NATIONAL LABOR RELATIONS BOARD

AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES

N.L.R.B.

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OFFICE OF THE GENERAL COUNSEL

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Preface

We are very pleased to again provide Agency staff and the labor-management community with this updated edition of "An Outline of Law and Procedure in Representation Cases." This book is now 50 years old. It was originally issued in the early 1960s and was the work of then Assistant General Counsel Elihu Platt. It was not revised until 1992 when former Deputy General Counsel John Higgins volunteered to update the text. Since then, he revised and updated the text in 1995, 1997, 1999, 2002, and 2005 and again in 2008. In 2010, John retired after more than 46 years of NLRB service. Notwithstanding, he has continued his service to the Agency by this updated edition of the text. In this new edition Mr. Higgins has brought the text through December 2011, has added a number of new topics, and has updated the subject matter index.

This book is a very important research tool. Both during my years as a Director of the Office of Representation Appeals and while serving as Acting General Counsel, I have referred to this book in researching representation case issues.

My thanks to John Higgins for his willingness to continue his efforts at keeping the Outline up to date. I also want to thank Marc Seidman, Acting Director of the Office of Representation Appeals, for reviewing the manuscript, as well as the dedicated employees in the Agency's Editorial Section for their tireless work on this project.

Lafe E. Solomon
Acting General Counsel

EDITOR'S NOTE

I am pleased to have this opportunity to once again update the Outline. As Lafe Solomon noted in the Preface, this text is now 50 years old and I have been involved with it for 20 of those years. It has been a most satisfying professional experience and I have enjoyed continuing it in my retirement from the Agency.

This particular edition is unique because it is the first to be published since the Two Member Board era. Many of the Two Member cases were reconsidered by a three Member panel after the New Process Steel decision and those cases are discussed and referenced in this volume with a citation to the three Member decision. Two Member decisions that have not been reconsidered are also included in this text and are noted as being just that—Two Member decisions. While these Two Member decisions are of little if, any, precedential value, I have nonetheless cited them in this text in order to give the reader a fuller understanding of the development of representation case law.

Over the past 10 years or so, I have used the Outline's classification system to prepare an annual paper on the developments in "R" Case law. That paper is presented at the Midwinter Meetings of the NLRB Practice and Procedure and the Developing Labor Law Committees of the ABA Labor and Employment Law Section. In the future, these papers will be included on the Agency's web site as a Supplement to this text.

I am most grateful to Acting General Counsel Solomon for giving me the opportunity to continue to work on this important book, to Marc Seidman for his review and suggestions for improvement, to Sylvia Moton Bostick for her assistance in the preparation of this text and to Christina Avent-Brown for her editing work.

John E. Higgins, Jr.,
August 2012

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1. JURISDICTION

1-100 Jurisdiction Generally

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The National Labor Relations Board's jurisdiction under the National Labor Relations Act extends to enterprises whose operations affect interstate commerce. Section 2(6) of the Act defines "commerce" and Section 2(7) defines "affecting commerce." The Board's jurisdiction has been construed to extend to all such conduct as might constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. *NLRB v. Fainblatt*, 306 U.S. 601–607 (1939). See *J. M. Abraham, M.D.*, 242 NLRB 839 (1979), in which statutory jurisdiction was established by receipt of Medicare funds and *Catalina Island Sightseeing*, 124 NLRB 813 (1959), in which regulation by another Federal agency under the commerce clause established statutory jurisdiction.

In its exercise of administrative discretion, the Board has limited the assertion of its broad *statutory jurisdiction* to those cases which, in its opinion, have a substantial effect on commerce. In doing so, the Board has adopted standards for the assertion of jurisdiction which are based on the volume and character of the business done by the employer. The Supreme Court has noted that Congress left it to the Board to ascertain whether prescribed practices would, in particular situations, adversely affect commerce. *Polish National Alliance v. NLRB*, 322 U.S. 643, 648 (1944). This is sometimes called *discretionary jurisdiction* and the Court has recognized that, even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 684 (1954).

a. History of jurisdictional standards

These broad principles, which delineate the basic law initially developed with respect to the Board's jurisdictional grant, have been affected by statutory changes made in 1959. Prior to 1950, the Board exercised its discretionary jurisdiction on a case-by-case basis. Since that year, it has defined in its decisions those categories of enterprises over which it would exercise discretionary jurisdiction. The standards under which the Board had been operating were substantially revised in July 1954, and again in October 1958. The Board's practice of establishing the standards under which it will assert jurisdiction was given a statutory basis by the Labor-Management Reporting and Disclosure Act of 1959, which added Section 14(c)(1) to the Act:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert Jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

Thus, while the Board may exercise its discretion to decline to assert jurisdiction over enterprises which meet the legal test of "affecting interstate commerce," it may not decline to assert jurisdiction over enterprises meeting its jurisdictional standards which were in effect on August 1, 1959.

A finding that the Board has statutory jurisdiction is necessary in all Board proceedings, even though no party contests that jurisdiction. *Clark Concrete Construction Corp.*, 116 NLRB 321 fn. 3 (1956).

Statutory jurisdiction can be challenged at any stage, but discretionary jurisdiction must be timely raised. *Anchortank, Inc*., 233 NLRB 295 fn. 1 (1977).

b. Board authority to cede jurisdiction

Section 10(a) of the Act permits the Board to cede jurisdiction to a State or Territory in:

> any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) . . . unless the provision of the State or Territorial statute . . . is inconsistent with the corresponding provision of this Act.

The Board has interpreted Section 10(a) to require that the state statutes provisions be parallel with the NLRA, if not substantially identical. In fact, notwithstanding the requests of some States, the Board has never made a cession agreement. See *Produce Magic, Inc*., 318 NLRB 1171 (1995), and cases cited therein.

1-200 The Jurisdictional Standards

The Board's jurisdictional standards are:

1-201 Nonretail

260-6744

260-3320-5000 et seq.

An annual outflow or inflow, direct or indirect, across state lines of at least $50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959) (see this decision for all the definitions under this heading).

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

Indirect outflow refers to sales of goods or services within the State to users meeting any standard except solely an indirect inflow or indirect outflow standard.

An illustration of the application of this definition: An employer engaged in tree surgery and landscaping performed $170,000 worth of services in and out of the State for several public utilities. As under *Siemons*, indirect outflow refers to services to users meeting any of the Board's jurisdictional standards (except the indirect outflow or indirect inflow standard) and the employer's services to the public utilities who met the gross volume for utilities constituted indirect outflow within the *Siemons* definition. Thus, because these services were in excess of $50,000 annually, the employer met the standard for assertion of jurisdiction for a nonretail enterprise. *Labor Relations Commission of Massachusetts*, 138 NLRB 381 (1962) (an advisory opinion under Secs. 102.98 and 102.99 of the Board's Rules and Regulations). Note that the above definition of indirect outflow specifically refers to "users." This was explained in *St. Francis Pie Shop*, 172 NLRB 89, 90 (1968), one of many cases based on the *Siemons* decision (see specifically, *Siemons*, supra at fn. 12).

For purposes of indirect outflow, an exempt organization qualifies as a "user" in the same manner and to the same degree as a nonexempt enterprise. *Peterein & Greenlee Construction Co.*, 172 NLRB 2110 (1968). Direct inflow refers to goods or services furnished directly to the employer from outside the State in which the enterprise is located. Indirect inflow refers to the purchase of goods or services which originate outside the employer's State but which were purchased from a seller within the State. See *Food & Commercial Workers Local 120 (Weber Meats)*, 275 NLRB 1376 fn. 1 (1985). In *Combined Century Theatres*, 120 NLRB 1379 (1959), and *George Schuworth*, 146 NLRB 459 (1964), the Board found indirect inflow in circumstances when the goods had changed form.

For a further explication of these definitions, see *Better Electric Co.*, 129 NLRB 1012 (1961).

Nonrecurring capital expenses are included in assessing an employer's inflow if those expenses are not the only items of inflow. *East Side Sanitation Service*, 230 NLRB 632 (1977); *Arrow Rock Materials*, 284 NLRB 1 (1987).

As stated in *Siemons*, supra at 85, direct and indirect outflow may be combined as can direct and indirect inflow. But, outflow and inflow may not be combined. See *Oregon Labor Management Relations Board*, 163 NLRB 17 (1967), combining the inflow of a contractor and its subcontractors.

The nonretail standard has been applied when services were provided directly to the consuming public but when the cost of these services were paid for by a commercial enterprise. *Bob's Ambulance Service*, 178 NLRB 1 (1969). See also *Carroll-Naslund Disposal*, 152 NLRB 861 (1965).

In *Hobart Crane Rental, Inc*., 337 NLRB 506 (2002), two companies that were allegedly a single employer did not together meet the outflow requirement in either of the two previous years.

In *Steven Scott Entertainment*, 353 NLRB 1078 (2009), the two Member Board decided to exercise jurisdiction over a booking agent in the entertainment industry where the business had gross annual revenue of $500,000 and direct inflow in excess of $50,000. Thus, the Board concluded this employer would satisfy both the non retail and retail standards.

1-202 Retail

260-6776

260-6768

260-6772

All retail enterprises which fall within the Board's statutory jurisdiction and do a gross annual volume of business of at least $500,000. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959).

There is a distinction between "retail" and "wholesale." In *Roland Electrical Co. v. Walling*, 326 U.S. 657, 764 (1946), the Court construed these terms precisely as they are used under the Fair Labor Standards Act. Thus, retail sales include sales to a purchaser who desires "to satisfy his own personal wants or those of his family or friends," while wholesale sales constitute "sales of goods or merchandise 'to trading establishments of all kinds, to institutions, industrial, commercial, and professional users, and sales to governmental bodies.'" *Bussey-Williams Tire Co.*, 122 NLRB 1146, 1147 (1959); *Taylor Baking Co.*, 143 NLRB 566 (1963). The construction and sale of residential homes exclusively is considered a retail enterprise. *DeMarco Concrete Block Co.*, 221 NLRB 341 (1975). If an employer is engaged in both wholesale and retail distribution, either standard applies. *DeMarco Concrete Block Co*., supra.

The retail standard, unlike that used for nonretail, is based on annual gross volume of business. Generally speaking, gross volume is easy to determine. But note that it does not include employers deductions from employee pay for tips. See *Love's Wood Pit Barbeque Restaurant,* 209 NLRB 220 (1974), and *Temptations,* 337 NLRB 376 (2001).

This gross volume test is predicated on a concept which was first used in 1950, and codified in 1954 when a revised set of jurisdictional yardsticks was adopted. Normally, meeting this type of standard will necessarily entail activities "affecting commerce," but, because gross volume, as distinguished from direct or indirect outflow or inflow used in nonretail operations, does not in and of itself indicate movement across State lines, evidence and a finding that the Board has statutory jurisdiction is required in addition to satisfying the gross volume requirement. Accordingly, whenever the gross volume standard is applied, including the retail standard, proof of statutory jurisdiction is needed. See, for example, *Longshoremen ILWU (Catalina Island Sightseeing)*, 124 NLRB 813 (1960).

A typical illustration of the application of the retail standard: Annual out-of-state purchases constituting inflow to the employer brings its operations within the Board's statutory jurisdiction, while its combined annual gross volume of sales in excess of $500,000 satisfies the dollar volume test for assertion of discretionary jurisdiction over retail enterprises. *Swift Cleaners*, 191 NLRB 597 (1971).

1-203 Instrumentalities, Links, and Channels of Interstate Commerce

260-6732

All enterprises engaged in furnishing interstate transportation of passengers or freight, and all other enterprises which function as essential links in the transportation of passengers or commodities in interstate commerce, deriving at least $50,000 annual gross revenue from such operations, or performing services valued at least at $50,000 for enterprises over which jurisdiction would be asserted under any standard except one based on indirect outflow or indirect inflow. *HPO Service*, 122 NLRB 394 (1959).

In *HPO*, the employer was engaged in the transportation by bus of mail under contract with the United States Post Office originating both within and outside the State of West Virginia, and over $50,000 of its annual gross revenue was received for such transportation of mail destined for delivery in States other than West Virginia. Where exact figures are not available, the Board may, in appropriate circumstances, infer from the nature of the employer operations that some revenue is derived from interstate travel. *Margate Bridge Co.*, 247 NLRB 1437 (1980).

The *HPO* standard has been applied to a variety of operations.

In *Carteret Towing Co.*, 135 NLRB 975, 977 (1962), it was applied to a company operating tugboats which, among other things, functioned as a link in the transportation of passengers and freight in interstate commerce, from which it received over $50,000 per year, and provided annual services in excess of that figure to companies over which the Board would assert jurisdiction.

In *Andes Fruit Co.*, 124 NLRB 781 fn. 2 (1959), it was applied to a company which received over $50,000 a year for stevedoring services performed for another company which imported products from a foreign country.

A *bank* partakes of the nature of an instrumentality of commerce and is so treated. *Amalgamated Bank of New York*, 92 NLRB 545 (1951), see also *NLRB v. Bank of America National Trust & Savings Assn.*, 130 F.2d 624 (9th Cir. 1942).

For further examples of enterprises described as "essential links," see *United Warehouse & Terminal Corp.*, 112 NLRB 959 (1955) (warehouse activities); *Etiwan Fertilizer Co.*, 113 NLRB 93 (1955) (shipping terminal operations); *Kenedy Compress Co.*, 114 NLRB 634 (1956) (warehouse and shipping); *Peoria Union Stock Yards Co.*, 116 NLRB 263 (1956) (public stockyard); *Aurora Moving & Storage Co.*, 175 NLRB 771 (1969) (packing and crating); and *Boston Cab Assn.*, 177 NLRB 64 (1969) (starter service); and *Open Taxi Lot Operation*, 240 NLRB 808 (1979) (airport station or dispatch services).

Note that in *Kenilworth Delivery Service*, 140 NLRB 1190 (1963), revenue from interstate transportation of commodities was combined with revenue from services performed within the State for enterprises which met the jurisdictional standards. In doing so, the Board explained that the purport of this standard was to equate transportation directly out of the State with within-State transportation services to other enterprises directly engaged in interstate commerce and to apply the $50,000 standard applicable to either category by adding the amount realized from each. This is consistent with Board policy in adding direct and indirect outflow or direct and indirect inflow.

In *Greyhound Terminal*, 137 NLRB 87 (1962), the Board included all revenue related to a bus terminal including rentals from a taxistand and restaurant in determining jurisdiction because these services were an integral part of the terminal but incidental thereto. In *Jarvis Cafeteria*, 200 NLRB 1141 (1972), the Board declined jurisdiction under the essential link standard where the

sale of bus tickets was a minor incidental aspect of the employees' total operations which included a restaurant.

See also *Superior Travel Service, Inc.*, 342 NLRB 570 (2004), holding that a travel agency qualifies as an "essential link."

1-204 National Defense/Federal Funds

260-6736

280-9706

Enterprises as to which the Board has statutory jurisdiction and whose operations exert a substantial impact on national defense, irrespective of the Board's other jurisdictional standards. No annual gross volume of business yardstick is used. *Ready Mixed Concrete & Materials*, 122 NLRB 318 (1959).

Illustrative of enterprises over which jurisdiction has been asserted under this standard: a company primarily engaged in transporting defense materials (*McFarland & Hullinger*, 131 NLRB 745 (1961)); a company which performed services for defense contractors (*Colonial Catering Co.*, 137 NLRB 1607 (1962)); a company which engaged in a substantial amount of research and development for the United States Government under contract (*Woods Hole Oceanographic Institution*, 143 NLRB 568 (1963)); and a company which hauled garbage away from Government missile sites and related housing units (*Disposal Service*, 191 NLRB 104 (1971)); and a company which provides janitorial services to the U.S. Marine Corps. (*Castle Instant Maintenance/Maid, Inc*., 256 NLRB 130 (1981)). See also *Pentagon Barber Shops*, 255 NLRB 1248 (1981); and *Fort Houston Beauty Shop*, 270 NLRB 1006 (1984), in which the national defense standard was not applied.

The Board will assert jurisdiction over an enterprise that derives substantial amounts of revenue from Federal funds even in the absence of evidence of interstate inflow or outflow. *Mon Valley United Health Services,* 227 NLRB 728 (1977), and *Community Services Planning Council,* 243 NLRB 798 (1979). See also *Electrical Workers Local 48* (*Kingston Constructors),* 332 NLRB 1492 (2000).

In *Firstline Transportation Security,* 347 NLRB 447 (2006), the Board rejected a contention that it should decline, for national security reasons, jurisdiction over a private airport screening company.

See also 1-504.

1-205 Plenary Jurisdiction

220-7533-5000

Plenary jurisdiction is exercised over enterprises in the District of Columbia and over which the Board would otherwise have statutory jurisdiction. *Westchester Corp.*, 124 NLRB 194 (1959); *M. S. Ginn & Co.*, 114 NLRB 112 (1956); and *Catholic University of America*, 201 NLRB 929 (1973).

1-206 Territories

220-7533-7500

Section 9(c)(1) of the Act provides that the Board shall direct an election in those cases where it has determined that "a question of representation affecting commerce exists." Section 2(6) of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

"Territory," as used in Section 2(6), has been interpreted by the Board to include Puerto Rico (*Ronrico Corp.,* 53 NLRB 1137 (1943)), the Virgin Islands (*Virgin Isles Hotel*, 110 NLRB 558 (1955); *Caribe Lumber & Trading Corp.*, 148 NLRB 277 (1964)); and Guam (*RCA Communications*, 154 NLRB 34 (1965)). In *Van Camp Seafood Co.*, 212 NLRB 537 (1974), the Board found that American Samoa is a territory as that term is used in Section 2(6) of the Act and exercised jurisdiction. See also *Micronesian Telecommunications Corp.*, 273 NLRB 354 (1984), where the Board exercised jurisdiction over the trust territory of the Northern Mariana Islands.

In *Facilities Management Corp.*, 202 NLRB 1144 (1973), the Board declined to assert jurisdiction over Wake Island. Assuming, arguendo, that it had statutory jurisdiction, the Board nonetheless declined to exercise it, particularly due to the fact that Wake Island "has no local permanent residents and is remote, difficult of access, and contains nothing but a military installation." See also *Offshore Express*, 267 NLRB 378 (1983), under Foreign Flag Ships, Foreign Nationals, and Related Situations, section 1-501, infra. For foreign policy considerations, the Board declined to exercise its statutory jurisdiction in the Panama Canal Zone. *Central Services*, 202 NLRB 862 (1973).

1-207 Labor Organizations

260-6796

28-8630

177-1683-8750

A labor organization, "when acting as an employer vis-a-vis its own employees, is an employer within the meaning of Section 2(2) of the Act, and subject to the Board's jurisdiction over that industry." *Variety Artists (Golden Triangle Restaurant)*, 155 NLRB 1020 (1965). In its role as an employer, the same jurisdictional standards are applied to a labor organization as to any other employer. *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1958); *Laundry Workers Local 26*, 129 NLRB 1446 (1961). See also *Teamsters Local 2000*, 321 NLRB 1383 (1996), where the Board rejected a contention that a union representing airline employees was not itself an employer under the Act.

