accredited by the Joint Commission on Accreditation of Hospitals or if such distinct part meets requirements equivalent to such accreditation requirements as determined by the Secretary.

(h) Extended care services

The term "extended care services" means the following items and services furnished to an inpatient of a skilled nursing facility and (except as provided in paragraphs (3) and (6)) by such skilled nursing facility

- (1) nursing care provided by or under the supervision of a registered professional nurse;

APPENDIX D

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 91-4

June 5, 1991

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Health Care Unit Placement Issues

GC Memorandum 91-3 set forth guidelines for the application of the Board's Health Care Rule. One important purpose of the Rule is to establish stable and consistent law with respect to appropriate health care units covered by the Rule, so as to reduce the frequency and the length of hearings.

There will, of course, continue to be disagreements as to unit placement issues in some health care cases, both those covered by the Rule and those not covered. Although in most cases those disagreements will render stipulated elections impossible and hence necessitate hearings, the Regions should do everything possible to avoid unnecessarily lengthy litigation over unit placement issues, especially those that are clearly governed by outstanding Board precedent. Obviously parties cannot be forced to stipulate a unit placement issue, but in some cases it may be appropriate, in advance of the hearing, to advise the parties of relevant Board precedent as to disputed classifications. I am hopeful that this information will result in an agreement on some or all the disputed classifications.

When, however, efforts at a stipulation are unsuccessful and a party continues to adhere to a position that appears contrary to outstanding Board law or policy, the Board agent or hearing officer should advise the party that, at the hearing which will necessarily ensue, the hearing officer may solicit a showing, e.g., an offer of proof as to what the party's witnesses would testify to regarding how the job classification differs from that in one or more prior cases in which the classification has been addressed by the Board. (See *CHM*, secs. 11226 and 10396 for discussion of Offers of Proof.)

To assist the Board agents in handling these matters, we are attaching research materials on various frequently litigated health care unit classifications. As these materials reflect, the Board law as to the placement of many of these classifications has been generally consistent since 1974. Thus, in some cases it may not be necessary for a hearing officer to permit extensive testimony on covered unit positions except to the extent the party offering this testimony is able to distinguish the disputed classification from a line of consistent Board cases. The attached research materials may also be of assistance to Regional staffs in the drafting of decisions. The attached materials are, as indicated, offered for assistance only, and have not been "approved" by the Board as representing the current thinking of any particular Board Member or, in fact, even of a

majority of the current Board. They have merely been compiled to minimize duplication of research and will, we hope, be supplemented and updated periodically.

I. REGISTERED NURSES—Professional employees involved in direct patient care who have graduated from an accredited nursing school and are required to pass a uniform state licensing exam. The following classifications have generally been included in RN units:

Graduate Nurses or Nurse Permittees—Nursing school graduates who, pursuant to temporary state permits, perform RN duties under RN supervision until such time as they pass the state licensing exam. *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975); *Meharry Medical College*, 219 NLRB 488, 489 (1975); *St. Elizabeth's Hospital*, 220 NLRB 325 (1975); *St. Mary's Hospital*, 220 NLRB 496 fn. 3 (1975); *Lydia E. Hall Hospital*, 227 NLRB 573 (1976).

Non-Nursing Dept. Nurses—RNs who are assigned to departments or divisions other than Nursing Services. *St. Mary's Hospital*, supra at 498 (epidemiology, product evaluation, and employee health service); *Newton-Wellesley Hospital*, 250 NLRB 409, 414 (1980) (pathology and employee health); *Frederick Memorial Hospital*, 254 NLRB 36, 39 (1981), rev'd. and remanded on other grounds 691 F.2d 191 (4th Cir. 1982) (operating room, recovery room, home care, infection surveillance, and oncology); *Milwaukee Children's Hospital Assn.*, 255 NLRB 1009, 1010 (1981) (emergency room, poison control, child & adolescent center, employee health services, pediatric-medical education, and pediatric-cancer); *Long Island College Hospital*, 256 NLRB 202, 207 (1981) (kidney center, methadone clinic, homecare, and alcoholism treatment).

Nurse Anesthetists—RNs who work in the Anesthesiology Department. *Trustees of Noble Hospital*, 218 NLRB 1441, 1444 (1975); *Kaiser Foundation Hospitals*, 219 NLRB 325, 326 fn. 2 (1975); *Samaritan Health Services*, 238 NLRB 629, 634 fn. 14 (1978); *Addison-Gilbert Hospital*, 253 NLRB 1010 (1981). But cf. *Long Island College Hospital*, supra at 207 fn. 21 (accepting stip excluding nurse anesthetists from RN unit where “record accords with the stip”).

Nurse Instructors or Faculty Nurses—RNs who provide nursing instruction. *Presbyterian Medical Center*, 218 NLRB 1266, 1267 (1975); *Jersey Shore Medical Center-Fitkin Hospital*, 225 NLRB 1191 (1976); *Ohio Valley Hospital Assn.*, 230 NLRB 604 (1977); *Newton-Wellesley Hospital*, supra at 414. But cf. *Long Island College Hospital*, supra, 256 NLRB 202, 207 fn. 21 (1981) (accepting stip excluding instructors from RN unit where “record accords with the stip”).

Nurse Practitioners—RNs with additional education and training who have the authority, subject to review by a licensed physician, to make diagnoses and prescribe medications and therapy. *Rockridge Medical Care Center*, 221 NLRB 560 (1975).

Conversely, the following classification has been excluded from RN units:

Admitting Officers—RNs whose duties are limited to admitting and discharging patients. *Newton-Wellesley Hospital*, supra at 704 (duties are primarily clerical).

Finally, there are cases going both ways on whether the following classification should be included in RN units:

Utilization Review Coordinators—RNs whose primary function is reviewing patient medical charts to evaluate whether the care provided is within administrative, government, and insurance guidelines. Held included: *Trustees of Noble Hospital*, supra at 1444–1445; *Samaritan Health Services*, supra, 238 NLRB 629, 634 fn. 14 (1978); *Long Island College Hospital*, supra. Contra: *Addison-Gilbert Hospital*, supra at 1011–1012; *Ralph K. Davies Medical Center*, 256 NLRB 1113, 1117 (1981) (duties are primarily administrative). See also *St. James Hospital*, 248 NLRB 1045, 1046 (1980) (finding that stipulated professional unit which included utilization review coordinators did not contravene Act or policy).

II. ALL PROFESSIONALS EXCEPT RNS AND PHYSICIANS—Includes all employees defined as professional within the meaning of Section 2(12) of the Act, except for physicians and registered nurses. (See Board’s Health Care Rules, 284 NLRB 1553.) The following classifications have been held to be included:

Audiologists—*Sutter Community Hospitals*, 227 NLRB 181, 185 (1976).

Chemists—*Barnert Memorial Hospital Center*, 217 NLRB 775, 783 (1975).

Counselor Consultants—oversee client-related work of counselors and senior counselors but are not managerial or possess 2(11) authority. *Buffalo General Hospital*, 218 NLRB 1090, 1093 (1975).

Dieticians—*Mason Clinic*, 221 NLRB 374, 376 (1975); *Sutter Community Hospitals*, supra at 188.

Educational Programmer—develops training programs on use of dialysis equipment for presentation to patients and medical personnel. *Sutter Community Hospitals*, supra at 188.

Educator—Special education teacher who works with adolescents implementing educational programs required by physician. *Mount Airy Psychiatric Center*, 253 NLRB 1003, 1005 (1981).

Medical Artists—depict medical procedures performed by MDs, illustrate parts of anatomy for use in educational or graphic demonstrations, prepare charts and

graphs illustrating effects of treatment. *Mason Clinic*, supra at 376.

Nuclear Physicist—*Sutter Community Hospitals*, supra at 185.

Pharmacists—*Mount Airy Psychiatric Center*, supra at 1005; *San Jose Hospital*, 228 NLRB 21 (1977); *Kaiser Foundation*, 219 NLRB 325 (1975).

Social Worker—*Mount Airy Psychiatric Center*, supra at 1005; *Gnaden Huetten Hospital*, 219 NLRB 235 fn. 1 (1975).