1-208 Multiemployer Groups and Joint Employers

260-3360-6700

530-5700 et seq.

All members of a multiemployer group who participate in, or are bound by, multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes. *Insulation Contractors of Southern California*, 110 NLRB 638 (1955). Jurisdiction is asserted if the standards are satisfied by any member of the association (*Laundry Owners Association of Greater Cincinnati*, 123 NLRB 543 (1959)), or by a total of the business of association members collectively without regard to that of the individual members (*Federal Stores*, 91 NLRB 647 (1950); *Checker Cab Co.*, 141 NLRB 583 (1963); and *Transportation Promotions*, 173 NLRB 828 (1969)).

Although neither the informality of the association nor the absence of an advance agreement to be bound by the negotiations does not preclude the assertion of jurisdiction on these grounds (*Fish Industry Committee*, 98 NLRB 696, 697–698 (1951)), the mere adoption by an employer of an area contract negotiated by an association of employers with which the employer is not connected is not sufficient to satisfy the standards (*Gordon Electric Co.*, 123 NLRB 862 (1959); *Greater Syracuse Printing Employers' Assn.*, 140 NLRB 217 (1963)).

It should be emphasized that multiemployer bargaining is predicated on the consent of the parties. See discussion in *Marty Levitt*, 171 NLRB 739 (1968), see also *Evening News Assn.*, 154 NLRB 1482 (1966), affd. sub nom. *Detroit Newspaper Publishers Assn.*, 372 F.2d 569 (6th Cir. 1967).

As in the case of multiemployer groups, such as employer associations, on a finding of a joint employer relationship, the Board will combine the gross revenues of the employers for jurisdictional purposes. *CID-SAM Management Corp*., 315 NLRB 1256 (1995); *Central Taxi Service*, 173 NLRB 826 (1969); *Checker Cab Co.*, 141 NLRB 583 (1963), enfd. 367 F.2d 692 (6th Cir. 1966); *NLRB v. Marinor Inns*, 445 F.2d 538 (5th Cir. 1971), enfg. 181 NLRB 467 (1970).

In making a joint-employer finding, substantial reliance is placed on the employers holding themselves out to the public as a single-integrated enterprise (*Transportation Promotions*, 173 NLRB 828 (1969); *Operating Engineers Local 428 (Bee Slurry)*, 169 NLRB 184 (1968); and *Bloch Enterprises*, 172 NLRB 1678 (1968), and also on the extent of control over the other employer's operations in particularly critical areas (*Hamburg Industries*, 193 NLRB 67 (1971)).

For further discussion of multiemployer associations and joint employers, see Chapter14.

1-209 Enterprises Falling Under Several Standards

260-6768

260-6772

260-3360-8400

If an enterprise is of such nature to be classified within several of the categories for which different standards have been established, jurisdiction is asserted if it satisfies the standards of any one of the categories within which it may be classified. *Country Lane Food Store*, 142 NLRB 683 (1963).

Thus, when an employer engages in both retail and nonretail operations, if the nonretail aspect is not de minimis, the Board asserts jurisdiction where the employer's operations meet either standard. See, for example, *Indiana Bottled Gas Co.*, 128 NLRB 1441 (1960), and *Man Products*, 128 NLRB 456 (1960).

See also *Phipps Houses Services*, 320 NLRB 876 (1996), where the Board discusses the exception to the policy of examining each function if the operation meets the highest standard the Board applies to any enterprise.

1-210 Postal Service Employees

480-0125

240-1775

280-4310

Under the Postal Reorganization Act of 1970 (Pub. L. 91-375, 91st Cong.), the National Labor Relations Act was made applicable to the United States Postal Service (USPS) and postal employees. The Board was specifically empowered to decide appropriate units, entertain representation petitions, conduct elections, and certify bargaining representatives for employees in the USPS.

1-211 Jurisdiction in an 8(a)(4) Situation

240-0167-1700

240-0167-8300

In a unique situation in which the Board, although finding legal jurisdiction, found that the respondent's operations failed to meet the Board's discretionary standards, it nonetheless fashioned an 8(a)(4) remedy. The case involved Section 8(a)(1), (3), and (5), as well as Section 8(a)(4). The 8(a)(4) remedy was predicated on the discharge of employees for having met with and given evidence to a Board agent. In these circumstances, while dismissing the 8(a)(1), (3), and (5) portions of the complaint on jurisdictional grounds, the Board nonetheless held that it would effectuate the policies of the Act to assert jurisdiction for the purpose of remedying the

respondent's unlawful interference with the statutory right of all employees to resort to and participate in the Board's processes and granted an 8(a)(4) remedy. *A A Electric Co.*, 177 NLRB 504 (1969). The Eighth Circuit refused enforcement originally of this case on other grounds, 435 F.2d 1296 (1971). The Supreme Court reversed the circuit court and remanded the case, saying that the court of appeals could "canvass" the "marginal" jurisdiction of the Board. 404 U.S. 821 (1971). The Eighth Circuit then enforced the Board's order in its finding of statutory jurisdiction. 80 LRRM 3055 (1972). See also *Pickle Bill's, Inc.*, 229 NLRB 1091 (1977), in which the Board processed an election petition involving an employer who did not meet the Board's discretionary standards. The Board did so because it had previously entered an 8(a)(4) order against the employer. It therefore processed the representation petition in order "to give full scope and effect" to that order.

1-212 Secondary Boycotts

260-3380

Although this outline is devoted solely to representation proceedings, the special rule adopting a standard for asserting jurisdiction in secondary boycott cases is included in order to make the statement of jurisdictional standards complete.

In cases in which a secondary boycott violation is alleged and the operations of the primary employer do not satisfy the jurisdictional requirements, the Board takes into consideration for jurisdictional purposes not only the operations of the primary employer, but also the entire operations of any secondary employers to the extent that the latter are affected by the conduct involved. *Teamsters Local 554 (McAllister Transfer)*, 110 NLRB 1769 (1955). Jurisdiction over an 8(b)(4) case gives the Board jurisdiction over a related 8(b)(7) case. *Plumbers Local 460 (L. J. Construction)*, 236 NLRB 1435 (1978).

For illustrations of the application of this standard, see *Hotel & Restaurant Employees Local 595 (Arne Falk)*, 161 NLRB 1458, 1461–1462 (1966); *Electrical Workers Local 257 (Osage Neon Plastics)*, 176 NLRB 424 (1969).

1-213 Indian Tribes

220-7567-7000

In *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007), the Board embarked "on a new approach to considering Indian owned and operated enterprises." Finding that the special attributes of Indian sovereignty are not implicated by Board jurisdiction over Indian commercial enterprises that are par t of the national economy, the Board eschewed its previous on/off reservation dichotomy for determining whether or not to assert jurisdiction. Where, however, the enterprise is a traditional tribal or governmental function, the Board will decline jurisdiction. *Yukon Kuskokwim Health Corp*., 341 NLRB 1075 (2004).

The Board had previously held that Indian tribes and their self-directed enterprises located on the tribal reservation are implicitly exempt as governmental entities within the meaning of the Act. See *Fort Apache Timber Co.,* 226 NLRB 503 (1976); and *Southern Indian Health Council*, 290 NLRB 436 (1988). However, the Board distinguished these cases and asserted jurisdiction where the tribal enterprise is located off the reservation. See *Sac & Fox Industries*, 307 NLRB 241 (1992); and *Yukon Kuskokwim Health Corp*., 328 NLRB 761 (1999) (jurisdiction asserted over hospital located off treaty reservation). The Board also asserted jurisdiction in cases where the enterprise, although located on the tribal reservation, is neither wholly owned nor controlled by the tribe. See *Devil's Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979). See also *Texas-Zinc Minerals Corp.*, 126 NLRB 603 (1960), in effect enforced in *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961), cert. denied 366 U.S. 928 (1961).

For a discussion of what constitutes reservation lands see *U.S. v. John,* 437 U.S. 634 (1978).

1-300 Miscellaneous Categories in Which Jurisdiction was Asserted

1-301 Architects

280-8910

An employer engaged in the practice of architecture, concededly in an operation over which the Board has statutory jurisdiction, was made subject to the Board's discretionary jurisdiction. "Architecture," the Board said, "plays an irreplaceable role in the construction industry, a major factor in interstate commerce, and it is apparent that disputes involving architects could have serious and far-reaching effects upon that industry." The standard for nonretail business was applied. *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049 (1971); *Skidmore*, *Owings & Merrill*, 192 NLRB 920 (1971); and *Fisher-Friedman Associates*, 192 NLRB 925 (1971).

1-302 Amusement Industry

280-7900

The retail standard applies to the amusement industry. *Ray*, *Davidson & Ray*, 131 NLRB 433 (1961); *Coney Island, Inc.*, 140 NLRB 77 (1963); and *Aspen Skiing Corp.*, 143 NLRB 707 (1963).

1-303 Apartment Houses

260-6704

280-6500 et seq.

The apartment house standard is a gross annual revenue of $500,000 or more. *Parkview Gardens*, 166 NLRB 697 (1967).

Parkview was, the first case to establish a jurisdictional standard in the residential apartment industry, viz., the operation of a garden-type apartment project composed of 592 units with an annual gross rental of $650,000.

In determining discretionary jurisdiction, the Board traditionally aggregates gross revenues derived from all residential buildings managed by the employer. *Riverdale Manor Owners Corp.*, 311 NLRB 1094 fn. 1 (1993). See also *CID-SAM Management Corp*., supra at fn. 4. Of course, there must also be a showing of statutory jurisdiction. Id. at fn. 5.

Historically, the Board asserts jurisdiction over the managing agent of buildings where the underlying buildings meet the necessary jurisdictional requirements. *Phipps Houses Services*, 320 NLRB 876 (1996).

1-304 Art Museums, Cultural Centers, and Libraries

280-8400

In a series of cases, the Board has applied a $1 million gross revenues standard for jurisdiction over employers which, although not education institutions themselves, do contribute to the cultural and educational values of the community. *Helen Clay Frick Foundation*, 217 NLRB 1100 (1975) (art museum); *Colonial Williamsburg Foundation*, 224 NLRB 718 (1976) (historical restoration and preservation); *Wave Hill, Inc*., 248 NLRB 1149 (1980) (environmental center); and *Rutland Free Library*, 299 NLRB 245 (1990) (private nonprofit library).

1-305 Bandleaders

280-7920

Bandleaders who "sell" music to ultimate purchasers, i.e., a sale (performance) to a purchaser to satisfy personal wants or those of family or friends, come under the retail standard. Bands which "sell" music to commercial enterprises, not to the ultimate consumers, are governed by the prevailing nonretail standard. *Marty Levitt*, 171 NLRB 739 (1968).

1-306 Cemeteries

280-6500

The Board will exert its jurisdiction over the operations of cemetery whose gross annual revenue exceeds $500,000 and whose annual out-of-state purchases are more than de minimis. *Catholic Cemeteries*, 295 NLRB 966 (1989), and cases cited therein.

1-307 Colleges, Universities, and Other Private Schools

280-8220

260-6708

Private nonprofit colleges and universities which receive a gross annual revenue from all sources (excluding only contributions which are, because of limitation by the grantor, not available for use for operating expenses) of at least $1 million. National Labor Relations Board's Rules and Regulations, Section 103.1, published in 35 F.R. 18370, December 3, 1970.

This monetary yardstick was established by rulemaking and implemented the Board's decision in *Cornell University*, 183 NLRB 329 (1970), in which it decided to assert jurisdiction over nonprofit private educational institutions. In doing so, the Board overruled its earlier decision in *Columbia University*, 97 NLRB 424 (1951).

For illustrations of the application of this standard, see *Boston College*, 187 NLRB 133 (1971); *Leland Stanford Jr. University*, 194 NLRB 1210 (1972); and *Garland Junior College*, 188 NLRB 358 (1971). In *Syracuse University*, 204 NLRB 641 (1973), the Board asserted jurisdiction on the basis of gross annual revenues in excess of $1 million of which at least $50,000 was received from points outside the State of New York.

Because the Board no longer declines to assert jurisdiction over educational institutions as a class, it asserted jurisdiction over the Corcoran Art Gallery, a District of Columbia institution, on a plenary basis. *Corcoran Gallery of Art*, 186 NLRB 565 (1970).

As jurisdiction had been extended over private colleges and universities, no substantial justification remained for withholding the exercise of the Board's powers over employers "whose operations are adjunctive to the educational system." Thus, jurisdiction was asserted over a foundation operating radio stations on that basis. *Pacifica Foundation-KPFA*, 186 NLRB 825 (1970). But in *College of English Language*, 277 NLRB 1065 (1985), the Board applied the retail rather than the educational standard because the nature of the employer's operation was dissimilar from that of colleges or secondary schools.

In *Windsor School*, 200 NLRB 991 (1972), the Board concluded that it was no longer justified in applying different standards to purely educational institutions based solely on their being operated for profit or nonprofit. Accordingly, it applied the jurisdictional standard of $1 million annual gross revenue, which it had established for nonprofit secondary institutions, to similar for-profit secondary schools. See also *Shattuck School*, 189 NLRB 886 (1971).

The jurisdictional standard for private schools is $1 million. See *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975). Although this case predates *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (see sec. 1-403), there is no reason to believe that the Supreme Court's decision there would affect this jurisdictional standard where it is applied to a nonreligious private school. For discussion of Religious Schools, see section 1-403 and for Religious Organizations, see section 1-503.

Where, however, a university, although a private institution, was made by State legislation "an instrumentality of the Commonwealth of Pennsylvania" with resulting increased State control over the affairs of the university, thus, becoming "a quasi-public higher educational institution," the assertion of jurisdiction was declined. *Temple University*, 194 NLRB 1160 (1972), but see *Howard University*, 224 NLRB 385 (1976).

In 1976 the Board asserted jurisdiction over the *University of Vermont,* 223 NLRB 423 (1976). The Board later reversed its position in an advisory opinion and now holds that this university is a political subdivision. *University of Vermont,* 297 NLRB 291 (1989).

1-308 Communication Systems

280-4800 et seq.

Enterprises engaged in the operation of radio, or television broadcasting stations, or telephone, or telegraph systems which do a gross annual volume of business of at least $100,000 come within the Board's discretionary jurisdiction. For statutory jurisdiction, the Board noted that the employer advertised national brand products and was a member of the Associated Press utilizing its wire service. *Raritan Valley Broadcasting Co.*, 122 NLRB 90 (1959).

The Board has applied its communication systems standard to community television antenna systems (CATV). *General Telephone & Electronics Communications*, 160 NLRB 1192, 1193 fn. 5 (1966).

The Board has, however, declined jurisdiction over a television station that operated for religious purposes alone. *Faith Center-WHCT Channel 18*, 261 NLRB 106 (1982). See also sections 1-403 and 1-503, supra.

1-309 Condominiums and Cooperatives

260-6704

280-6510

In *30 Sutton Place Corp.*, 240 NLRB 752 (1979), the Board reversed its decision in *Point East Condominium Owners Assn.*, 193 NLRB 6 (1971), and decided that it would assert jurisdiction over condominiums and cooperatives. The jurisdiction standard was set at gross annual revenues in excess of $500,000. See also *Imperial House Condominiums*, 279 NLRB 1225 (1986). In determining discretionary jurisdiction, the Board traditionally aggregates gross revenues derived from all residential buildings managed by the employer. *Riverdale Manor Owners Corp.*, 311 NLRB 1094 fn. 1 (1993).

For discussion of jurisdiction over managing agents see section 1-303, supra.

1-310 Credit Unions

280-6140

Credit unions (nonprofit corporations engaged in the extension of consumer credit) are within the Board's jurisdiction. Credit unions' operations, like those of many financial institutions, have aspects of both retail and nonretail enterprises. To the extent credit unions lend money to or secure deposits from individuals, their operations appear to be retail in nature. To the extent they invest their funds in Treasury notes or commercial ventures, their activities are nonretail in nature. Thus, the impact on commerce of credit union operations may be measured by either the retail or nonretail standard. *East Division, Federal Credit Union*, 193 NLRB 682 (1971).

1-311 Day Care Centers

260-6750

280-8350

In *Salt & Pepper Nursery School*, 222 NLRB 1295 (1976), the Board set a $250,000 annual revenue standard for day care centers for children.

1-312 Financial-Information Organizations and Accounting Firms

280-8930

Jurisdiction is asserted over employees engaged in the collection, compilation, editing, and disseminating of information in the areas of credit, finance, marketing, sales, economics,

education, and research. *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971); *Credit Bureau of Greater Boston*, 73 NLRB 410 (1947). *Ernst & Ernst National Warehouse*, 228 NLRB 590 (1977).

1-313 Gaming

260-6724

280-7990

The retail standard applies to the gaming industry. *El Dorado Club*, 151 NLRB 579 (1965); *Harrah's Club*, 150 NLRB 1702 (1965), enfd. 362 F.2d 425 (9th Cir. 1966), cert. denied 386 U.S. 915 (1967).

The Board exercised jurisdiction in two cases involving casinos affiliated with racetracks, finding that the enterprises were predominently casinos and the employees predominently casino employees. *Prairie Meadows Racetrack & Casino*, 324 NLRB 550 (1997), and *Delaware Park*, 325 NLRB 156 (1997).

In an Advisory Opinion, the Board found that the employer was no longer a racetrack but as a result of changes in operations, particularly the addition of 2000 slot machines, the facility became primarily a casino over which the Board would exercise jurisdiction. *Empire City at Yonkers Raceway*, 355 NLRB 225 (2010).

See also Horseracing and Dogracing, infra at section 1-502.

1-314 Government Contractors

260-3390

260-6736

280-9100 et seq.

In *Management Training Corp*., 317 NLRB 1355 (1995), a divided 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 Fire Protection Co.*, 216 NLRB 584 (1975). The Sixth, Fourth, and Tenth Circuits have upheld the *Management Training* doctrine. See *Pikeville United Methodist Hospital of Kentucky v. NLRB*, 109 F.3d 1146 (6th Cir. 1997); *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997); and *Aramark Corp. v. NLRB,* 156 F.3d 1087 (10th Cir. 1998). See also *Recana Solutions,* 349 NLRB 1163 (2007); *Jacksonville Urban League,* 340 NLRB 1303 (2003),.

The Board referenced the *Management Training* doctrine in a jurisdiction case involving exempt entities under the Railway Labor Act. See, e.g., *D & T Limousine Service*, 320 NLRB 859, 860 fn. 3 (1996).

For a discussion of State or Political Subdivisions, see section 1-401, infra**.** See also Comity to State Elections, section 10-120.

1-315 Health Care Institutions

260-6752 et seq.

280-8000 et seq.

In 1974 Congress enacted Section 2(14) to give the Board jurisdiction over "health care institutions." These institutions are defined as "any hospital, convalescent hospital, health

maintenance organization, health clinic, nursing home, extended care facility or other institution devoted to the care of sick, infirm or aged persons." In *East Oakland Health Alliance*, 218 NLRB 1270 (1975), the Board set discretionary standards for these institutions.

For nursing homes, visiting nurses' associations, and related facilities, the standard was set at $100,000 in gross revenues and for hospitals and other institutions the standard is $250,000. The Board has applied the statutory definition for health care institutions to include patient care at outpatient hemodialysis units, *Bio-Medical of San Diego*, 216 NLRB 631 (1975); family planning clinics, *Planned Parenthood Assn.*, 217 NLRB 1098 (1975); facilities for the care and treatment of the mentally retarded, *Beverly Farm Foundation*, 218 NLRB 1275 (1975); doctors' offices, *Private Medical Group*, 218 NLRB 1315 (1975); and dentists' offices, *Jack L. Williams, DDS*, 219 NLRB 1045 (1975).

The Board has held that a blood bank that performs some patient-related function is a health care institution. *Syracuse Region Blood Center*, 302 NLRB 72 (1991). Generally, the $250,000 standard has been deemed applicable.

Health care facilities are held to be within the Board's jurisdiction even though they may be sponsored and administered by religious organizations; *Mid American Health Services*, 247 NLRB 752 (1980); and *Saint Marys Hospital*, 260 NLRB 1237 (1982); *St. Elizabeth Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983). But see *Motherhouse of Sisters of Charity*, 232 NLRB 318 (1977), in which the Board did not assert jurisdiction because of the primarily religious purpose of that nursing home.

At one time, the Board found that a medical school did not come within the health care definition because its primary purpose was education rather than patient care. *Albany Medical College*, 239 NLRB 853 (1978). However, the Board reconsidered and overruled that result in *Kirksville College*, 274 NLRB 794 (1985), giving the term "health care institution" an expansive reading when the medical school was closely intertwined with its hospital. In *Duke University*, 306 NLRB 555 (1992), the Board declined to extend *Kirksville* to find that campus busdrivers are health care employees because they drive medical employees on campus routes.

For discussions of health care unit issues, see section 15-170.

1-316 Hotels and Motels

260-6728

280-7010

Jurisdiction is asserted over hotels and motels that receive at least $500,000 in gross annual revenue. *Penn-Keystone Realty Corp.*, 191 NLRB 800 (1971).

Historic note: Initially, the standard for hotels and motels created a dichotomy between residential and transient property (see *Floridan Hotel of Tampa*, 124 NLRB 261 (1959)). This distinction was clarified in *Continental Hotel*, 133 NLRB 1694 (1961), but the dichotomy was nonetheless maintained. In *Penn-Keystone*, supra, the Board held that, because it no longer declined to assert jurisdiction over residential apartment buildings (*Parkview Gardens*, 166 NLRB 697 (1967), see supra at sec. 1-303), it was unnecessary to continue to distinguish between residential and transient hotels or motels. Thus, as *Penn-Keystone* received gross annual revenue in the sum of $500,000, it met the monetary standard for hotels and motels as well as the monetary standard—also $500,000—for the assertion of jurisdiction over residential apartment buildings established in *Parkview Gardens.*

1-317 Law Firms and Legal Service Corporations

280-8100

260-6734

The Board will assert jurisdiction over law firms, *Foley, Hoag & Eliot*, 229 NLRB 456 (1977), and legal service corporations, *Wayne County Legal Services*, 229 NLRB 1023 (1977).

The jurisdictional amount for law firms and legal services organizations is $250,000 in gross revenues. *Camden Regional Legal Services*, 231 NLRB 224 (1977).

1-318 Newspapers

260-6740

280-2710

The Board asserts jurisdiction over newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products, when the annual gross volume of the particular enterprise involves amounts of $200,000 or more. *Belleville Employing Printers*, 122 NLRB 350 (1959).

Thus, for example, where the employer published a newspaper which carried advertisements of nationally sold products amounting to $4000, purchased by national advertising agencies, and derived an annual revenue of over $294,000 from its operations, more than $98,000 of which it derived from job printing, jurisdiction was asserted under this standard. *Berea Publishing Co.*, 140 NLRB 516 (1963).

1-319 Nonprofit Charitable Institutions

280-8670

In *St. Aloysius Home*, 224 NLRB 1344 (1977), the Board reversed its longstanding policy of not exercising jurisdiction over nonprofit institutions whose activities are essentially noncommercial in nature and are intimately connected with the charitable purposes of the institution. See, e.g., *Columbia University*, 97 NLRB 424 (1951), and *Ming Quong Children's Center*, 210 NLRB 899 (1974). The decision to reverse *Columbia University* and *Ming Quong* was grounded on the 1974 Health Care Amendments which deleted the reference to nonprofit hospitals in Section 2(2) of the Act. The *St. Aloysius* majority concluded that those amendments removed any validity for further excluding nonprofit organizations, whether health care related or not, from the coverage of the Act. In *Ohio Public Interest Campaign*, 284 NLRB 281 (1987), the Board applied this policy but declined jurisdiction over a nonprofit corporation engaged in consumer lobbying because of its local character. Jurisdiction was exercised over *Goodwill Industries of Denver*, 304 NLRB 764 (1991), revg. *Goodwill Industries of Southern California*, 231 NLRB 536 (1977). See section 20–630 for a discussion of the employee status of individuals working at these facilities.

Having removed the charitable or nonprofit distinction, the Board in *St. Aloysius* announced that the jurisdictional standard for these institutions would depend on its substantive purpose, e.g., the day care center standard would apply to nonprofit as well as to profit day care centers.

1-320 Office Buildings

260-6748

280-6510

280-6530

Enterprises engaged in the management and operation (whether as owners, lessors, or contract managers) of office buildings are within the Board's jurisdiction when the gross annual revenue derived from such office buildings amounts to $100,000, and when $25,000 is derived from enterprises whose operations meet any of the current standards, except the indirect inflow and outflow standards. *Mistletoe Operating Co*., 122 NLRB 1534 (1959).

Thus, for example, where an employer was engaged in the business of renting offices and its gross annual revenue from office rentals exceeded the sum of $100,000 and at least $25,000 of that sum was derived from a tenant who during an annual period sold and shipped goods valued in excess of $50,000 directly to points outside the State, the office buildings standard was met. *Gulf Building Corp*., 159 NLRB 1621 (1966).

For a discussion of jurisdiction over managing agents, see section 1-303, and over shopping centers, see section 1-325.

1-321 Private Clubs

260-6716

280-7990

The retail standard applies to private clubs. *Walnut Hills Country Club*, 145 NLRB 81, 82 (1964).

In determining whether the gross volume of business of an enterprise in this category meets the Board's retail standard, members' dues and initiation fees are not included as income derived from its retail operation. *Golf Course Inns*, 199 NLRB 541 (1972); *Rancho Los Coyotes Country Club*, 170 NLRB 1773 (1968); and *Woodland Hills Country Club*, 146 NLRB 330, 331 (1964).

1-322 Professional Sports

260-6784

280-7940

The Board asserted jurisdiction over the American League of Professional Baseball Clubs, finding that professional baseball is an industry in or affecting commerce and, as such, is subject to Board jurisdiction. No specific monetary standard was set "as the annual gross revenues of this Employer are in excess of all of our prevailing monetary standards, we find that the Employer is engaged in an industry affecting commerce, and that it will effectuate the policies of the Act to assert jurisdiction herein." *American League of Professional Baseball Clubs*, 180 NLRB 190, 192 (1970). In later cases, the Board exercised jurisdiction over other professional sports but again did not set a monetary standard. See *Major League Rodeo, Inc*., 246 NLRB 743 (1979), and cases cited at fn. 7 therein.

1-323 Public Utilities

260-6760

280-4900 et seq.

The standard for public utilities is a gross annual volume of business of at least $250,000 or an annual outflow or inflow of goods, materials, or services, whether directly or indirectly across State lines, of $50,000. *Sioux Valley Empire Electric Assn.*, 122 NLRB 92 (1959); *Kingsbury Electric Cooperative*, 138 NLRB 577 (1962).

1-324 Restaurants

280-5800

The $500,000 annual gross volume standard, applicable to retail enterprises in general, also applies to restaurants. *City Line Open Hearth*, 141 NLRB 799 (1963).

In that case, the restaurant standard was met where its gross volume of business, projected on an annual basis, met the retail test and the employer's purchases of beverages, food, and supplies, produced and originating from outside the State, affected commerce under the Act and brought its operations within the Board's statutory jurisdiction.

See also *Denny's Restaurant*, 177 NLRB 702 (1969), in which jurisdiction was asserted on the basis of a single-integrated enterprise.

1-325 Shopping Centers

260-6780

280-6510

Shopping centers are treated the same as office buildings (see sec. 1-320). *Carol Management Corp.,* 133 NLRB 1126 (1961).

1-326 Social Services Organizations

280-8300 et seq.

260-6793

In *Hispanic Federation for Development*, 284 NLRB 500 (1987), the Board announced that it would apply a $250,000 gross annual revenue for all social service organizations other than those for which the Board has already set a specific standard for the type of activity in which they are engaged. In doing so, the Board noted that it had previously set a standard of $100,000 for homemaker services and for visiting nurses' associations. The $250,000 has been applied to organizations that solicit, collect, and distribute funds for charitable purposes. *United Way of Howard County*, 287 NLRB 987 (1988).

1-327 Stock Brokerage Firms

280-6200 et seq.

Employers engaged in the securities industry are subject to the Board's jurisdiction. A contention that the Securities Exchange Act precludes the Board from exercising its authority in cases involving this industry was rejected. *Goodbody & Co.*, 182 NLRB 81 (1970).

1-328 Symphony Orchestras

280-7920

The Board exercises jurisdiction over symphony orchestras which have a gross annual revenue from all sources (excluding only contributions which are because of limitations by the grantor not available for use for operating expenses) of not less than $1 million. Board Rules and Regulations, Section 103.2, published at 38 F.R. 6176, March 7, 1973.

1-329 Taxicabs

280-4120

260-6788

The retail standard of $500,000 or more annual volume of business is applied to taxicabs.

In *Carolina Supplies & Cement Co*., supra, 122 NLRB 88 fn. 5, the term "retail enterprises" was deemed to include taxicabs. See also *Red & White Airway Cab Co.*, 123 NLRB 83 (1959), in which the Board relied on the cited language in the *Carolina* decision. But see taxicab dispatch and starter cases under Instrumentalities, Links, and Channels of Interstate Commerce, section 1-203 of this chapter.

1-330 Transit Systems

280-4100 et seq.

260-6792

Annual gross volume of business of $250,000 or more meets the Board standard for a private transit system. *Charleston Transit Co.*, 123 NLRB 1296 (1959).

This standard is distinguishable from the one described immediately above in that it embraces enterprises engaged in intrastate operations but which nonetheless affect substantially interstate commerce. Thus, in *Charleston*, the employer operated a local passenger transit system by bus in and around Charleston, West Virginia, carrying no freight or mail nor interchanging or sharing

facilities with any other transit company. However, it carried more than 9 million passengers, including those using bus service to large plants, and its annually purchased fuel, tires, and parts produced out of the State in a sum exceeding $160,000.

Where an employer operated a local bus transportation business, deriving its revenue from contracts with local school boards for the transportation of school children the Board asserted jurisdiction under the *Charleston Transit* standards. See Government Contractors, section 1-314 of this chapter.

1-400 Jurisdiction Declined for Statutory Reasons

177-1683 et seq.

Section 2(2) of the Act specifically excludes certain enterprises from its definition of "employer" and for this reason jurisdiction is not asserted over those enterprises. Excluded are: the United States Government and wholly owned Government corporations or any Federal Reserve Bank; a State or a political subdivision of a State; persons subject to the Railway Labor Act; labor organizations (other than when acting as an employer); and anyone acting in the capacity of officer or agent of such labor organization. Because these are statutory limits on the Board's jurisdiction, they can be raised at any time. *Chelsea Catering Corp.*, 309 NLRB 822 fn. 2 (1992).

1-401 State or Political Subdivision

177-1683-5000

260-3390

In determining whether an entity falls within the scope of the 2(2) exemption for "any State or political subdivision thereof," the entity must either be (1) created directly by the State so as to constitute a department or administrative arm of the Government, or (2) administered by individuals who are responsible to public officials or to the general public. *Natural Gas Utility District of Hawkins County*, 167 NLRB 691 (1967), enfd. 427 F.2d 312 (6th Cir. 1970), affd. as to applicable standard only 402 U.S. 600 (1971).

The Board held that the *University of Vermont* is a political subdivision because it meets both prongs of the *Hawkins* test. See *University of Vermont,* 297 NLRB 291 (1989), revg. a 1976 decision reported at 223 NLRB 423.

Charter schools have presented a political subdivision issue. In *Charter School Administration Services*, the two Member Board found that an employer operating charter schools was not a political subdivision, 353 NLRB 394 (2008). Later, however, on January 10, 2011, the Board issued a Notice and Invitation to File Briefs in *Chicago Mathematics & Science Academy Charter School, Inc*., Case No. 13–RM–1768. The issue in this case is "whether the Employer-Petitioner, a charter school, is a political subdivision within the meaning of Section 2(2) of the Act and therefore exempt from the Board's jurisdiction." This case was pending before the Board at the time of publication of this text. See also *Pilsen Wellness Center*, 13–RM–1770 (also pending).

(1) Creature of the State

An entity does not become a creature of the State by the mere receipt of revenue from a preestablished tax fund (see *Service Employees Local 402 (San Diego Facilities Corp.),* 175 NLRB 161 (1969)), or by occupancy of city-owned property (*Trans-East Air, Inc*., 189 NLRB 185 (1971)), or because the employees are paid by the city where this is merely a convenient method for transferring funds to an association or society to which the latter is entitled (*Minneapolis Society of Fine Arts*, 194 NLRB 371 (1972)).

In *Jervis Public Library Assn.*, 262 NLRB 1386 (1982), the Board found that it lacked jurisdiction because the entity is an administrative arm of the State. See also *Rosenberg Library*

Assn., 269 NLRB 1173 (1984). In *Hinds County Human Resource Agency,* 331 NLRB 1404 (2000), the Board dismissed a petition on jurisdictional grounds finding that the employer was created by the county Board of Supervisors pursuant to a State statute granting the authority for these agencies to Boards of Supervisors. The Board also noted that virtually all the Agency's funding came from State and Federal governmental services.

In *State Bar of New Mexico,* 346 NLRB 674 (2006), the Board found a State bar to be a creature of the New Mexico Supreme Court that serves as an administrative arm of that Court.

In *Research Foundation of the City University of New York*, 337 NLRB 965 (2002), the Board found that an organization whose purpose is to administer grant awards was not a public employer because it was created by private individuals and was not responsible to the general public. In deciding this issue, the Board found it unnecessary to decide whether it lacked jurisdiction because the employer was a single employer with the City of New York because the Board found no bases for single-employer status.

The Board has rejected political subdivision contentions for Indian Tribes. *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), and *Yukon Kuskokwim Health Corp*., 340 NLRB 1171 (2004), and 328 NLRB 761 (1999), and privately run prisons. *Correction Corp. of America v. NLRB*, 234 F.3d 1321 (D.C. Cir. 2000).

(2) Administered by Individuals Responsible to Public Officials or General Public

During the 1990s the Board considered the issue of what is necessary to establish that an entity is administered by individuals who were responsible to the general public. In *Enrichment Services Program, Inc*., 325 NLRB 818 (1998), the Board reversed prior holdings and ruled that the "individuals are responsible to the general electorate under *Hawkins County* only if the relevant electorate is the same as that for general political elections." In doing so, the Board overruled *Woodbury County Community Action Agency*, 299 NLRB 554 (1990); and *Economic Security Corp.*, 299 NLRB 562 (1990). In *FiveCap, Inc.,* 331 NLRB 1165 (2000), the Board found that the governing body of a Head Start program was not responsible to the general electorate.

It must also be shown that the entity in question is administered by individuals who hold office not by virtue of the entity's own articles of incorporation, but by virtue of a State requirement. *Fayetteville-Lincoln County Electric System*, 183 NLRB 101 (1970). See also *Cape Girardeau Care Center*, 278 NLRB 1018 (1986), finding jurisdiction where there was no direct accountability to public officials; *Concordia Electric Cooperative*, 315 NLRB 752 (1994), finding that electric cooperatives are generally not held to be political subdivisions and *Research Foundation*, supra.

Indian Tribes do not meet this prong of the political subdivision test. *San Manuel Indian Bingo & Casino*, supra.

For additional illustrations of the application of these tests for determining whether or not an entity is a political subdivision within the meaning of Section 2(2), see *Regional Medical Center at Memphis*, 343 NLRB 346 (2004); *City Public Service Board of San Antonio*, 197 NLRB 312 (1972); *Sis-Q Flying Service*, 197 NLRB 195 (1972); *Lewiston Orchards Irrigation District*, 186 NLRB 827 (1970), enf. denied 469 F.2d 698 (9th Cir. 1972); *Austell Natural Gas System*, 186 NLRB 280 (1970); *Detroit Institute of Arts*, 271 NLRB 285 (1984); *Pennsylvania State Assn.*, 267 NLRB 71 (1983); and *Columbia Park Assn.*, 289 NLRB 123 (1988).

Although jurisdiction has been asserted over private educational institutions, local school boards do not come within the definition of "employer" set out in Section 2(2). *Children's Village*, 197 NLRB 1218 (1972), and *Lima & Allen County Action Commission*, 304 NLRB 888 (1991).

For a discussion of Government Contractors, see section 1-314, supra.

1-402 Employers Subject to the Railway Labor Act

177-1683-7500

240-6737

280-4000 et seq.

280-4500 et seq.

The Railway Labor Act, originally endowed with jurisdiction over common carriers such as railroads, had its coverage extended under Title II of that Act to common carriers by air engaged in interstate or foreign commerce.

Because of the nature of this type of jurisdictional question, it has been the Board's practice to refer the issue of jurisdiction to the National Mediation Board (NMB) in cases where the jurisdictional issue is doubtful. *Federal Express Corp.*, 317 NLRB 1115 (1995). The Board gives "substantial deference" to NMB decisions. *DHL Worldwide Express*, 340 NLRB 1034 (2003).

In making its determination on whether it has jurisdiction, the NMB has a two-pronged jurisdictional analysis: (1) whether the work is traditionally performed by employees of air and rail carriers; and (2) whether a common carrier exercises direct or indirect ownership or control.

When the NMB finds that the entity meets the definition of common carrier under the Act administered by it, the NLRB declines to assert jurisdiction. Compare *United Parcel Service*, 318 NLRB 778 (1995), where the Board decided the jurisdiction issue itself based on a prior history of NLRA coverage of the employer. See also *Phoenix Systems & Technologies*, 321 NLRB 1166 (1996), applying the same principle where the factual situations are similar. Accord: *Spartan Aviation Industries,* 337 NLRB 708 (2002). Where NMB has previously rejected jurisdiction, the burden is on the party asserting current NMB jurisdiction to establish jurisdictionally significant changes since the NMB decision, *D & T Limousine Service*, 320 NLRB 859 (1996), and *United Parcel Service*, infra.