Technologists (medical lab; cardiopulmonary)—*St. Barnabas Hospital*, 283 NLRB 472 (1987) (technologists found to be professionals based on exercise of discretion and independent judgment, duties performed were predominantly intellectual and varied, and output could not be standardized in relation to a given period of time. Although not required to have college degree, 20 of 26 techs held degrees). Cf. *Middlesex General Hospital*, 239 NLRB 837 (1978) (techs found not to be professionals) and *Norton Community Hospital*, 291 NLRB 1174, 1175 fn. 10 (1988) (record did not support finding that technologists were professionals). See section III, “Technical Employees” (Laboratory Technicians).

Therapists (physical, recreational, occupational)—*Mount Airy Psychiatric Center*, supra at 1005; *Sutter Community Hospitals*, supra at 187.

Utilization Review Coordinator—reviews patient medical charts to determine if hospitalization is warranted under Medicare/Medicaid. *St. James Hospital*, 248 NLRB 1045, 1046 (1980). See section I, “Registered Nurses” (Utilization Review Coordinators); but see also section V, “All Nonprofessional Employees” (Utilization Review Coordinator included in service and maintenance unit in *Baptist Memorial Hospital*, 225 NLRB 1165, 1170 (1976)).

III. TECHNICAL EMPLOYEES—Employees whose job/jobs involve the use of independent judgment and specialized training in major health care occupational groups such as medical laboratory, respiratory therapy, radiography, emergency medicine, and medical records. They supply a support role and work in patient care. Although the laws on licensing, training, registration, and qualifications vary, most health care technical employees are certified (usually by a national examination) licensed or registered with state authorities. (For additional details see 284 NLRB 1553–1555.) The following classifications have generally been included in technical units:

Infant Care Technicians—*Barnert Hospital Center*, 217 NLRB 775, 779 (1975).

Laboratory Technicians—*Mad River Community Hospital*, 219 NLRB 25 (1975); *Trinity Memorial Hospital*, 219 NLRB 215, 218 (1975); *Alexian Bros. Hospital*, 219 NLRB 1122 (1975); *William W. Backus Hospital*, 220 NLRB 414, 417 (1975); *Children's Hospital*, 222 NLRB 588, 591 (1976). But compare

laboratory technologists. See *Children's Hospital*, supra at 590 (finding laboratory technologists to be professionals). See also section II, "All Professionals except RNs and Physicians" (Technologists).

Licensed Practical Nurses—*Trinity Memorial Hospital*, supra at 216; *Alexian Bros. Hospital*, supra; *St. Catherine's Hospital*, 217 NLRB 787 (1975). See also discussion of Rule, 284 NLRB 1528, 1555 (1988).

Operating Room Technicians (Surgical Technicians)—*Barnert Hospital Center*, supra at 780 (certified ORT); *Trinity Memorial Hospital*, supra at 216; *William W. Backus Hospital*, supra at 418. Compare *St. Elizabeth's Memorial Hospital*, 220 NLRB 325, 329 (1975) (including ORT in-service and maintenance unit).

Orthopedic Technicians—*Barnert Hospital Center*, supra at 779.

Physical Therapy Assistants—*Trinity Memorial Hospital*, supra at 216.

Psychiatric Technicians (Mental Health Counselor)—*Barnert Memorial Hospital Center*, supra at 778; *Southern Maryland Hospital*, 274 NLRB 1470, 1475 (1985).

Respiratory Therapy Technicians (Pulmonary Function Therapist)—*Trinity Memorial Hospital*, supra at 216; *St. Elizabeth's Hospital*, supra at 327; *William W. Backus Hospital*, supra at 417; *Children's Hospital*, supra at 593; *Alexian Bros. Hospital*, supra, 219 NLRB 1122 fn. 5.

Surgical Assistants—*Trinity Memorial Hospital*, supra at 217.

X-Ray (Radiology) Technicians (Technologists)—*Barnert Memorial Hospital Center*, supra at 778; *Mad River Community Hospital*, 219 NLRB 25 (1975); *Trinity Memorial Hospital*, supra at 217; *Clarion Osteopathic Hospital*, 219 NLRB 248, 249 (1975); *Alexian Bros. Hospital*, supra; *St. Elizabeth's Hospital*, supra at 328; *William W. Backus Hospital*, supra at 416; *Pontiac Osteopathic Hospital*, 227 NLRB 1706, 1707 (1977).

Conversely, the following classifications have generally been found not to be technical employees and are excluded from a technical unit:

Dark Room Technicians—*Barnert Memorial Hospital Center*, supra at 778; *St. Elizabeth's Hospital*, supra at 329; *William W. Backus Hospital*, supra at 416; *Southern Maryland Hospital*, supra at 1475.