In *Teamsters Local 295 (Emery Air Freight Corp.),* 255 NLRB 1091(1981), the Board found jurisdiction over an air freight forwarder declining to refer the matter to NMB because NMB had previously declined jurisdiction over air forwarders.

The NMB determined that it has jurisdiction over a company engaged in furnishing air travel service to its members (*Voyager 1000*, 202 NLRB 901 (1973)); a company engaged in air taxi, charter, and on-demand and scheduled airline services plus refueling and maintenance work (*Skyway Aviation*, 194 NLRB 555 (1972)); a company engaged in servicing and storing aircraft, selling fuel, providing pilots and service to an aircraft club, and running an air taxi (*Mark Aero, Inc.*, 200 NLRB 304 (1972)); a company engaged in operating, servicing, and storing aircraft at a county airport (*International Aviation Services*, 189 NLRB 75 (1971)); a company engaged in cleaning airline terminals (*Globe Aviation Services*, 334 NLRB 278 (2001)); and a company providing rail loading services (*Foreign & Domestic Car Service,* 333 NLRB 96 (2001)).

In other cases, the NMB determined that it has no jurisdiction over a company engaged solely in intrastate air transportation, thus not meeting the statutory definition in Section 201, Title II, of the Railway Labor Act (*Panorama Air Tour*, 204 NLRB 45 (1973)); a scheduled aircraft carrier between several locations in California which in a 5-year period made only one flight outside the State (*Air California*, 170 NLRB 18 (1968)); a company engaged in airport food catering operations (*Dobbs Houses v. NLRB,* 443 F.2d 1066 (6th Cir. 1971)); a company which trains pilots and flight engineers, maintains and services aircraft, and operates an air taxi service found to be "minimal" (*Flight Safety, Inc.*, 171 NLRB 146 (1968)).

Companies providing sky cap services have generally been held to be under the jurisdiction of the NMB. See e.g., *Primeflight Aviation Services*, 353 NLRB 467 (2008) (two Member decision); *ServiceMaster Aviation Services*, 325 NLRB 786 (1999); and *Aviation Safeguards*, 338 NLRB 770 (2003). Similarly there was no NLRB jurisdiction over a company that provides ramp

services to airline carriers at O'Hare Airport (*Swissport USA,* 353 NLRB 143 (2008)) (two Member decision) or over a company which leases and operates an airport (*Trans East Air, Inc*., 189 NLRB 185 (1971)).

In *Ogden Ground Services*, 339 NLRB 869 (2003), the Board found NMB jurisdiction, noting that the NMB had found no NMB jurisdiction over other aspects of the Ogden operations.

The NMB will assert jurisdiction over companies providing services to airlines where these companies are under the control of the airline. Compare *Chelsea Catering Corp.*, 309 NLRB 822 (1992), and *TNT Skypack*, 311 NLRB 62 (1993).

NMB jurisdiction involves common carriers by air. For an extensive discussion of that term see *Phoenix Systems & Technologies*, supra, where, inter alia, the Board rejected the contention that the Air National Guard is a common carrier.

In *Teamsters Local 2000*, 321 NLRB 1383 (1996), the Board found that a union representing RLA covered employees is itself an employer under the Act.

For casehandling instructions, see CHM 11711.

1-403 Religious Schools

260-6708 et seq.

280-8200 et seq.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Accordingly, the Court concluded that there is no Board jurisdiction in these instances. The Court declined to reach "difficult and sensitive" constitutional questions presented by an application of Board jurisdiction.

The Board has not limited the *Catholic Bishop* principle to schools operated by a religious organization itself. Instead, the Board has found that it is the religious purpose and the employees' role in effectuating that purpose that prompted the Court's decision. See *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987). In *St. Joseph's College*, 282 NLRB 65 (1986), the Board concluded that the concerns of the *Catholic Bishop* court were applicable to colleges and universities, reversing a line of cases that had limited *Catholic Bishop* to elementary and secondary schools. Compare *Livingstone College*, 286 NLRB 1308 (1987), in which jurisdiction was found because although church-owned, the primary purpose of the college was secular. Although the Board in *Hanna Boys Center*, 284 NLRB 1080 (1987), distinguished between jurisdiction over teachers at religious institutions and other employees of those institutions, it later characterized that decision as involving "a home for troubled boys" when it found no jurisdiction to process a petition for an election of custodians at a parochial school. *St. Edmund's High School*, 337 NLRB 1260 (2002).

In *University of Great Falls,* 331 NLRB 1663 (2000), the Board found that the Religious Freedom Restoration Act (RFRA) did not bar its jurisdiction over this university. Moreover, the Board rejected the contention that *Catholic Bishop* warranted a finding of no jurisdiction. Instead, the Board concluded that the school did not have a "substantial religious character." For a related RFRA case, see *Ukiah Valley Medical Center,* 332 NLRB 602 (2000). See also *Carroll College, Inc.,* 345 NLRB 254 (2005), reaffirmed at 350 NLRB No. 30 (2007).

The *Catholic Bishop* rule has not been applied to health care institutions where the primary purpose of the institutions is not religious or to a language school even though sponsored by the church when the school was not part of the Church religious mission, *Casa Italiana Language School*, 326 NLRB 40 (1998).

In *Catholic Social Services, Diocese of Belleville*, 355 NLRB 943 (2010), the Board rejected the employers contention that its operation was a school and thus governed by *Catholic Bishop*, 440 U.S. 490 (1979). Instead, the Board found that the employer was a social service agency and within the Board's jurisdiction.

See Health Care Institutions, section 1-315 of this chapter for discussion of religiously sponsored health care institutions. See also Colleges, Universities, and other Private Schools (sec. 1-307) and Religious Organizations (sec. 1-503).

1-500 Jurisdiction Declined for Policy Considerations

240-0150

In its discretion, the Board, subject to the limitation imposed by Section 14(c)(1) of the Act, is empowered to decline to assert jurisdiction where the impact on commerce of a labor dispute would not be sufficiently substantial to warrant the exercise of its jurisdiction.

Illustrations of the administrative exercise of this discretion follow:

1-501 Foreign Flag Ships, Foreign Nationals, and Related Situations

240-0150-5000

240-0175

280-4410

177-1675 et seq.

The United States Supreme Court has ruled that the Act does not provide for Board jurisdiction over ships of foreign registration and employing alien seamen, although the ships regularly operate in American ports and are owned by a foreign corporation which is a wholly owned subsidiary of an American corporation. *McCulloch v. Sociedad Nacional de Marineros de Honduras (United Fruit Co.)*, 372 U.S. 10 (1963). Compare *NLRB v. Dredge Operators, Inc*., 19 F.3d 206 (5th Cir. 1994), where the Fifth Circuit upheld the Board's decision to conduct an election on American flagships working in Hong Kong.

A foreign government operating a commercial business within the United States presents different considerations. In *State Bank of India*, 229 NLRB 838 (1977), the Board overruled prior precedent and concluded that it has statutory jurisdiction over such operations and that there was no valid justification for declining jurisdiction. The *State Bank* policy has been applied to schools, *German School of Washington*, 260 NLRB 1250 (1982); to a cultural center owned and operated by the German government, *Goethe House New York*, 288 NLRB 257 (1988), and to a manufacturing plant, *S. K. Products Corp.,* 230 NLRB 1211 (1977). Cf. *C. P. Clare & Co.*, 191 NLRB 589 (1971).

In *Herbert Harvey, Inc.*, 171 NLRB 238 (1968), and *National Detective Agencies*, 237 NLRB 451 (1978), the Board found no jurisdiction over firms supplying services to the World Bank if the World Bank controlled their labor relations because the Bank enjoys "the privileges and immunities from the laws of the sovereignty in which it is located customarily extended to such organizations."

In *RCA OMS, Inc*., 202 NLRB 228 (1973), jurisdiction was declined in a situation involving employees at several sites in Greenland, particularly since Greenland is a possession of Denmark and governed as a county of that country. See also *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957). See also *Offshore Express*, 267 NLRB 378 (1983), in which jurisdiction was declined over tugboat operations for the U.S. Navy at Diego Garcia, an island in the British Indian Ocean Territory. Accord: *Computer Sciences Raytheon*, 318 NLRB 966 (1995) (American company doing business in Antigua, a sovereign nation, and Ascension, a possession of the United Kingdom), and *Range Systems Emergency Support*, 326 NLRB 1047 (1998) (military weapons testing operation in the Bahamas). Compare *Asplundh Tree Expert Co.,* 336 NLRB 1106 (2001), where the Board found jurisdiction over an American firm doing business outside the U.S. on a temporary basis. *Asplundh* is an unfair labor practice case where the issue was protected activity by employees on temporary assignment in Canada. The Third Circuit denied enforcement of the *Asplundh* decision on jurisdictional grounds. 365 F.3d 168 (2004).

The Board reaffirmed its *Asplundh* holding in *California Gas Transport, Inc.,* 347 NLRB 1313 (2006).

For related discussion see section 1-206, supra.

1-502 Horseracing and Dogracing

260-6784

280-7940

In accordance with past rulings, the Board, pursuant to an exercise of its rulemaking authority, continued to decline to exercise its jurisdiction over the horseracing and dogracing industries. The Board's Rules and Regulations, Section 103.3, published in 38 F.R. 9507, April 17, 1973. But see *American Totalisator Co.*, 264 NLRB 1100 (1982), in which the Board asserted jurisdiction over an employer engaged in the manufacture, service, and repair of electronic equipment used in parimutuel wagering at racetracks.

Prior to this rulemaking determination which followed existing Board policy, the Board had concluded that racetrack operations, while exercising some impact on interstate commerce, was essentially local in character, and the effect of labor disputes involving racetrack enterprises was not sufficiently substantial to warrant assertion of jurisdiction. *Centennial Turf Club*, 192 NLRB 698 (1971); *Walter A. Kelley*, 139 NLRB 744 (1962); *Meadow Stud, Inc.*, 130 NLRB 1202 (1961); *Hialeah Race Course,* 125 NLRB 388 (1960); *Los Angeles Turf Club*, 90 NLRB 20 (1950).

In *Prairie Meadows Racetrack & Casino*, 324 NLRB 550 (1997), the Board extended jurisdiction over casinos that were affiliated with racetracks.

In *Empire City at Yonkers Raceway*, 355 NLRB 225 (2010), a racetrack became primarily a casino as the result of a change in operations including the addition of 2000 slot machines.

See also 1-313 (Gaming).

1-503 Religious Organizations

The Board will not assert jurisdiction over employees of a religious organization where the work of the employees is not sufficiently related to the Employer's commercial operations. *Riverside Church,* 309 NLRB 806 (1992); and *Faith Center-WHCT Channel 18,* 261 NLRB 106 (1982). See also section 1-403 of this chapter.

In *Ecclesiastical Maintenance Services*, 320 NLRB 70 (1995), the Board advised that it would take jurisdiction over a cleaning service owned by a Catholic Archdiocese where the annual revenue was $1 million and direct inflow in excess of $50,000. Because this case was an Advisory Opinion, the Board declined to determine the religious affiliation jurisdictional issue. The Board later found jurisdiction over this same employer (325 NLRB 629 (1998)) where the company did not have a religious mission and even if it did, its employee perform secular, not religious duties. See also *Casa Italiana Language School*, 326 NLRB 40 (1998) (Board found jurisdiction where language school was not part of church's religious mission). But in *St. Edmund's High School,* 337 NLRB 1260 (2002), the Board distinquished *Ecclesiastical Maintenance* on the grounds that the school at which the custodians worked was closely integrated to the mission of the church. In *University of Great Falls,* 331 NLRB 1663 (2000), the Board rejected the contention of a religiously sponsored university, that exercise of Board jurisdiction would violate the Religious Freedom Restoration Act. See also *Carroll College, Inc.,* 345 NLRB 254 (2005), reaffirmed at 350 NLRB No. 30 (2007). Accord: *Ukiah Valley Medical Center,* 332 NLRB 602 (2000), with respect to a hospital operated by the Seventh Day Adventist Church.

See also section 1-403 (Religious Schools) and section 1-308 (Communication Systems).

1-504 National Security

In *Firstline Transportation Security,* 347 NLRB 447 (2006), the Board rejected a contention that for national security reasons it should decline to exert jurisdiction over a private airport screening company that does airport screening of passengers at the Kansas City International Airport.

The case contains a collection of the Board's cases decided during World War II where the Board was confronted with national security contentions that it should decline jurisdiction.

See also section 1-204.

1-600 Rules of Application

1-601 Advisory Opinions

240-2500 et seq.

Section 102.98 of the Board's Rules and Regulations provides a procedure by which a State or Territorial agency or court may, in a case pending before the agency or court, request an advisory opinion (AO) from the Board as to whether the Board would decline to assert jurisdiction (1) on the basis of its current standards (1) over an employer involved in a case currently pending before the agency or court or (2) because the "employing enterprise" is not within the jurisdiction of the Act.

Earlier iterations of the rule permitted parties to request an advisory opinion but only as to current standards. That provision was repealed. Now the Board will only issue an opinion to the court or agency and it will consider both its current standards and whether an employer is a "political subdivision" or is otherwise exempt from the Board's statutory jurisdiction. See *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988); *University of Vermont,* 297 NLRB 291 (1989); and *Correctional Medical Systems*, 299 NLRB 654 (1990). The Board will not give an advisory opinion on a preemption issue even at the request of a State court. *Townley Sweeping Service*, 339 NLRB 301 (2003).

Petitions filed under Section 102.98 require that the State agency or the parties provide the record information described in Section 102.99. *W.M.P. Security Service Co.*, 309 NLRB 734 (1992). See also *De Coster Egg Farms*, 325 NLRB 350 (1998), when a petition was dismissed because the the State agency had no evidence nor made any factual determination.

The Board will generally not provide the requested advice if there is either a pending representation case—*Humboldt General Hospital*, 297 NLRB 258 (1989), or unfair labor practice case—*American Lung Assn.*, 296 NLRB 12 (1989), unless it can be shown that there is a need for a more expeditious determination than the normal case procedures will provide. This rule applies even when the pending case and the advisory opinion involve different locations if the pending case would resolve the jurisdiction issue. *Inter-Neighborhood Housing Corp.*, 311 NLRB 1342 (1993).

In *Child & Family Service*, 315 NLRB 13 (1994), the Board found that a scheduled hearing before the State board provided sufficient warrant for expeditious determination.

A determination that the Board has jurisdiction over the employer under Section 102.98(a) is not a determination that the Board would certify the union in that matter. See, e.g., *Carroll Associates*, 300 NLRB 698 (1990).

The Board will not give an advisory opinion where there are factual disputes about jurisdiction. See *Brooklyn Bureau of Community Service,* 320 NLRB 1148 (1996); and *De Coster Egg Farms*, supra.

See CHM section 11709 for Regional Office procedures on the filing of an advisory opinion petition.

1-602 Declaratory Orders

240-2900

This is a little used procedure that is available only to the General Counsel. When there is an unfair labor practice charge and representation petition involving the same employer, and the General Counsel has a question about Board jurisdiction a petition for a declaratory order may be filed with the Board. See the Board's Rules and Regulations, Section 102.105 and *Trico Disposal Service*, 191 NLRB 104 (1971). The Board will not issue a declaratory order where the facts are in dispute. *Latin Business Assn*., 322 NLRB 1026 (1997).

These procedures for a declaratory order under Section 102.105 are to be distinguished from the procedures available under 5 U.S.C. § 554(e). See *Wilkes-Barre Publishing Co.*, 245 NLRB 929 (1979); and *Television Artists AFTRA*, 222 NLRB 197 (1976).

See CHM section 11710 for Regional Office procedures for a Declaratory Order under the Board's Rules.

1-603 *Tropicana* Rule

240-0167-6700

260-3320-8700

Under this rule, in any case where an employer refuses, on reasonable request by a Board agent, to provide information relevant to the Board's jurisdictional determination, jurisdiction will be asserted without regard to whether any jurisdictional standard is shown to be satisfied, if the record at a hearing establishes that the Board has statutory jurisdiction. *Tropicana Products*, 122 NLRB 121, 123 (1959); *Major League Rodeo, Inc*., 246 NLRB 743 (1979); and *Continental Packaging Corp.,* 327 NLRB 400 (1998). This principle has been applied also in situations where the employer was unable to produce relevant information and subpoenaed drivers failed to respond and testify or gave incredible testimony. *Supreme, Victory & Deluxe Cab Co.*, 160 NLRB 140 (1966).

The *Tropicana* rule is applicable in unfair labor practice cases. *J.E.L. Painting & Decorating*, 303 NLRB 1029 (1991); *Bell Glass Co*., 293 NLRB 700 (1989); and *Strand Theatre*, 235 NLRB 1500 (1978).

For discussion of procedures see CHM section 11704.

1-604 Totality of Operations

260-3320-0137

It is the totality of an employer's operations which determines whether jurisdiction should be asserted. *Siemons Mailing Service*, 122 NLRB 81, 84 (1959); see also *T. H. Rogers Lumber Co.*, 117 NLRB 1732 (1957).

In *Bloch Enterprises*, 172 NLRB 1678 (1968), the Board combined the revenues of two operations because of their close relationship even though it found the two were not a single employer.

1-605 Integrated Operations

260-3360-3300 et seq.

If the enterprise is integrated, jurisdiction is exercised when the activities are diverse (*Potato Growers Cooperative Co.*, 115 NLRB 1281 (1956); *Country Lane Food Store*, 142 NLRB 683 (1963)), as well as when they are of like nature (*Kostel Shoe Co.*, 124 NLRB 651, 654 (1959)).

1-606 Computation of Jurisdictional Amount

260-2300 et seq.

The dollar volumes are expressed in annual terms, computation being based on the most recent calendar or fiscal year or on the figures of the immediately preceding 12-month period.

The inclusion in the computation of unusual or nonrecurrent business transactions which brought the employer within the standards is not a ground for declining to assert jurisdiction (*Imperial Rice Mills*, 110 NLRB 612 (1955)), except that jurisdiction will not be asserted on the basis of nonrecurrent capital expenditures alone (*Magic Mountain, Inc.,* 123 NLRB 1170 (1959)). The fact that the employer does not have title to the goods does not exclude those goods from the computation of gross volume. *Pit Stop Markets*, 279 NLRB 1124 (1986).

If no annual figures are available, figures for a period of less than 1 year may be projected to obtain an annual figure. *Carpenter Baking Co.*, 112 NLRB 288 (1955). Projections can include income from the past year projections of income for new business or combinations where both established and new businesses are involved. *Pet Inn's Grooming Shoppe*, 220 NLRB 828 (1975). The Board will take into account the experience of the predecessor in projecting what the revenues of a successor will be. See discussion in *Northgate Cinema, Inc.,* 233 NLRB 586 (1977).