EEG Technicians—*Barnert Memorial Hospital Center*, supra at 778; *Trinity Memorial Hospital*, supra at 218; *St. Elizabeth's Hospital*, supra at 329; *William W. Backus Hospital*, supra at 417; *Pontiac Osteopathic Hospital*, supra at 1707.

Compare Southern Maryland Hospital, *supra* at 1476 (including EEG tech in technical unit).

EKG Technicians—Barnert Memorial Hospital Center, *supra* at 777; Trinity Memorial Hospital, *supra* at 218; St. Elizabeth's Hospital, *supra* at 329; William W. Backus Hospital, *supra* at 417; Pontiac Osteopathic Hospital, *supra* at 1707; Southern Maryland Hospital, *supra* at 1473.

IV. BUSINESS OFFICE CLERICALS—Those clerical employees who, because they perform business office functions, are geographically isolated from and have minimal contact with other nonprofessional employees and patients, are separately supervised, and thus do not share a community of interest with other nonprofessionals. The following classifications have generally been found to be business office clericals (BOCs):

Accounting Clerks—*St. Catherine's Hospital*, 217 NLRB 787, 789 (1975); *Trumbull Memorial Hospital*, 218 NLRB 796 (1975); *Valley Hospital*, 220 NLRB 1339, 1343 (1975); *Seton Medical Center*, 221 NLRB 120 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 676 (1976); *Baker Hospital*, 279 NLRB 308 (1986).

Administration Clerks—*Trumbull Memorial Hospital*, *supra*; *St. Luke's Episcopal Hospital*, *supra* at 676.

Audit Clerks—*Trumbull Memorial Hospital*, *supra*; *Seton Medical Center*, *supra*; *St. Luke's Episcopal Hospital*, *supra* at 676.

Cashiers—*St. Catherine's Hospital*, *supra* at 789; *Southwest Community Hospital*, 219 NLRB 351, 352 (1975); *St. Claude General Hospital*, 219 NLRB 991 (1975); *William W. Backus Hospital*, 220 NLRB 414, 415 (1975); *Valley Hospital*, *supra* at 1343; *Seton Medical Center*, *supra*.

Communications Clerks (see also Switchboard, Telephone & PBX Operators)—*St. Luke's Episcopal Hospital*, *supra* at 676; *Jewish Hospital*, 223 NLRB 614, 621 (1976).

Computer Operators & Programmers—*Trumbull Memorial Hospital*, *supra* at 797; *St. Francis Hospital*, 219 NLRB 963, 964 (1975).

Credit & Collection Clerks—*Trumbull Memorial Hospital*, *supra* at 797; *Valley Hospital*, *supra* at 1343; *Seton Medical Center*, *supra*.

Credit Union Clerks—*St. Luke's Episcopal Hospital*, *supra* at 676.

Data Processors, Keypunch Operators & Data Control Clerks— *Trumbull Memorial Hospital*, *supra* at 797; *St. Francis Hospital*, *supra* at 964; *William W.*

Backus Hospital, supra at 415; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra, 221 NLRB 120, 121–122 (1975).

Insurance Clerks—*Trumbull Memorial Hospital*, supra at 797; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra.

Management Engineering Clerks—*St. Luke’s Episcopal Hospital*, supra at 676.

Personnel & Payroll Clerks—*Trumbull Memorial Hospital*, supra at 797; *St. Luke’s Episcopal Hospital*, supra at 676.

Planning & Development Clerks—*Seton Medical Center*, 221 NLRB 120 (1975); *St. Luke’s Episcopal Hospital*, supra at 676.

Public Relations & Community Affairs Clerks—*William W. Backus Hospital*, supra at 415; *St. Luke’s Episcopal Hospital*, supra at 676.

Switchboard, Telephone & PBX Operators—*St. Catherine’s Hospital*, supra at 789; *St. Francis Hospital*, supra, 219 NLRB 963, 964 (1975); *St. Claude General Hospital*, supra; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra; *Medical Arts Hospital of Houston*, 221 NLRB 1017, 1018 (1975); *Baptist Memorial Hospital*, 225 NLRB 1165, 1168–1169 (1976); *Duke University*, 226 NLRB 470, 471 (1976).

Volunteer Dept. Clerks—*Seton Medical Center*, supra.

Conversely, the following classifications have generally been found not to be business office clericals:

Emergency Room Clerks—*St. Elizabeth’s Hospital*, 220 NLRB 325 fn. 1 (1975); *William W. Backus Hospital*, supra at 416.

Housekeeping Clerks—*William W. Backus Hospital*, supra at 415; *Baptist Memorial Hospital*, supra, 225 NLRB 1165, 1167–1168 (1976).

Laboratory Clerks/Secretaries—*Kanawha Valley Memorial Hospital*, 218 NLRB 846 (1975); *Gnaden Huetten Memorial Hospital*, 219 NLRB 235, 236–237 (1975); *William W. Backus Hospital*, supra at 415; *Baptist Memorial Hospital*, supra at 1167–1168.

Library Clerks—*Jewish Hospital of Cincinnati*, 223 NLRB 614, 622 (1976); *Duke University*, supra at 471.

Maintenance Clerks—*William W. Backus Hospital*, supra at 415.

Medical Dept. Clerks—*Trumbull Memorial Hospital*, 218 NLRB 796 (1975); *St.*

Elizabeth's Hospital, supra, 220 NLRB 325 fn. 1 (1975); *St. Luke's Hospital*, supra at 677; *Baptist Memorial Hospital*, supra at 1167–1168; *Duke University*, 226 NLRB 470 (1976).

Operating Room Clerks—*William W. Backus Hospital*, supra at 415.

Pharmacy Clerks—*St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *William W. Backus Hospital*, supra at 415; *Medical Arts Hospital of Houston*, supra at 1018.

Ward Clerks—*Sisters of St. Joseph of Peace*, 217 NLRB 797 (1975); *William W. Backus Hospital*, supra at 415; *St. Luke's Episcopal Hospital*, supra at 677–678; *Duke University*, supra at 471.

Finally, there are cases going both ways on whether the following classifications are business office clericals:

Admitting Clerks—Held BOCs: *St. Catherine's Hospital*, 217 NLRB 787, 789 (1975); *Trumbull Memorial Hospital*, 218 NLRB 796 (1975); *St. Francis Hospital*, 219 NLRB 963, 964 (1975); *St. Claude General Hospital*, 219 NLRB 991 (1975); *St. Elizabeth's Hospital*, 220 NLRB 325 (1975); *Valley Hospital*, 220 NLRB 1339, 1343 (1975); *Seton Medical Center*, 221 NLRB 120 (1975); *Medical Arts Hospital of Houston*, 221 NLRB 1017 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 676 (1976); *Baptist Memorial Hospital*, 225 NLRB 1165, 1168 (1976). Contra: *William W. Backus Hospital*, 220 NLRB 414, 415–416 (1975); *Jewish Hospital of Cincinnati*, 223 NLRB 614, 621 (1976) (finding admitting clerks to be hospital clericals rather than business office clericals).

Billing Clerks—Held BOCs: *St. Catherine's Hospital*, supra at 789; *William W. Backus Hospital*, supra at 415. Contra: *St. Luke's Episcopal Hospital*, supra at 677 (placing certain billing clerks in service and maintenance unit).

Mail Clerks & Messengers—Held not BOCs: *St. Luke's Episcopal Hospital*, supra at 677–678; *Jewish Hospital of Cincinnati*, supra at 622; *Duke University*, supra at 471. Contra: *Trumbull Memorial Hospital*, supra at 797; *Seton Medical Center*, supra (including mail clerks and messengers in BOC unit).

Medical Education Clerks—Held not BOCs: *St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *Baptist Memorial Hospital*, supra at 1168–1169. Contra: *St. Francis Hospital*, supra at 964; *St. Luke's Episcopal Hospital*, supra at 676 (finding RN and medical education clerks to be BOCs).