In *Hickory Farms of Ohio*, 180 NLRB 755 (1970), in determining how much annual income the employer would have derived from his operations but for picketing, the Board used the revenues received by it during the 12-month period preceding the picketing. It reiterated the rule that a drop in volume of business as a result of picketing cannot be taken into consideration as a factor in defeasance of the Board's jurisdiction. (*Cox's Food Center*, 164 NLRB 95 (1967); see also *Hygienic Sanitation Co*., 118 NLRB 1030 (1957); *Carpenters District Council (Fairmount Construction),* 95 NLRB 969 (1951)). But the Board will not presume that an employer will have met the Board's jurisdictional standards but for picketing which began on the employer's first day in business. *Stage Employees IATSE Local 330 (Western Hills Theatres)*, 204 NLRB 1057 (1973).

For another example of projection, see *Powerful Gas No. 1*, 181 NLRB 104 (1970).

Where the employer performs services on goods owned by another, it is the value of the employer's sales and services, and not the value of the goods worked on, which is considered in determining whether to assert jurisdiction. *Devco Diamond Rings*, 146 NLRB 556 (1964).

1-607 Relitigation of Jurisdiction

For discussion of this subject see "Finality of Decisions," section 2-400, infra.

2. REGIONAL DIRECTORS' DECISIONMAKING AUTHORITY IN REPRESENTATION CASES

A major milestone in the history of the National Labor Relations Board was the 1959 change in the Act which permitted the Board to delegate its decisionmaking authority in representation cases to the Regional Directors. This delegation, its scope, specific powers, the finality of Regional Directors' decisions, and the procedure for transfer and review to the Board are treated here.

2-100 Statutory and Administrative Delegation

188-2000

188-6067-6050

393-0167-5000

The National Labor Relations Act was amended on September 14, 1959, by the addition of the following language in Section 3(b):

> The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

On May 4, 1961, the Board published in the *Federal Register* a statement describing the delegation to the Regional Directors pursuant to the amendment of Section 3(b). This grant of authority became effective with respect to any petition filed under subsection (c) or (e) of Section 9 of the Act on or after May 15, 1961. The principal effect of the delegation was to permit Regional Directors to decide representation cases. This had previously been done only by the Board in Washington.

The grant of authority under the amendment to Section 3(b) of the Act was initially challenged in *Wallace Shops*, 133 NLRB 36 (1961). It was contended in that case that the Board, in delegating its Section 9 powers to its Regional Directors, had exceeded the authority vested in it by Section 3(b) of the Act, and that, in amending its Rules and Regulations and Statements of Procedure, the Board failed to conform to the requirements of the Administrative Procedures Act, 5 U.S.C.A § 1001. Rejecting both contentions, the Board held:

> 1. The task of interpreting the Act is a function vested in the Board, with power of review in the courts, and the Board did not exceed the authority granted to it by the amendments to Section 3(b).
>
> 2. The delegation which the amendments to the Rules and Regulations and Statements of Procedure were designed to implement involves only the Board's powers over proceedings for the certification of employee representatives. Section 5 of the Administrative Procedure Act, 5 U.S.C.A. § 1004, by its terms expressly exempts such proceedings from the provisions of Sections 5, 7, and 8, which deal with adjudications, hearings, and decisions.
>
> 3. Section 4(c) of the Administrative Procedure Act applies only to substantive rules, and, since these amendments were procedural and organizational, Section 4(c) did not apply.

A similar challenge, in the form of contentions that the delegation of decisionmaking authority to the Regional Directors in representation cases was unconstitutional and Section 3(b) as amended in this respect and the Board's Rules and Regulations were in conflict with the Administrative Procedure Act, was rejected by the Board in *Weyerhaeuser Co.*, 142 NLRB 702 (1963), citing *Wallace Shops*, supra.

Acting Regional Directors have the same authority as the Regional Directors in whose stead they are designated to serve. *Korb's Trading Post*, 232 NLRB 67, 68 fn. 3 (1977).

A State court sustained the validity of the Board's delegation of authority. In *Pennsylvania Labor Relations Board v. Butz*, 411 Pa. 360, 192 A.2d 707 (1963), the lower court held that the National Labor Relations Board itself, rather than a Regional Director, must make the decision to decline jurisdiction. The Supreme Court of Pennsylvania reversed the lower court, at 192 A.2d 7115:

> The National Board, with statutory authority, properly delegated to the Director its authority to decline jurisdiction and, the Director having made a final determination in accordance with proper procedure, the federal jurisdiction over the instant labor matter was suspended.

2-200 Scope of Authority

378-0140

393-6081-2000 et seq.

393-6034-1400

Since the effective date of the delegation, the Regional Directors have exercised the authority contemplated by the statutory amendment to decide whether a question concerning representation exists, to determine the appropriate bargaining unit, and to direct elections to determine whether employees wish union representation for collective-bargaining purposes. They also rule on petitions to rescind union-security authorizations and on motions to clarify, amend, or rescind a certification resulting from a petition filed after the date the delegation went into effect. Such action by the Regional Director is final and binding on the parties, subject to a review procedure.

The powers granted to Regional Directors include the issuance of such decisions, orders, rulings, directions, and certifications as are necessary to process any petition. Thus, they may dispose of petitions by administrative action, by formal hearing and decision, or by stipulated election agreements; pass on rulings made at hearings, including motions to dismiss petitions, and on requests for extensions for filing of briefs beyond the time granted by the hearing officer; rule with respect to showing of interest, waivers, disclaimers, withdrawals, or current charges; and entertain motions for reconsideration and oral argument. See *Pentagon Plaza*, 143 NLRB 1280 (1963), which makes clear that, under the delegation of decisionmaking authority in representation cases, Regional Directors have the same authority as the Board, in cases which they decide, to reconsider their decisions. See also *Air Lacarte, Florida, Inc.*, 212 NLRB 764 (1974), in which the Board affirmed the Regional Director's reconsideration of a representation case based on new evidence.

A Regional Director may also consider alternative units when a petitioner expresses a willingness to proceed to an election in any unit found appropriate. *Acme Markets, Inc.,* 328 NLRB 1208 (1999).

Election arrangements, e.g., dates and places of elections, mail ballots etc., are within the discretion of the Regional Director. *Manchester Knitted Fashions*, 108 NLRB 1366 (1954); *Halliburton Services*, 265 NLRB 1154 (1982); *Odibrecht Contractor of Florida*, 326 NLRB 33 (1998); and *CEVA Logistics U.S. Inc.*, 357 NLRB No. 60 (2011).

In three cases decided in 2011, the Board reaffirmed that the decision as to the location of an election, including a rerun election is within the sound discretion of the Regional Director. *Austal USA, LLC*, 357 NLRB No. 40 and *Mental Health Association, Inc*., 356 NLRB No. 151. In

Austal however, the Board remanded the case when it was unable to determine whether the Regional Director actually exercised this discretion. Slip op. p. 3.

In the third case, *2 Sisters Food Group, Inc*., 357 NLRB No. 168 (2011), the Board majority provided an extensive analysis of the *Austal* factors—the factors Regional Directors should take into consideration in exercising their discretion with respect to election location. Thereafter the Office of General Counsel issued a memorandum concerning Regional Director discretion as to election sites. OM Memorandum 12-50 (April 24, 2012)

In *T & L Leasing,* 318 NLRB 324 (1995), the Board held that Regional Directors must, absent special circumstances, honor the terms of a Stipulated Election Agreement.

The Board's Rules and Regulations were amended to effectuate the terms of the 1961 grant of authority to the Regional Directors. Subpart C, Sections 102.60 through 102.72, inclusive, details the "procedure under Section 9(c) of the Act for the determination of questions concerning representation of employees and for clarification of bargaining units and for amendment of certifications under Section 9(b) of the Act.'' See also Rules and Regulations, Sections 102.77(b), 102.80(a), 102.85, and 102.88. The Board's Statements of Procedure, Sections 101.21. 101.22, 101.23, 101.28, and 101.30 were similarly revised.

2-300 Other Specific Powers Under the Delegation

188-8067

393-6081-2000 et seq.

393-7077-2000 et seq.

393-7022-1700

In the course of the normal decisional process, the Board has from time to time spelled out other specific forms of authority which may be exercised by the Regional Directors under the delegation. Some of these are:

1. The question of whether a continuance is to be granted and its extent is a matter within the sound discretion of the Regional Director. See *Power Equipment Co*., 135 NLRB 945 fn. 1 (1962), for a full discussion.

2. The jurisdiction of the Regional Director in making postelection investigations is not limited to the specific issues raised by the parties. *Carter-Lee Lumber Co.*, 119 NLRB 1374, 1376 (1958).

3. The Regional Director's staff is merely carrying out its duties when, in connection with having a petitioner withdraw its single-employer petition, it tells the petitioner of the existence of a multiemployer bargaining history involving the named employers. This is not improper assistance to the petitioning union. *Dittler Bros., Inc.,* 132 NLRB 444 (1961); see Statements of Procedure, Section 101.18.

4. When the Regional Director has consolidated a complaint case and an objections-to-election case and the consolidated proceeding comes to the Board for review, the Board may rule on the complaint, but sever the representation case and remand it to the Regional Director. See, for example, *Collins & Aikman Corp*., 143 NLRB 15 (1963).

5. A Regional Director has delegated authority to deny a request for enforcement of a subpoena. Such a request was therefore properly referred by the hearing officer to the Regional Director rather than the Board. *Northern States Beef*, 311 NLRB 1056 (1993).

6. A Regional Director does not have authority to vary the terms of a Stipulated Election Agreement, absent special circumstances. *T & L Leasing*, supra.

2-400 Finality of Decisions

393-6081-4067

596-0175-5025 et seq.

After the delegation of decisional authority in representation cases to the Regional Directors became effective, the question was raised whether to continue the policy in existence at that time that, in the absence of new or previously unavailable evidence, the Board will decline to reconsider matters determined in a prior representation case in a subsequent refusal-to-bargain unfair labor practice proceeding. The Board held that the policy will continue to govern under the delegation. Thus, where a representation petition had been processed by the Regional Director under Section 3(b) and the Board had denied a request for review of the decision and direction of election, relitigation of the issues raised in the request for review was not permitted in a later unfair labor practice proceeding involving an alleged violation of Section 8(a)(5). *Mountain States Telephone Co.*, 136 NLRB 1612, 1613 (1962). In *Hafadai Beach Hotel,* 321 NLRB 116 (1996), the Board noted that this was not limited to refusal to bargain cases. In *Hafadai*, supra, the Board precluded the relitigation of jurisdiction. See also *I.O.O.F. Home of Ohio, Inc.,* 322 NLRB 921 (1997), where the issue was supervisory status. Accord: *Premier Living Center,* 331 NLRB 123 fn. 5 (2000).

Compare *Union SquareTheatre Management,* 326 NLRB 70 (1998), relitigation permitted of employee status of technical directors in a subsequent 8(a)(l) and (3) case. Later affirmed at 327 NLRB 618 (1999).

Section 102.67(f) of the Rules and Regulations, provides in part: "Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

The Board's practice was affirmed by the Supreme Court in *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). The Court concluded that the 3(b) amendment was enacted for the purpose of expediting the final disposition of the Board's caseload, and this delegation of authority reflects the considered judgment of Congress that the Regional Directors "have an expertise concerning unit determination" sufficiently comparable to the Board's expertise and that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review.

A Regional Director's finding in an "R" case can have "persuasive relevance" in an unfair labor practice case subject however to reconsideration and additional evidence. *Dole Fresh Vegetables,* 339 NLRB 785 (2003).

When an agreement for a consent election provides that the determinations of the Board's Regional Director shall be final and binding, the courts have consistently held that "such a determination is conclusive and cannot thereafter be questioned unless the Regional Director acts arbitrarily or capriciously or not in line with Board policy or the requirements of the Act.'' *NLRB v. United Dairies*, 337 F.2d 283, 286 (10th Cir. 1964). In the absence of fraud, misconduct, or gross mistake, the Regional Director's decision is final, even though the Board might have reached a different conclusion in the first instance. *General Tube Co.,* 141 NLRB 441, 445 (1963). These cases, it should be noted, were decided after the effective date of the delegation.

The Board accords finality to a Regional Director's decision where the Board Members are equally divided and there is no majority to grant review. *United Health Care Services,* 326 NLRB 1379 (1998), and *Rapera, Inc.,* 333 NLRB 1287 (2001).

In a representation proceeding, the Regional Director's consent to the withdrawal of a representation petition, on the ground that the exercise of jurisdiction by the National Labor Relations Board would not effectuate the policies of the National Labor Relations Act, constitutes a sufficient declination of jurisdiction to permit a State board to assume jurisdiction. *Pennsylvania Labor Relations Board v. Butz*, supra, 192 A.2d 707, 714.

2-500 Transfer and Review

393-6048

393-6081-4000 et seq.

The Regional Director may transfer a case to the Board for initial decision at any time before decision. This may occur prior to the hearing, during the hearing, or after the hearing. Whether a particular case should be transferred is a matter to be determined by the Regional Director, although Board policy is to discourage these transfers. It is also within the discretion of the Regional Director to inform the parties of the reason for transferral.

Parties to a representation case may request the Board to review any action of the Regional Director taken pursuant to the authority under Section 3(b). Neither the filing of a request for review, nor the granting of review, will stay the Regional Director's decision, unless otherwise ordered by the Board. Absent an order from the Board, the ballots in question will be impounded. See Section 102.67(b) of the Board's Rules.

Review of actions of Regional Directors may be sought only in any of the following situations:

1. Where a substantial question of law or policy is raised because of the absence of, or departure from, officially reported precedent.
2. Where a Regional Director's decision on a substantial factual issue is clearly erroneous, and such error prejudicially affects the rights of a party.
3. Where the conduct of a hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error.
4. Where there are compelling reasons for reconsideration of an important Board rule or policy.

With respect to the second ground, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues, together with page citations from the transcript and a summary of the argument. But such request may not raise any issue or allege any facts not timely presented to the Regional Director.

Failure to request review precludes the relitigation, in any related subsequent unfair labor practice proceeding, of any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the Regional Director's action; this also precludes relitigation of any such issues in any related subsequent unfair labor practice proceeding.

See the Board's Rules and Regulations, Section 102.67.

The amendments to the Rules (Sec. 102.67 and 102.69) now defer most requests for review of a Regional Directors decision until after the election. Althougth a party may request special permission to appeal prior to the election, Section 102.65(c) makes clear that such permission will only be granted under "extraordinary circumstances" when it appears that the "issue will otherwise evade review." A party does not have to request special permission in order to preserve its right to review in the post-election process. See GC Memo 12–04 p. 18–19 (April 26, 2012), for further details on special appeals.

* * * *

The reader can find more complete information on related representation matters as follows:

Election Procedures—Chapter 22
Conduct of Elections—Section 24-400
Objection Procedures—Section 24-100

3. INITIAL REPRESENTATION CASE PROCEDURES

Having considered the general authority of the Regional Directors of the Board under Section 3(b), pursuant to the 1959 amendments to the Act, we follow with a capsule summary of representation case procedures as distinguished from substantive law, beginning with the filing of the petition through the decision by the Regional Director or the Board.

Sections 102.60 through 102.82 of the Board's Rules and Regulations, and Sections 101.17 through 101.21 of the Statements of Procedure describe these procedural steps. They may also be found, in greater detail, in the NLRB Casehandling Manual (CHM) (Part Two), Representation, sections 11000 through 11284.

EDITORS NOTE

At the time of the publication of this edition of this text, the Board was considering proposed Rule changes designed to expedite the processing of petitions—both pre and postelection. The notice of proposed rulemaking was published in the Federal Register (76 FR 36812) on June 22, 2011. **As described in the Board's Press Release the proposed amendments would:**

- Allow for electronic filing of election petitions and other documents.
- Ensure that employees, employers, and unions receive and exchange timely information they need to understand and participate in the representation case process.
- Standardize timeframes for parties to resolve or litigate issues before and after elections.
- Require parties to identify issues and describe evidence soon after an election petition is filed to facilitate resolution and eliminate unnecessary litigation.
- Defer litigation of most voter eligibility issues until after the election.
- Require employers to provide a final voter list in electronic form soon after the scheduling of an election, including voters' telephone numbers and email addresses when available.
- Consolidate all election related appeals to the Board into a single postelection appeals process and thereby eliminate delay in holding elections currently attributable to the possibility of preelection appeals.
- Make Board review of postelection decisions discretionary rather than mandatory.

On November 30, 2011, the Board met to consider the proposals and a majority of the Board, voted to approve certain changes. The Board decided to:

- Limit the litigation in a preelection hearing to issues that are relevant to "determining if there is a question concerning representation" and make clear that the hearing officer in a preelection hearing has the authority to limit testimony and evidence to those issues.
- Provide the hearing officer in a preelection case with the authority to preclude posthearing briefs if he/she determines that the issues do not warrant briefing.
- No longer permit filing of requests for review of a Regional Director's Decision and Direction of Election prior to the election. The appeal process will be consolidated so that all election appeals—those that had previously been filed before the election and those filed after—are consolidated in a single post election appeal process.

- Require that requests for special permission to appeal to the Board (Rules Section 102.65) be limited to "extraordinary circumstances."
- Discontinue the Board's practice of scheduling the election between the 25th and 30th day after the Regional Director's Decision and Direction of Election.
- Provide that in both stipulated and directed election cases, appeals will be considered by the Board only if the Board in its discretion considers them to "present serious issues for review."

On December 21, the Board adopted a final rule as to those matters approved on November 30. This final rule took effect on April 30, 2012. Thereafter its implementation was suspended. The matter was in litigation at the time of this publication.

See GC Memo 12–04 (April 26, 2012) (later withdrawn) for a full discussion of the Rule change and Agency practice pursuant thereto.

3-100 Filing of Petition and Notification

316-6700 et seq.

393-1000 et seq.

393-6007-1700 to 8700

When a petition is filed with the Regional Office, the petitioner receives a written acknowledgement of the filing, and the employer and all other interested parties are given written notification, including a description of the bargaining unit alleged to be appropriate and the name of the Board agent to whom the case has been assigned. The types of petitions are discussed, infra, at chapter 4.

The following are regarded as interested parties:

a. The petitioner;
b. The employer;
c. The owner of a leased department in a store;
d. Any individual or labor organization named in the petition as having an interest or as being a party to a collective-bargaining contract, current or recently expired, covering any of the employees involved;
e. Any labor organization which has notified the Regional Office by letter within the prior 6 months that it represents the employees involved or is actively campaigning among them; and
f. Any labor organization whose name appears as an interested party in any prior case involving the same employees which was closed within recent years.

An intervenor was held to have had notice of the petition prior to the date it executed a Stipulated Election Agreement. *Seven-Up/Royal Crown Bottling Cos*., 323 NLRB 579 (1997).

See section 9-550 for discussion of the period for filing a petition.

3-200 Submission of Showing of Interest

324-0100 et seq.

578-8075-6056

If the petitioner has not already done so, proof of interest should be submitted within 48 hours after filing, but in no event later than the last day on which the petition may be timely filed. Note that when a petition is filed involving the same employer who is a party in a pending 8(b)(7)

unfair labor practice charge, the petitioner is not required to allege that a claim has been made on the employer or that the union represents a substantial number of employees. See CHM sections 11020–11035 and chapter 5, infra, for more complete information.