Medical Records Clerks—Held not BOCs: *St. Catherine's Hospital*, supra at 790; *Sisters of St. Joseph of Peace*, supra at 798; *Gnaden Huetten Memorial Hospital*, supra at 236–237; *Alexian Bros. Hospital*, supra at 1123; *St. Claude General Hospital*, supra at 992; *William W. Backus Hospital*, supra at 415; *Valley*

Hospital, supra at 1343; *Central General Hospital*, 223 NLRB 110, 111 (1976); *Baptist Memorial Hospital*, supra at 1168; *Morristown-Hamblen Hospital Assn.*, 226 NLRB 76, 79 (1976); *Duke University*, 226 NLRB 470, 471 (1976). Contra: *Seton Medical Center*, 221 NLRB 120, 122 fn. 21 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 677 (1976) (excluding medical records clerks from service and maintenance unit).

Nursing Office Clerks—Held not BOCs: *St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *St. Luke's Episcopal Hospital*, supra at 677; *Baptist Memorial Hospital*, supra at 1168–1169. Contra: *Medical Arts Hospital of Houston*, 221 NLRB 1017, 1018 (1975) (excluding nursing office clerks from service and maintenance unit).

Pastoral Care Clerks—Held BOCs: *St. Luke's Episcopal Hospital*, supra at 676. Contra: *Baptist Memorial Hospital*, supra at 1167 (including chaplain's secretary in service and maintenance unit); *Duke's University*, supra at 471 (including chapel receptionist in service and maintenance unit).

Purchasing, Stockroom & Inventory Clerks—Held BOCs: *Trumbull Memorial Hospital*, 218 NLRB 796, 797 (1975); *St. Francis Hospital*, supra at 964; *William W. Backus Hospital*, supra at 415; *Valley Hospital*, supra at 1343; *Seton Medical Center*, supra; *St. Luke's Episcopal Hospital*, supra at 676. Contra: *St. Catherine's Hospital*, supra, 217 NLRB 787, 789–790 (1975); *Alexian Bros. Hospital*, supra at 1123; *St. Elizabeth's Hospital*, supra, 220 NLRB 325 fn. 1 (1975); *Jewish Hospital of Cincinnati*, supra at 622; *Duke University*, supra.

Receptionists & Information-Desk Clerks—Held BOCs: *St. Catherine's Hospital*, supra at 789; *Southwest Community Hospital*, 219 NLRB 351, 353 (1975); *William W. Backus Hospital*, supra at 415; *Duke University*, supra. Contra: *Trumbull Memorial Hospital*, supra at 797 (including all but one receptionist classification in service and maintenance unit); *Jewish Hospital*, supra at 621–622 (including information-desk clerks in service and maintenance unit).

V. ALL NONPROFESSIONAL EMPLOYEES, EXCEPT FOR TECHS, SKILLED MAINTENANCE, BOCS, AND GUARDS. This unit will generally include all service and maintenance employees. See 284 NLRB 1565–1566. This unit is analogous to the plantwide production and maintenance unit in the industrial sector and, as such, is the classical appropriate unit. 284 NLRB 1523 fn. 60. *Newington Children's Hospital*, 217 NLRB 793 (1975). Employees in this category generally perform manual and routine job functions, and are not highly skilled or trained. The following classifications have been held to be included:

Barbers—*Baptist Memorial Hospital*, 225 NLRB 1165, 1169 (1976).

Clerks (hospital clericals who work side by side with service and

maintenance employees in various depts. performing clerical functions, i.e., admitting; emergency room; radiology dept.; purchasing dept. clerk and typist; classified data input clerk)—*William W. Backus Hospital*, 220 NLRB 414, 415–416 (1975); *Baptist Memorial Hospital*, supra at 1167.

Hostesses (department of religion)—*Baptist Memorial Hospital*, supra at 1171.

Housekeeping employees—*Gnaden Huetten Memorial Hospital*, 219 NLRB 235, 236 (1975).

Librarian—*William W. Backus Hospital*, supra at 418; *Baptist Memorial Hospital*, supra at 1173.

Manicurist—*Baptist Memorial Hospital*, supra at 1169.

Medical Record Clerical Employees—*St. Luke's General Hospital*, 220 NLRB 488, 489 (1975); *Gnaden Huetten Memorial Hospital*, supra at 236; *Sisters of St. Joseph of Peace*, 217 NLRB 797 (1975); *William W. Backus Hospital*, supra at 415.

Nurses Aides—*Gnaden Huetten Memorial Hospital*, supra at 236.

Photographer-Cinematographer-Television Technician—*Newington Children's Hospital*, supra at 795.