3-300 Information Requested of Parties

R/R 102.61(a) and (b)

378-2878

Employers are requested to submit commerce data, a list of employees in the proposed unit, and, when appropriate, information concerning striking employees eligible to vote under Section 9(c)(3). Employers are also advised that, should an election be agreed to or directed, a list of names and addresses of the eligible voters must be filed with the Regional Director by the employer within 7 days after the agreement or direction. This list (*Excelsior list*) is in addition to the proposed unit list (see specific discussion at secs. 23-510 and 24-324, infra).

All parties are requested to submit copies of any presently existing or recently expired contracts covering any of the employees as well as pertinent correspondence, and to notify the Board agent of any other interested parties entitled to be advised of the proceeding. (See CHM sec.11009, for the contents of the initial letter to the employer in an RC case.)

3-400 Preliminary Investigation

393-6014

The Board agent assigned to the case examines the petition for sufficiency, determines the adequacy of the showing of interest, and then contacts the parties and requests the submission of all other pertinent data. (See CHM secs. 11010.1 and 11010.2, for the steps taken by the Board agent in RC, RD, and RM cases, respectively.)

3-500 Dismissal or Withdrawal of Petition

393-6027 et seq.

393-6034 et seq.

393-6081

When it is readily apparent that no question concerning representation exists, the showing of interest is inadequate, the unit sought is inappropriate, the petition is not timely filed, or the petition does not meet the test of sufficiency for any other reason, the petitioner is requested to withdraw the petition. If this is not done within a reasonable time, the petition is dismissed. (For appeals from such dismissals, see CHM secs. 11100–11104.) See also section 8–200, infra.

3-600 Amendments to Petition

393-6021 et seq.

The petitioner may add to or delete from the original or amended petition and, when this occurs, all interested parties are notified of the changes. See section 9-520, infra, for additional discussion of amending the petition.

3-700 Consent-Election Agreements

393-6054 et seq.

Consent-election agreements obviate the necessity for a hearing. There are two types of consent-election agreements: (1) Agreement for Consent Election (Form NLRB-651), (2) Stipulated-Election Agreement, and (3) Full Consent Agreement (Form NLRB-652). Under either, the parties agree that an election be conducted by the Regional Director. The basic difference between the two is that under a consent agreement, questions which arise in connection with the election at the postelection stage are determined by the Regional Director, but under a stipulated agreement these questions are determined by the Board.

3-800 Notice of Hearing and Hearings

393-6068-2000

If the Regional Director has reason to believe that a question concerning representation exists, and if an election agreement is not obtained, a notice of hearing is issued (Form NLRB-852). In such circumstances a hearing is mandatory. *Angelica Healthcare Services*, 315 NLRB 1320 (1995). Compare *Mueller Energy Services*, 323 NLRB 785 (1997), where the Regional Director did not have reasonable cause and *Premier Living Center,* 331 NLRB 123 fn. 9 (2000) (no hearing required in a UC case).

All parties must receive at least 5 days' notice of hearing. *Croft Metals, Inc.*, 337 NLRB 688 (2002).

A Regional Director may use a Notice to Show Cause procedure to assist in expediting a representation case but that procedure cannot be a substitute for a hearing. *Amerihealth Inc./Amerihealth HMO*, 326 NLRB 509 (1998).

Ordinarily a hearing will be conducted even if the issue is one that the Board is reconsidering. But see *Pratt Institute,* 339 NLRB 971 (2003).

3-810 Nature and Objective

393-6068-0100

The hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination under Section 9 of the Act. The hearing is investigatory, not adversary. Parties have a right to present relevant evidence on the issues presented by the petition and the Board has ruled that it was an error to refuse the introduction of evidence in those circumstances. *Barre National, Inc*., 316 NLRB 877 (1995). In *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999), the Board held that it was improper for a hearing officer to exclude testimony about a group of contested employees because of the small size of the group. See section 3-840 on the obligation of parties to take positions on issues. See section 22–118 (a) for a discussion of subpoenas in representation cases.

3-820 Hearing Officer's Responsibilities

393-6068 et seq.

The hearing officer is an agent of the Board who has an affirmative obligation to develop a full and complete record and may, if necessary to achieve this purpose, call and question witnesses, cross-examine, and require the introduction of all relevant documents. See *Mariah, Inc*., 322 NLRB 586 fn. 1 (1996). Once on notice of a substantial issue, the hearing officer is obliged to conduct inquiry. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999). The hearing officer is, of course, required to be impartial in rulings and in conduct. For a discussion of hearing officer discretion to seek enforcement of subpoenas see section 3–840. For discussion of burdens of proof in representation cases see NLRB Hearing Officers Guide.

The revised Rules (See 102.66) have been clarified to make clear that hearing officers have authority to limit evidence to the question of the existence of a question concerning representation. GC Memo 12–04 provides an extensive discussion of which issues can be litigated and which issues can be deferred for post-election proceedings. See particularly pages 7–15.

3-830 Intervention

393-2001-2083

The hearing officer considers all motions to intervene. Motions for intervention are denied if filed by "employees'' or "employees' committees'' not purporting to be labor organizations, or by an organization which had been directed to be disestablished by a final Board order. Those

filed by labor organizations within the meaning of the Act, which show an interest in the employees concerned, are granted. A party permitted intervention may thereafter participate fully in the hearing, although the extent to which an intervenor may block stipulations depends on its showing of interest. See also *Peco, Inc.,* 204 NLRB 1036 (1973), in which employees opposed to amendment were permitted to intervene in AC hearing. (For additional discussion on intervention, see sec. 5–640, infra.)

3-840 Conduct of Hearing

393-6068-6067-1700 through 8300

393-6075

Evidence is received either in the form of sworn oral testimony or stipulations. Examination and cross-examination of witnesses are permitted and parties are expected to take positions on the matters raised at the hearing. See *Seattle Opera Assn.*, 323 NLRB 641 (1997); and *Mariah*, *Inc.,* 322 NLRB 586 fn. 1 (1996). Failure to do so may limit the party's right to present evidence or to utilize the challenge procedure on the disputed classification if there is a presumption in the law with respect to that classification. *Bennett Industries*, 313 NLRB 1363 (1994). But in *Allen Health Care Services,* 332 NLRB 1308 (2000), the Board distinguished *Bennett Industries* on a unit issue where there was no presumption with respect to that unit. In those circumstances, the Board directed that the hearing officer take testimony necessary for the Board to make a unit determination. In doing so, the Board noted its obligation under Section 9(b) to "decide in each case . . . the unit appropriate."

In *Marian Manor for the Aged,* 333 NLRB 1084 (2001), the Board affirmed a hearing officer who refused to seek enforcement of a subpoena in a preelection hearing. In doing so the Board found the evidence sought was relevant and necessary but noted that there was no showing that the information could not be obtained from the employer's own employees and that preelection hearings are investigatory, do not permit credibility resolutions and require expeditious handling.

Where foreign language witnesses are required for the hearing, the Board secures the interpreter and pays the costs. *Solar International Shipping Agency*, 327 NLRB 369 (1998). Compare *George Joseph Orchard Siding, Inc.*, 325 NLRB 252 (1998), for unfair labor practice hearing policy.

Sequestration does not apply in pre-election representation cases. *Fall River Savings Bank*, 246 NLRB 831 fn. 4 (1979).

A petitioner is permitted to amend the petition during the hearing to reflect any changes in position after hearing the testimony. The other parties are likewise permitted to reflect changes in position. Withdrawal requests are also considered. Opportunity for oral argument is given to any party requesting it. The hearing officer refers to the Regional Director or to the Board for ruling all motions to dismiss, to transfer the case to the Board, or for oral argument before the Regional Director or the Board.

3-850 Hearing Officer's Report

393-7055

The hearing officer, after the close of the hearing, submits a brief report to the Regional Director, or to the Board in cases in which an order transferring the case to the Board has been issued prior to the preparation of the report.

3-860 Briefs

393-7066-2000 through 9000

Section 102.67(a) of the Board's Rules and Regulations provides that any party desiring to submit a brief to the Regional Director shall file an original and one copy thereof within 7 days after the close of the hearing, with the proviso that, before the close of the hearing and for good

cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Requests for additional time, not made to the hearing officer, must be made to the Regional Director in writing. CHM section 11244.2, notes that "Authority to grant extensions of time to file briefs is discretionary with the hearing officer," and not automatic.

The revised rules (Sec 102.66(d)) give the hearing officer discretion as to whether parties may file briefs, set the due date for filing if permission is granted and delineate the issues to be briefed. Sec GC Memo 12–04, pages 17–18.

3-870 Posthearing Matters Prior to Decision

393-6068-7000

393-6068-6067-(3300)

393-6054-0100 through 8200

The transcript of the hearing may be corrected, if necessary. If the matter is pending before the Board and an unfair labor practice charge is filed, the Board is notified of the filing. All motions, or answers to motions, filed after the close of the hearing are filed directly with the Regional Director, or if before the Board with the latter. A consent-election agreement may be entered even after hearing. (For withdrawal of petitions or disclaimer of interest, see chapter 8, infra.)

3-880 Regional Director's or Board Decision and Request for Review

393-6081-2000 et seq.

393-6081-6000 et seq.

The Regional Director or, if the case is transferred to the Board in Washington, the Board may dismiss a petition, remand it for further hearing, or direct an election.

393-7077-4000 et seq.

As noted supra Section 2-500, the revisions to the Rules no longer provide for requests for review of the Regional Directors pre-election decision. That aspect of the proceeding is now held postelection. Presumably, the case holdings and Agency practices with respect to requests for review described below will now be applicable, where appropriate, to this new consolidated post-election proceeding.

Sections 102.67(b) and (c) provides for requests for review of Regional Director's decisions. Where a party is challenging a Regional Director's factual findings, its request for review should be accompanied by documentary evidence. *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998). The filing of such a request or the grant of review does not, "unless otherwise ordered by the Board," operate as a stay of any action taken or directed by the Regional Director and the Regional Director may schedule and conduct the election. See *Mercedes-Benz of Orlando*, 355 NLRB 592 (2010); and *Fred Meyer Stores, Inc*., 355 NLRB 606 (2010). In that event, the voters whose eligibility is being questioned in the request for review will be challenged and their ballots impounded.

The Second Circuit has held that in some circumstances a substantial change in the bargaining unit by the Board on review may affect the validity of the election. See *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir. 1984); *NLRB v. Lorimar Productions*, 771 F.2d 1294 (9th Cir. 1985); and *NLRB v. Parson School of Design*, 793 F.2d 503 (2d Cir. 1986). All three cases are discussed by the Board in *Toledo Hospital*, 315 NLRB 594 (1994); and *Morgan Manor Nursing & Rehabilitation Center*, 319 NLRB 552 (1995*)*. The Board has held that its *Sonotone* procedures (infra at sec. 21-400) for professional and nonprofessional elections are not implicated by these court rulings. *Pratt & Whitney*, 327 NLRB 1213 (1999). See also *Northeast Iowa Telephone Co.,* 341 NLRB 670 (2004), in which a divided Board distinguished these cases from the "vote and impound procedures of the Board."

The Board will sometimes permit a disputed classification or an individual to vote under challenge rather than seeking to resolve the question on review. Usually, the number of such challenges will not exceed more than 10–12 percent of the unit. See *Silver Cross Hospital,* 350 NLRB No. 11 fn. 10 (2007).

In those situations in which the Board, on review, decides to vote the contested classification or person under challenge, any ensuing certification will note that the position is neither included nor excluded. *Orson E. Pontiac-GMC Trucks, Inc.*, 328 NLRB 688 (1999).

In a variation of this issue, the Board ordered a new election when it determined on review of the Regional Director's decision that the Director had incorrectly found that two healthcare institutions were a single employer. Because an election had already been held on the premise that the companies were a single employer, the Board found that the ballot misidentified the employer and the unit and therefore a second election was warranted. *Mercy General Partners*, 331 NLRB 783 (2000).

A Board decision will ordinarily apply "to all pending cases in whatever stage." *Aramark School Services*, 337 NLRB 1063 (2002).

For discussion of the finality of Regional Directors decisions and the effect of the absence of a Board majority to reverse a Regional Director's decision see section 2–400.

* * * *

This section of the procedures summarizes the initial stages of a representation proceeding. The precise language of the Board's Rules and Regulations and Statements of Procedure should be consulted at all times in relation to specific procedural provisions and, for greater detail, it is important to follow the steps described in the CHM.

3-900 Review of Representation Decisions

3-910 Judicial Review—Generally

A Board order in a representation case is not a final order and is therefore, not subject to judicial review directly. *AF of L v. NLRB*, 308 U.S. 401 (1940). Indeed, the Board retains jurisdiction over the representation case even where a related unfair labor practice case is pending in the Court. *Freund Baking Co.*, 330 NLRB 17 fn. 3 (1999).

Where, however, the contention is that the Board's decision in the representation case is in excess of its delegated power and is contrary to a specific prohibition of the Act, a party can obtain district court review of the Board's decision. *Leedom v. Kyne*, 358 U.S. 184 (1958). The Court has held that this exception to the general rule of nonreviewability is a "narrow one,'' *Boire* v. *Greyhound Corp*., 376 U.S. 473 (1964). In test of certification proceedings, the Board generally rejects ancillary defenses where it is clear that the employer would not honor the certification in any event. See, e.g., *People Care, Inc.,* 314 NLRB 1188 fn. 2 (1994), rejecting an employer defense that the union was dilatory in seeking bargaining.

For a discussion of Court jurisdiction over the representation case see *Freund Baking Co*., 330 NLRB 17 fn. 3 (1999).

3-911 Review by Employers

An employer who is dissatisfied with an adverse representation decision by the Board can obtain review of the decision only by refusing to bargain if and when the union is certified. The defense to that refusal to bargain would then be that the certification was improperly issued. The Board does not permit relitigation of the representation issue in the refusal to bargain case. Section 102.67(f) of the Board Rules, *Shadow Broadcast Service,* 323 NLRB 1002 (1997); and *FPA Medical Management*, 331 NLRB 936 (2000). In those circumstances, the court will review the representation issue in the court of appeals proceeding to enforce the Board order. Failure to request review will bar a party from raising the issue in a subsequent challenge to the certification. *Nursing Center at Vineland Concrete*, 318 NLRB 337 (1995). Similarily, in the

absence of newly discovered evidence, an employer may not challenge a certification on the ground of supervisory status of unit members if it failed to raise the issue in the representation case. See *Premier Living Center*, 331 NLRB 123 (2000), where the Board likened that effort to a post election challenge. See also *International Maintenance Corp*., 337 NLRB 705 (2002), where the Board did not address a contention that the unit had increased by a factor of 10 because it was not raised as an exception.

In an unfair labor practice case, the Respondent is required to notify the Board of its intention to preserve the issues that it raised in the underlying unfair labor practice case. Some courts have disagreed with the Board as to how much notification is required. See *Nathan Katz Realty v. NLRB,* 251 F.3d 981 (D.C. Cir. 2001).

In *Food & Commercial Workers Local 1996* (*Visiting Nurse Health System*), 336 NLRB 421 (2001), a divided Board found that a certified union could engage in secondary activity against a neutral that was doing business with the employer who was refusing to honor the certification. See also section 7–120.

3-912 Review by Unions

A union, on the other hand, has to utilize an even more indirect method of obtaining review if it is dissatisfied with an adverse decision of the Board in a representation case. Thus, a union would have to engage in allegedly unlawful 8(b)(7)(B) picketing where it believes the Board has incorrectly certified the results of an election (a union loss) because of the erroneous representation case decision. *Oakland G. R. Kinney Co.,* 136 NLRB 335 (1962); *Kansas Color Press,* 158 NLRB 1332 (1966); and *American Bread Co.,* 170 NLRB 91 (1968).

3-920 Litigation of Unfair Labor Practice Issues in Representation Cases

The Board is occasionally confronted with a contention that it should review an unfair labor practice decision of the General Counsel in a representation case. Stated simply, the general rule has since the earliest days of Section 3(d) of the Act been that the Board will not permit the litigation of unfair labor practices in representation proceedings. *Times Square Stores Corp.,* 79 NLRB 361 (1948). See also *Texas Meat Packers,* 130 NLRB 279 (1961); *Cooper Supply Co*., 120 NLRB 1023 (1958); and *Capitol Records*, 118 NLRB 598 (1957); and *Virginia Concrete Corp*., 338 NLRB 1182 (2003). But in *All County Electric Co.,* 332 NLRB 863 (2000), a divided Board permitted the litigation of alter ego status in a representation case. In doing so the Board majority distinguished *Texas Meat Packers*, which held that issues of motivation for a layoff should not be litigated in representation cases.

In *Cooper Supply*, the issue was one of striker eligibility to vote in an election. The General Counsel had refused to find bad-faith bargaining charge which the union contended resulted in an unfair labor practice strike which in turn, it was argued, made the strikers eligible to vote. The Board refused to consider the union's contention solely because the General Counsel had refused to issue an 8(a)(5) complaint as to the bargaining. However, the fact that an unfair labor practice charge concerning the same conduct has been dismissed does not require pro forma overruling of the objection because they are not tested by the same criteria. *ADIA Personnel Services*, 322 NLRB 994 (1997).

Where, however, a party is charged with an unfair labor practice, the Board will consider that party's contention that the General Counsel incorrectly dismissed an unfair labor practice charge which the party relies on as its defense to the General Counsel's prosecution. See *Warwick Caterers*, 269 NLRB 482 (1984).

A finding in a representation case of supervisory status is not binding in a later unfair labor practice case involving allegations of independent 8(a)(1) conduct, *Bon Harbor Nursing & Rehabilitation Center,* 348 NLRB 1062 (2006).

For a related discussion of the relationship between unfair labor practice decisions of the General Counsel and objections to an election see discussion at section 24-312.

3-930 Effect of Violence on a Board Certification

In "extraordinary" circumstances of union violence, the Board may decline to enforce a certification or to give a normal bargaining order remedy. See *Overnite Transportation Co.,* 333 NLRB 472 (2001). See also *Laura Modes Co*., 144 NLRB 1592 (1963), and section 6-380, infra.

3-940 Relitigation

The Board has "in a limited number of cases . . . departed from the rule that . . . issues that had been presented to and decided by the Board in a prior related representation case cannot be relitigated." In *Salem Hospital Corp.*, 357 NLRB No. 119 (2011), the Board reaffirmed this principle and refused to allow relitigation. In doing so, the Board cited *Sub-Zero Freezer Co*., 271 NLRB 47 (1984), as one of the limited number of cases that permitted relitigation (employees contended that there was "an atmosphere of fear and reprisal").

4. TYPES OF PETITIONS

A representation proceeding is initiated by the filing of a petition. Section 9(c) of the Act provides for three types of petitions: (1) a petition seeking certification, (2) an employer petition seeking resolution of a question concerning representation, and (3) a petition seeking decertification of the presently recognized bargaining agent. Section 9(e) of the Act provides for petitions for balloting with respect to recision of a union-shop authorization. In addition, the Rules and Regulations, Section 102.60(b), provides for petitions for clarification of the bargaining unit and petitions for amendment of the certification.