Physical Therapy Aides—*Gnaden Huetten Memorial*, supra, 219 NLRB 235, 236.

Porter (hospital barber shop)—*Baptist Memorial Hospital*, supra at 1169.

Printer—*Baptist Memorial Hospital*, supra at 1171.

Psychiatric Activities Director (and Assistant)—*Baptist Memorial Hospital*, supra at 1169.

Recovery Room Technicians—*Baptist Memorial Hospital*, supra at 1172.

Respiratory and Pulmonary Dept. Employees—*Baptist Memorial Hospital*, supra at 1172.

Secretaries (staffing, nursing office, liaison office, in-service education, office of the chaplain, director of housekeeping, medical education, cardiac lab. secretaries and clericals, pulmonary and respiratory dept. medical secretaries, medical transcribers)—*Baptist Memorial Hospital*, supra at 1167.

Technicians (darkroom; EKG; orthotic footwear; leather)—*William W. Backus Hospital*, supra, 220 NLRB 414, 416 (1975); *Barnert Memorial Hospital*

APPENDIX D

Center, 217 NLRB 775, 778 (1975); *Newington Children's Hospital*, supra at 795.

Utilization Review Coordinator—*Baptist Memorial Hospital*, supra at 1170. But see section II “All Professionals, except RNs and Physicians” (utilization review coordinator found to be professional in *St. James Hospital*, 248 NLRB 1045, 1046 (1980)).

Ward Clerks—*Sisters of St. Joseph of Peace*, 217 NLRB 797 (1975).

APPENDIX E
Sample *Tropicana* Subpoena

ATTACHMENT TO SUBPOENA DUCES TECUM

1. [XYZ Company] shall be referred to in this subpoena as the Employer.
2. Documents which show the full and correct name and address of the Employer's business, its legal status, and the names, titles and dates of tenure of all owners, partners, principals, officers, and directors of the Employer's business.
3. True copies of the Employer's Articles of Incorporation, Corporate Charter and Certificate of Incorporation, Corporate By-Laws, and all amendments thereto, and all annual reports and licenses or applications to do business filed by the Employer with state and county governments, including but not limited to the State of ____ and/or the County of ____.
4. A true copy of all contracts and other agreements between the Employer and state and county governments, including but not limited to the State of _____ and/or the County of _____.
5. All books, records or other documents, including but not limited to books of accounts, accounts receivable records, purchase orders, invoices, journals, ledgers, bills of lading, canceled checks, billing slips, delivery and/or receiving records, and State and Federal tax returns, for the period from _____ to the present, which will show:
 - a) Gross receipts for products sold and services rendered by the Employer directly to enterprises or persons located outside the State of _____.
 - b) Gross receipts for products sold and services rendered by the Employer directly to enterprises or persons located within the State of _____, including the identity and address of each of the enterprises or persons to whom sales were made or services performed.
 - c) The dollar value of all goods, supplies, and services purchased and/or received by the Employer from enterprises or persons located outside the State of _____.
 - d) The dollar value of all goods, supplies, and services purchased and/or received by the Employer from all enterprises or persons located within the State of _____, including the identity and address of each of the enterprises or persons from whom purchases were made or services received.
6. Pay roll records showing names, addresses, job classifications, departments, rates of pay, dates of hire, and hours of employment for all individuals employed by the Employer, including individuals on layoff status and the dates of layoffs, for the period from _____ to date.

HEARING OFFICER'S GUIDE

7. In lieu of physically producing the information and/or records required above, the hearing officer for the National Labor Relations Board will accept sworn testimony by a responsible official of the Employer regarding each of the items above.

APPENDIX F

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION __**

| |
|--------------------------------------|
| Correct Name of Employer: |
| Case No. |
| Correct Name of Charged Party Union: |
| Correct Name of Intervening Union: |

STIPULATION

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.
2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.
3. The Charged Party is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Intervening Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.
4. The Charging Party Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts:

5. The disputed work is:
(Describe work in dispute)

Upon receipt of this Stipulation by the Hearing Officer it may be admitted, without objection, as a Board exhibit in this proceeding.

HEARING OFFICER'S GUIDE

For the Charging Party Employer

For the Charged Party Union

For the Intervenor

RECEIVED:

Hearing Officer

Date: _____

Board Exhibit No. _____

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