The first four types of petitions (RC, RM, RD, and UD) all seek Board-conducted elections. The next two (UC and AC), are different in nature as the general description of each below will readily indicate. No attempt will be made here to outline the relevant substantive law which is applicable to given situations in the determination and disposition of cases involving any of the six types of petitions. Issues arising in relation to RC, RM, and RD petitions are treated under the several substantive chapters which pertain to all election petitions, whether they be for certification, decertification, or employer petitions. Issues arising in relation to UD, UC, and AC petitions are treated in a separate chapter.

4-100 Representation Petition Seeking Certification (RC)

316-6700 et seq.

A petition for certification as bargaining agent under Section 9(c)(1)(A)(i) may be filed by an employee or group of employees or any individual or labor organization acting on their behalf, alleging that a substantial number of employees wish to be represented for collective-bargaining purposes and that their employer declined to recognize their representative. Such a petition is usually filed by unions, although in the language of the Act and Board interpretation this need not necessarily be the case, as the statutory provision uses the language "employee or group of employees or any individual or labor organization acting in their behalf."

4-200 Decertification Petition (RD)

316-6733

Under Section 9(c)(1)(A)(ii), an employee, group of employees, individual, or labor organization may file a decertification petition asserting that the currently certified or recognized bargaining representative no longer represents the employees in the bargaining unit.

The substantive rules governing decertification petitions specifically are treated in the chapter on the "Existence of a Representation Question," infra, at chapter 7.

4-300 Employer Petition (RM)

316-6750

Under Section 9(c)(1)(B), an employer may file a petition for an election alleging that one or more individuals or labor organizations have presented a claim to be recognized as the bargaining representative of a unit of employees. The petitioning employer is generally required to show that the union has presented an affirmative demand for recognition. If the union is an incumbent, the employer must show that it has a good-faith uncertainty as to the union's majority status. See *Levitz Furniture Co*., 333 NLRB 717 (2001).

The substantive rules governing employer petitions specifically are treated in the chapter on the "Existence of a Representation Question," infra, at chapter 7.

4-400 Union-Security Deauthorization Petition (UD)

324-4060-5000

Under Section 9(e), the Board is empowered to take a secret ballot of the employees in a bargaining unit covered by an agreement between their employer and a labor organization, made pursuant to Section 8(a)(3), on the filing with the Board of a petition by 30 percent or more of the employees in the unit alleging their desire that the authority for such a provision be rescinded. The Board certifies the result of such balloting to the labor organization and to the employer.

In *Los Angeles Times Communications*, 357 NLRB No. 66 (2011), the Board held that it must conduct a UD election even when the union-security clause does not make the payment of dues a condition of employment such that loss of employment is not a possible sanction for non payment of dues.

See CHM sections 11500–11516 for UD procedures. See also section 5-620, infra.

4-500 Petition for Clarification (UC)

355-7700

385-0150

385-7501-2500 et seq.

The Board's express authority under Section 9(c)(1) to issue certifications carries with it the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Thus, under Section 102.60(b) of the Board's Rules and Regulations, a party may file a petition for clarification of a bargaining unit when there is a certified or currently recognized bargaining representative and no question concerning representation exists. (See also Sec. 101.17 of the Statements of Procedure.)

See *Armco Steel Co*., 312 NLRB 257 (1993), for a discussion of the use of UC proceedings to clarify unit scope as well as unit placement issues.

For further discussion of Unit Clarification (UC) proceedings, see section 11-200.

4-600 Petition for Amendment of Certification (AC)

385-0150

385-2500 et seq.

Flowing from the Board's express authority under Section 9(c)(1) to issue certifications is the implied authority to amend them. Under Section 102.60(b) of the Board's Rules and Regulations, a party may file a petition to amend certification to reflect changed circumstances, such as changes in the name or application of the labor organization or in the site or location of the employer, when there is a unit covered by a certification and no question concerning representation exists. (See also sec. 101.17 of the Statements of Procedure.)

Note that petition for *amendment* of certification may be filed only for a unit covered by a certification, while a petition for *clarification* of a bargaining unit may be filed either when the bargaining representative has a certification or is recognized by the employer but not pursuant to a certification. *Locomotive Firemen & Enginemen,* 145 NLRB 1521 (1964). The requirements and procedures for UC and AC petitions are set out in the Rules and Regulations, Sections 102.61(d) and 102.61(e), and CHM sections 11490–11498. See also section 11-100, infra.

4-700 Expedited Elections—Section 8(b)(7)(C)

See discussion in sections 5-610, 7-150, and 22-122 infra.

4-800 Joint Petition (RJ Petiton)

At the time of the publication of this text, the Board was considering a newly proposed election petition.

As proposed, this petition would be jointly filed by the employer and the union. It would not require a showing of interest and would assure the petitioners an election within 28 days of filing. Unit employees would be notified of the filing of the petition within 3 days thereof and the Excelsior list would be provided at the time of filing.

The joint nature of the petition would obviate the need for a preelection hearing.

The Board published a notice of proposed rulemaking as to this proposed petition on February 26, 2008 (73 FR 10199).

5. SHOWING OF INTEREST

324-0125 et seq.

324-2000

324-4020-1400

An employee or group of employees, or any individual or labor organization acting in the employees' behalf, may file a representation petition under Section 9(c)(1)(A) of the Act. The Board is required to investigate any such petition which alleges that a "substantial number'' of the employees desire an election, whether it is for certification or decertification. The Board has adopted the administrative rule that 30 percent constitutes a "substantial number.'' Statements of Procedure, Section 101.18(a). This 30-percent rule applies to all representation petitions filed by or in behalf of a group of employees.

The purpose of this requirement is to enable the Board to determine whether or not the filing of a petition warrants the holding of an election without the needless expenditure of Government time, efforts, and funds. *River City Elevator Co.,* 339 NLRB 616 (2003); *Pike Co*., 314 NLRB 691 (1994); *S. H. Kress Co*., 137 NLRB 1244, 1248 (1962); and *O. D. Jennings & Co.*, 68 NLRB 516 (1946). The showing-of-interest requirement is based on public policy and therefore may not be waived by the parties. *Martin-Marietta Corp*., 139 NLRB 925 fn. 2 (1962). The administrative determination of a showing of interest has no bearing on the issue of whether a representation question exists. *Sheffield Corp*., 108 NLRB 349, 350 (1954).

The showing of interest is an administrative matter not subject to litigation. *O. D. Jennings & Co.*, supra; *River City Elevator Co*., supra; *General Dynamics Corp*., 175 NLRB 1035 (1969); *Allied Chemical Corp*., 165 NLRB 235 (1967); and *NLRB v. J. I. Case Co*., 201 F.2d 597 (9th Cir. 1953).

Specific issues which pertain to the showing of interest are treated below.

5-100 Timeliness of Submission of a Showing of Interest

324-4020-3000

324-6033-6700

324-6067-6700

A showing must be submitted within 48 hours of the filing of the petition, but in no event later than the last day a petition might timely be filed. Statements of Procedure, Section 101.17; *Mallinckrodt Chemical Works*, 200 NLRB 1 (1972). CHM section 11024.1. See also *Excel Corp. (Excell II)*, 313 NLRB 588 (1993), where the Board on reconsideration of its earlier decision at 311 NLRB 710 (1993) (*Excel I*), refused to permit additional showing to be filed after the window period. The Board in *Excel II* characterized its decision in *Excel I* as "an ill-advised departure'' from precedent and the Board's Rules.

An exception to this rule, based on the special circumstances involved, was made in *Rappahannock Sportswear Co.*, 163 NLRB 703 (1967). In that case, there was no bargaining history, and two rival unions were engaged in initial organization of the employer's employees. The employer was aware of both organizational campaigns, and, on being notified that one of the unions had filed a petition, recognized, and executed a collective-bargaining agreement with the other. Although the showing of interest in support of that petition was not furnished to the Regional Office until the date the contract was executed, all cards predated the filing of the petition. The Board declined to apply Section 101.17, noting the manifest inequity in permitting the hasty signing of a contract to truncate the normal 48 hours for the filing of a showing of interest. See also *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), discussed under Recognition Bar (sec. 10-500).

When the petitioner broadens its original unit to one that is substantially larger and different from that originally petitioned for, the broadened unit request is treated like a new petition and must be supported by an adequate showing of interest. *Centennial Development Co*., 218 NLRB 1284 (1975). Cf. *Brown Transport Corp*., 296 NLRB 1213 (1989). See also section 5-800, infra.

In *Metal Sales Mfg.*, 310 NLRB 597 (1993), the Board permitted the late filing of an affidavit attesting to the dates the employees signed the showing of interest.

5-200 Nature of Evidence of Interest

324-4040-3300 et seq.

324-8025

590-7550

The most commonly submitted type of evidence of interest consists of cards on which employees apply for membership in the labor organization and/or authorize it to represent them.

Cards which were neither applications for membership nor specific authorizations to represent, but merely asked the Board to conduct an election, were held to suffice as evidence of interest when the cards stated that the purpose of seeking an election was for the union to be certified. *Potomac Electric Co*., 111 NLRB 553, 554–555 (1955).

Other types of evidence of interest are also used, particularly when intervention is sought. Thus, a current contract constitutes evidence of interest. *Brown-Ely Co.*, 87 NLRB 27 fn. 2 (1950). A recently expired contract may also serve as such evidence. *Bush Terminal Co*., 121 NLRB 1170 fn. 1 (1958). Where a labor organization has a contract covering the employer's plant at another location and claims that the contract is applicable to the new plant, it has sufficient evidence of interest to warrant intervention. Intervention has also been granted based on agreements between the intervenors and a trade association that had been adopted by the employer in the proceeding, each signatory union being regarded as having "at least a colorable interest in certain of the employees involved." *W. Horace Williams Co.*, 130 NLRB 223 fn. 2 (1961).

It is clear, of course, that a contract found in an unfair labor practice proceeding to have been executed in violation of Section 8(a)(2) of the Act may *not* serve as evidence of interest. *Bowman Transportation,* 120 NLRB 1147 fn. 7 (1958); see also *Halben Chemical Co.*, 124 NLRB 1431 (1959).

5-210 Construction Industry

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board announced new unfair labor practice rules with respect to 8(f) prehire agreements in the construction industry. The Board noted that the second proviso to Section 8(f) provides that these agreements do not bar an election petition, and held that during the term of an 8(f) agreement, no showing of interest is required for an RM election petition filed by the signatory employer. The Board has decided to apply the same rule to an RC petition filed by the signatory union during the term of an 8(f) agreement or shortly after the expiration. *Stockton Roofing Co.*, 304 NLRB 699 (1991).

In *Pike Co.*, 314 NLRB 691 (1994), the Board determined that the numerical sufficiency of a showing of interest in the construction industry is based on the number of unit employees employed at the time the petition is filed. In doing so, the Board rejected a contention that the showing should be based on the number of employees eligible to vote under the formula announced in *Steiny & Co.,* 308 NLRB 1323 (1992), discussed in section 23-420, infra.

For other construction industry issues, see sections 9-211, 9-1000, 10-600–10-700, and 15-130.

5-300 Designee

324-8025-5000

324-8075

530-2075

Issues are sometimes raised as to whether an authorization designating one labor organization may serve as valid evidence of interest for another.

The general policy has been stated as follows: "The Board has always accepted showing-of-interest cards designating a Labor Organization affiliated with . . . the labor organization appearing on the ballot.'' *New Hotel Monteleone*, 127 NLRB 1092, 1094 (1960) (see also cases in fn. 6 of this decision), and *Monmouth Medical Center*, 247 NLRB 508 (1980). Note, however that in *Woods Quality Cabinetry Co.,* 340 NLRB 1355 (2003), the Board set aside an election where the petitioner was incorrectly designated as an affiliate of the AFL–CIO.

A designation of a parent organization is a valid designation of its affiliate. Thus, cards designating the AFL–CIO have been held to be valid evidence of interest for an international union affiliated with the AFL–CIO. *Up-To-Date Laundry*, 124 NLRB 247 (1959); see also *Wm. P. McDonald Corp.*, 83 NLRB 427 fn. 2 (1949); *General Shoe Corp.*, 113 NLRB 905, 905–906 (1955). Similarly, cards designating an international have been accepted as valid evidence submitted by one of its locals. *Norfolk Southern Bus Corp.*, 76 NLRB 488, 489–490 (1948). Designations of an organizing committee that was acting on behalf of the petitioner constitute valid evidence of interest on behalf of the latter. *Cab Service & Parts Corp.*, 114 NLRB 1294 fn. 2 (1956). But see *O & T Warehousing Co*., 240 NLRB 386 (1979), in which the Board declined to place on the ballot "AFL–CIO and/or its Appropriate Affiliate,'' requiring the parent organization either to place itself on the ballot or designate a specific affiliate to appear on the ballot in advance of the election.

Two or more labor organizations may join together to file a petition as joint petitioners or to intervene in a proceeding. Authorization cards designating only one petitioner are sufficient to establish the interest of joint petitioners, and it is immaterial whether the cards indicate a desire for joint or individual representation. "We are persuaded that when 30 percent of the employees in a bargaining unit have indicated a desire to be represented by one or the other or two unions, and the two unions then offer themselves as joint representatives of the employees, the petitioning unions have demonstrated enough employee interest in their attaining representative status to warrant holding an election.'' *St. Louis Packing Co.*, 169 NLRB 1106, 1107 (1968). See also *Mid-South Packers*, 120 NLRB 495 fn. 1 (1958); *Stickless Corp*., 115 NLRB 979, 980 (1956).

In such circumstances, the jointly acting labor organizations are jointly certified if successful in the election, and the employer may then insist that they, in fact, bargain jointly for the employees in question in a single unit. *Mid-South Packers*, supra. If testimony at the hearing indicates that in fact the joint petitioners intervened to represent groups of employees separately, the Board will dismiss the petition. *Automatic Heating Co.*, 194 NLRB 1065 (1972); *Suburban Newspaper Publications*, 230 NLRB 1215 (1977).

For further discussion of joint representation, see section 6-370, infra.

5-400 Validity of Designations

324-8025

324-8075

530-2075

737-4267-7500

Evidence of interest consisting of authorizations from employees must, of course, bear the valid signatures of such employees. Signatures are presumed to be genuine unless there is some indication to the contrary.

An employee's subjective state of mind in signing a union card cannot negate the clear statement on the card that the signer is designating the union as that employee's bargaining agent. *Gary Steel Products Corp.*, 144 NLRB 1160 (1963). However, inducements offered to obtain authorizations may be brought into issue. In one case, the Board held that cards submitted by the petitioner, which had been signed by supporters of the incumbent union, were not invalid because solicited through appeals to sign to get an election, in which the petitioner's literature clearly reflected that the petitioner's purpose in seeking such authorizations was to supplant the incumbent. *Potomac Electric Co.*, 111 NLRB 553 (1955). These issues are not, as noted earlier, litigable. See CHM section 11028 et seq. for procedures for challenging showing. See also *General Dynamics Corp.*, 213 NLRB 851, 853 (1974), concerning the appropriate timing of the challenge.

Issues have arisen involving the validity of designations because of alleged supervisory participation in securing the showing of interest and allegations to that effect have been found meritorious where in fact such participation existed. Thus, when a supervisor participated in obtaining the signatures of all the employees whose cards were submitted as evidence of interest, the petition was dismissed. *Southeastern Newspapers*, 129 NLRB 311 (1961). In that case, the employer's motion to dismiss was treated "as a request for administrative investigation of the petitioner's showing.'' Cards signed at a meeting at which a supervisor vigorously espoused the petitioner's cause were not counted as valid evidence of interest. *Wolfe Metal Products Corp.*, 119 NLRB 659 (1958). See also *Desilu Productions*, 106 NLRB 179 (1953). More recently, the Board has characterized this policy as a "bright line rule" of excluding all cards directly solicited by a supervisor. *Dejana Industries,* 336 NLRB 1202 (2001).

In *Catholic Community Services*, 254 NLRB 763 (1981), the Board found no supervisory taint when supervisors and unit employees signed a letter endorsing the need for a union and an alleged supervisor sat at petitioner counsel's table during the representation hearing. In a decertification proceeding, where the supervisor is a member of the bargaining unit and there is no showing that his/her solicitation of the showing of interest was at the behest of the employer, the Board will not find taint of the showing of interest. *Los Alamitos Medical Center*, 287 NLRB 415, 417 (1987).

In a case which the Regional Director referred to the Board for an administrative determination of a showing of interest, the Board found that the individual alleged to have participated in obtaining all the authorization cards was not a supervisor within the meaning of the Act "during the period in which the authorization cards were solicited,'' and consequently his participation did not taint or otherwise cast a doubt on the uncoerced nature of the showing of interest. *L. A. Benson Co.*, 154 NLRB 1371 (1965). See also *Silver Spur Casino*, 270 NLRB 1067 (1984).

See also sections 24-110 and 24-328 for discussion of supervisory solicitation of support for union as objectionable conduct.

A showing of interest is not subject to attack on the ground that the cards on which it is based have been revoked or withdrawn. "Such an attack,'' said the Board, "has no bearing on the validity of the original showing but merely raises the question as to whether particular employees

have changed their minds about union representation. That question can best be resolved on the basis of an election by secret ballot.'' *General Dynamics Corp.*, 175 NLRB 1035 (1969). See also *Allied Chemical Corp.*, 165 NLRB 235 fn. 2 (1967); *Vent Control, Inc*., 126 NLRB 1134 (1960).

Cards signed for more than one labor organization may be counted in determining showing of interest. "There is no reason why employees, if they so desire, may not join more than one labor organization.'' The election will determine which labor organization, if any, the employees wish to represent them. *Brooklyn Gas Co.*, 110 NLRB 18, 20 (1955).

5-500 Currency and Dating of Designations

324-8050

530-2075-6700

The general rule is that the individual authorization must be dated and must be current. *A. Werman & Sons*, 114 NLRB 629 (1956). The requirement for dating the showing may be accomplished by affidavit either submitted with the showing itself or timely filed thereafter. *Dart Container Corp*., 294 NLRB 798 (1989). See also *Metal Sales Mfg.*, 310 NLRB 597 (1993), where the Board permitted the late filing of an affidavit attesting to the dates of the showing.

Questions have arisen, however, as to what is meant by "current.'' Thus, it has been held that cards dated more than a year prior to the filing of the petition were sufficiently current. *Carey Mfg. Co.*, 69 NLRB 224 fn. 4 (1946); see also *Northern Trust Co.*, 69 NLRB 652 fn. 4 (1946) (10 months), and *Covenant Aviation Security, LLC,* 349 NLRB 699 (2007), citing *Carey Mfg.* with approval.

Evidence of interest submitted in a prior Board proceeding which had been withdrawn was held to be valid evidence of interest in a new case more than 2 months later. *Cleveland Cliffs Iron Co.*, 117 NLRB 668 (1957); see also *Knox Glass Bottle Co.*, 101 NLRB 36 fn. 1 (1953). However, cards dated prior to a State-conducted election, which had been lost by the petitioner 3 months prior to the Board proceeding, were held to be insufficient evidence of interest. *King Brooks, Inc.*, 84 NLRB 652, 652–653 (1949). In *Big Y Foods*, 238 NLRB 855 fn. 4 (1978), a contention that the showing of interest was stale was rejected when the delay in processing the petition to an election was attributable to the employer's unfair labor practices. Similarly, the Board rejected a suggestion that a new showing be made because of a lapse of time and turnover among employees between the first and directed second election. *Sheraton Hotel Waterbury*, 316 NLRB 238 (1995). See also *Freund Baking Co*., 330 NLRB 17 (1999).

The Board will accept a showing of interest gathered prior to the time a question concerning representation could be raised. *Covenant Aviation Security,* supra.

Under certain circumstances, labor organizations are permitted to intervene after the close of the hearing. However, they must meet the requirements for an intervenor's showing of interest as of the time of the hearing in the case. *Gary Steel Products Corp.*, 127 NLRB 1170 fn. 3 (1960); see also *Transcontinental Bus System,* 119 NLRB 1840 fn. 3 (1958); *United Boat Service Corp.,* 55 NLRB 671 (1944). See also *Crown Nursing Home Associates*, 299 NLRB 512 (1990).

5-600 Quantitative Sufficiency

324-0187

324-4020

As already indicated, a showing of 30 percent of the employees in the appropriate unit is normally required of a petitioner. *Pearl Packing Co.*, 116 NLRB 1489, 1489–1490 (1957); see also *S. H. Kress & Co.*, 137 NLRB 1244, 1249 (1962).

The Board has rejected contentions that a larger showing of interest should be required when the petitioner has previously lost several elections. *Sheffield Corp.*, 134 NLRB 1101 fn. 4 (1962); *Barber-Colman Co.*, 130 NLRB 478 fn. 3 (1961). When cards attacked because of alleged

unreliability are insufficient in number to reduce a petitioner's showing of interest to less than 30 percent, the showing is accepted as adequate. *Pearl Packing Co.*, supra.

A showing of interest of less than 30 percent was found to be adequate in which (1) the petitioner had represented most of the classifications in the requested unit for 20 years; (2) its last contract had contained a valid union-security provision requiring the employees to become and remain members; and (3) the Board, in refusing to resolve the unit issues pursuant to a motion for clarification, had already advised the petitioner that it would entertain a petition for certification. *FWD Corp*., 138 NLRB 386 (1962) (see also cases cited in fn. 3 of this decision).

Board practice does not require a new showing of interest in the case of expanding units. *Avondale Shipyards*, 174 NLRB 73 (1969).

No evidence of interest is required when the labor organization seeks to add employees to an existing certified unit as an accretion to such unit. *Kennametal, Inc*., 132 NLRB 194 fn. 4 (1961). In *Duke Power Co*., 191 NLRB 308, 311 fn. 10 (1971), the Board held that there is no requirement that the employees' interest in decertification be expressed on the Board's standard forms.

A change in ownership of the employer during the organizing campaign does not require a new showing of interest. *New Laxton Coal Co*., 134 NLRB 927 (1961).

5-610 No Showing of Interest in 8(b)(7)(C) Cases

578-8075-6056

Despite the statutory provision noted above requiring that the petition be supported by a substantial number of employees, Section 8(b)(7)(C) of the Act provides that, when a petition is filed in conjunction with an unfair labor practice charge alleging a violation of this section, the Board shall direct an election in the appropriate unit without regard to the absence of a showing of substantial interest. Accordingly, in these circumstances, no showing of interest is required.

See section 7-150 for further information.

5-620 A Specific 30-Percent Requirement in UD Cases

324-4060-5000

On the other hand, Section 9(e)(1) of the Act establishes a specific 30-percent requirement in support of petitions to rescind a labor organization's authority to enter into collective-bargaining contracts requiring membership in the union as a condition of employment, as set forth in Section 8(a)(3) of the Act. See *Covenant Aviation Security, LLC,* supra, where the Board rejected the union's contention that the signature underlying the showing of interest must postdate the effective union-security provisions.

5-630 Employer Petitions

316-6725

324-4020-5000

When the petition is filed by an employer, pursuant to Section 9(c)(1)(B) of the Act, no evidence of representation on the part of the labor organization claiming a majority is required. *Felton Oil Co.*, 78 NLRB 1033, 1035–1036 (1948). This is true of any intervenor claiming to represent a majority of the employees in the unit involved in the petition. See also *General Electric Co.*, 89 NLRB 726, 726–727 (1950). It is also true even if the employer seeks to withdraw its petition but a union claiming to represent a majority in the unit desires an election. *International Aluminum Corp.*, 117 NLRB 1221 (1957).

See also discussions of 8(f) agreements under section 5-210 in this chapter, supra.

5-640 Showing of Interest for Intervention

324-4040

Administratively, the Board has adopted the following policies with respect to the showing of interest of intervenors:

(a) If an intervenor has less than a 10-percent showing of interest and the other parties are willing to consent to an election, the consent-election agreement is approved, and the intervenor has the right to appear as a choice on the ballot.

(b) If an intervenor has more than a 10-percent showing and is unwilling to consent to an election, even though the other parties are willing, a consent-election agreement will not be approved, and the matter must go to hearing (unless dismissal is required by some other factor).

(c) "Intervention'' based on more than 30-percent showing amounts to a cross-petition which permits the union to seek a unit differing in substance from that of the original peitition.

An intervenor seeking a unit different from that sought by the petitioner must make a petitioner's showing of interest in the unit it seeks. *Great Atlantic & Pacific Tea Co.,* 130 NLRB 226, 226–227 (1961).

When the petitioner sought an election in a single unit of employees in two departments and the intervenor sought to represent the employees in separate departmental units, but the intervenor had failed to make the necessary 30-percent showing among the employees in either department, the Board did not direct elections in separate units, but placed the intervenor's name on the ballot in the overall unit since it had made some showing of interest among the employees sought. *Southern Radio & Television Equipment Co.*, 107 NLRB 216, 216–217 (1954). When intervention was sought for the purpose of securing a separate election in a craft unit, severing it from an existing larger unit, the union was required to make a 30-percent showing of interest in the craft unit. *Boeing Airplane Co.*, 86 NLRB 368 (1949).

If the petitioner lacks a sufficient interest in a unit found appropriate, but an intervenor possesses a petitioner's interest and wishes to proceed to an election, the petition will not be dismissed, nor will a withdrawal request be granted, but the intervenor will be treated as a cross-petitioner. *Borden Co.*, 120 NLRB 1447, 1449 (1958); *Seaboard Machinery Corp.*, 98 NLRB 537 (1951). In such circumstances, the petitioner may be placed on the ballot as a choice in any unit in which it has some evidence of interest, but may not be on the ballot for any unit in which it has no evidence of interest. *Borden Co.*, supra.

In *Crown Nursing Home Associates*, 299 NLRB 512 (1990), the Board held that an intervenor has the right to make an additional showing of interest when the original petitioner sought to withdraw because another incumbent union had served a contract. The additional showing was required to be submitted timely but was not required to predate the execution of the contract.

See also section 3-830, supra.

5-700 Relation to Bargaining Unit

In all cases, the showing of interest must relate to the bargaining unit involved. *Esso Standard Oil Co*., 124 NLRB 1383, 1385 (1959).

5-800 Date for Computation

324-4090

It is apparent that the computation as to the showing of interest must be made at some certain date or dates. Normally, this is as of the date the petition was filed, or the showing may be computed from the payroll period immediately preceding the filing of the petition. *Brunswick*

Quick Freezer, 117 NLRB 662 (1957). This is true even in industries when there is fluctuating employment. *Higgins*, *Inc*., 111 NLRB 797 fn. 2 (1955); *Trenton Foods*, 101 NLRB 1769 (1953).

When the unit found appropriate differs from that sought and a new check of the showing of interest is necessary, the Union may be given reasonable time to procure additional showing of interest. CHM section 11031.2. See also *Brown Transport Corp.*, 296 NLRB 1213 (1989); *Casale Industries*, 311 NLRB 951 (1993); and *Alamo Rent-A-Car*, 330 NLRB 897, 899 fn. 9 (2000).

In seasonal industries, the showing of interest may be made as of the time of filing the petition, even though the number of employees at such time is only a small percentage of the complement at the seasonal peak. *J. J. Crosetti Co.*, 98 NLRB 268 fn. 1 (1951). Accord: *Pike Co.,* 314 NLRB 691 (1994) (construction industry).

If there are no employees employed at the time of filing the petition, the showing of interest may be made among the employees of the previous season if it is expected that they will be recalled during the new season. *Grower-Shipper Vegetable Assn.,* 112 NLRB 807 (1955); cf. *Holly Sugar Corp.*, 94 NLRB 1209 (1951). In a seasonal industry, a significant rate of reemployment will permit the use of the previous periods showing of interest. *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974).

Unusual circumstances occasionally require a different policy. Thus, when the petition was prematurely filed (in a nonseasonal industry) and a later election was directed, a current showing of interest was required. *Mrs. Tucker's Products*, 106 NLRB 533, 535 (1953). When the petitioner had been found in an unfair labor practice proceeding to have received employer assistance in violation of Section 8(a) (2), an adequate showing of interest had to be made with cards obtained after the petitioner's illegal status as the representative of the employees had been "effectively cut off.'' *Halben Chemical Co.*, 124 NLRB 1431 (1959). See also *Bowman Transportation*, 120 NLRB 1147, 1150 fn. 7 (1958); and *Share Group, Inc*., 323 NLRB 704 (1997).

In *Gaylord Bag Co.*, 313 NLRB 306 (1993), the Board restated its rule that the showing was not litigable. In reviewing the Regional Director's objections determination the Board assumed that a contention concerning the showing was timely and went on to conclude that the showing was adequate even assuming the employer's contentions were correct. Thus, the Board noted that even discounting the cards of employees allegedly affected by the union's conduct, there were sufficient remaining cards to satisfy the showing. It is important to note here that the Board's discussion of the adequacy of the showing was not essential to its determination of the case because as the Board noted "after the election the adequacy of the showing is irrelevant.'' See also *City Stationery, Inc.,* 340 NLRB 523 (2003).

5-900 Investigations of Showing of Interest

324-2000

393-6814

530-2075-6767

737-2850-9900

"An integral and essential element of the Board's showing-of-interest rule is the nonlitigability of a petitioner's evidence as to such interest. The Board reserves to itself the function of investigating such claims, and in its investigation it endeavors to keep the identity of the employees involved secret from the employer and other participating labor organizations. . . . The Board's requirement that petitions be supported by a 30-percent showing of interest gives rise to no special obligation or right on the part of employers.'' *S. H. Kress & Co.*, 137 NLRB 1244, 1248–1249 (1962).

In keeping with these policies, a hearing officer is barred by the Board's Rules and Regulations from producing the evidence of interest. *Plains Cooperative Oil Mill*, 123 NLRB

1709, 1711 (1959), and the Board refused to supply cards in response to a subpoena. *Irving v. DiLapi*, 600 F.2d 1027 (2d Cir. 1979). The manner, method, and procedure in determining the showing of interest is not for disclosure. *Pacific Gas & Electric Co.*, 97 NLRB 1397 fn. 3 (1951). In *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), the Board, on review, found sufficient evidence of lack of a showing of interest to dismiss the petition without a remand to the Regional Director.

When a party contends that a showing of interest was obtained by fraud, duress, or coercion, the proper procedure is to submit to the Regional Director any proof it might have. *Perdue Farms, Inc*., 328 NLRB 909 (1999); and *Pearl Packing Co.*, 116 NLRB 1489 (1957). See also *Columbia Records*, 125 NLRB 1161 (1960); and *Waste Management of New York*, 323 NLRB 590 (1997). Such conduct may also be considered as objectionable. See *St. Peter More-4*, 327 NLRB 878 (1999), and *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 (1999). Similarly, any attack on the genuineness of signatures should be made by submitting available evidence to the Regional Director within 5 days after the close of the hearing. *Georgia Kraft Co.*, 120 NLRB 806 (1958); *Phillips Petroleum Co.*, 130 NLRB 895 fn. 2 (1961). See also *Tung-Sol Electric*, 120 NLRB 1674, 1678 (1958). See also CHM section 11028.1, et seq.

When evidence is submitted to the Regional Director which gives reasonable cause for believing that the showing of interest may have been invalidated by fraud or otherwise, an administrative investigation will be made. See, for example, *Perdue Farms,* supra; *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Georgia Kraft Co.*, supra. However, an administrative investigation will not be made unless the allegations of invalidity are accompanied by supporting evidence. *Goldblatt Bros*., 118 NLRB 643 fn. 1 (1957). Thus, affidavits by more than 70 percent of the unit to the effect that the affiants had not authorized the petitioner to represent them warranted an administrative investigation. *Globe Iron Foundry*, supra. Compare *General Shoe Corp.,* 114 NLRB 381, 382–383 (1956), in which such denials were from less than 70 percent of the unit.

A request for a check of the showing to determine its quantative sufficiency must be made timely, viz. "only at or around the petition is filed" *Community Affairs, Inc*., 326 NLRB 311 (1998).

The above-administrative procedures parallel, but do not impinge on, the general rule that the Board normally refuses to receive evidence in representation cases that signatures on cards were unlawfully obtained or were otherwise invalid or fraudulent, but that such issues may be litigated, on appropriate charges and a complaint, in an unfair labor practice proceeding. *Dale's Super Valu*, 181 NLRB 698 (1970). See also *Radio Corp. of America*, 89 NLRB 699 fn. 5 (1950); *White River Lumber Co.*, 88 NLRB 158 fn. 3 (1950); *Clarostat Mfg. Co.*, 88 NLRB 723 fn. 2 (1950).

6. QUALIFICATION OF REPRESENTATIVE

177-3200

Section 9(c)(1)(A) provides that employees may be represented "by any employee or group of employees or any individual or labor organization." An election is directed and a certification is issued unless the proposed bargaining representative fails to qualify as a bona fide representative of the employees. Specific statutory provisions defining "labor organization" and, in the case of guards, creating a limitation with respect to their representative are treated here. The Board has also developed administrative policies for determining the qualification of representatives, and these, too, are discussed in this chapter.

6-100 The Statutory Definition of Labor Organization

177-3925

347-4030

Section 2(5) defines "labor organization" as follows:

> 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 *Litton Business Systems*, 199 NLRB 354 (1972), and *Machinists*, 159 NLRB 137 (1966), for Board findings of a "labor organization."

6-110 Application of the Statutory Definition

308-6000

339-2500 et seq.

347-4030

The fact that a union is in its early stages of development and has not as yet won representation rights does not disqualify it as a labor organization. Thus, the Board has found that the petitioner existed for the statutory purposes, although those purposes had not yet come to fruition because employees had participated in its organization and subsequent activities even though the latter were limited by the organization's lack of representation rights. *Michigan Bell Telephone Co.*, 182 NLRB 632 (1970). See also *Early California Industries*, 195 NLRB 671, 674 (1972).

When there was no showing that the intervenor restricted its membership on religious grounds or that it would not accord adequate representation to all unit employees, the intervenor was qualified to act as representative. *Town & Country*, 194 NLRB 1135 (1972).

Despite the lack of structural formality manifested by the absence of a constitution or bylaws and by the failure to collect dues or initiation fees, an organization which admitted employees to membership, was established for the purpose of representing its membership, and intended to do so if certified was found to be a labor organization. *Butler Mfg. Co*., 167 NLRB 308 (1967). See also *Yale University*, 184 NLRB 860 (1970); and *Stewart-Warner Corp*., 123 NLRB 447 (1959). See also *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). But a group of five employees who engaged in a concerted refusal to see patients, was not a labor organization and thus, not bound by the notice provisions of Section 8(g). *Vencare Ancillary Services*, 334 NLRB 965 (2001).

In *East Dayton Tool Co.*, 194 NLRB 266 (1972), the Board, after finding the petitioner to be a "labor organization" within the Act's definition, also held that the fact that the petitioner's organizers were members of the former independent union before its affiliation with the intervenor and the fact that the petitioner adopted a name similar to that of the former union did

not constitute the petitioner the same labor organization as the intervenor nor preclude the petitioner from filing a petition.

When the intervenor contended that the petitioner should not be recognized as a labor organization because it did not intend to fulfill its bargaining obligation if certified, but to affiliate with another labor organization immediately after certification, the Board found it premature to consider such possibility. Rather, the Board held that after certification it could , pursuant to its authority to police its certifications, examine the propriety of a post certification affiliation if an appropriate motion were filed. *Butler Mfg. Co.*, supra; *Guardian Container Co.*, 174 NLRB 34 (1969). The Board applied the same reasoning when it dismissed an employer's contention that the petitioner was not a labor organization because it had "bound itself by contract, custom, and practice" with the employer's competitors "not to bargain or negotiate any other or different terms of employment from those embodied in Petitioner's national contract." *Margaret-Peerless Coal Co.*, 173 NLRB 72 (1969). See also *Gino Morena Enterprises*, 181 NLRB 808 (1970), in which there was a premature contention that the petitioner did not fulfill the statutory requirement of employee participation.

In interpreting Section 2(5) of the Act, the Board, in *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851–852 (1962), stated its basic policy as follows:

> In order to be a labor organization under Section 2(5) of the Act, two things are required: first, it must be an organization in which employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. If an organization fulfills these two requirements, the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

Accord: *Coinmach Laundry Corp.,* 337 NLRB 1286 (2003).

In *Electromation, Inc.,* 309 NLRB 990 (1992), the Board set out its analysis of what is contemplated by the phrase "dealing with." This analysis is fully discussed in *Syracuse University,* 350 NLRB 755 (2007), holding that the employer's Staff Complaint Process is not a labor organization because its purpose is adjudicative and it does not make proposals to management or receive counterproposals from management.

See also *Harrah's Marina Hotel*, 267 NLRB 1007 (1983), in which the Board held that the petitioner was not a labor organization. The employer contended that the petitioner was not a labor organization because of criminal activities of its officials and because it was not democratic. The Board found that the petitioner did not meet the statutory definition of Section 2(5) of the Act. See also *Mohawk Flush Doors*, 281 NLRB 410 (1986).

An exclusive bargaining representative is empowered to designate and authorize agents including other labor organizations to act on its behalf. *CCI Construction Co.,* 326 NLRB 1319 (1998).

6-120 Impact of Labor-Management Reporting and Disclosure Act of 1959

133-2500

Violations of the Labor-Management Reporting and Disclosure Act of 1959 do not affect Board policy, since Section 603(b) of the Act explicitly provides: " nor shall anything contained in [Titles I through VI] . . . of this Act be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

An organization's (or its agent's) possible failure to comply with the Landrum-Griffin Act should be litigated in the appropriate forum under that Act, and not by the indirect and potentially

duplicative means of the Board's consideration in the course of determining the union's status under Section 2(5) of the Act. See *Neiser Supermarkets*, 142 NLRB 513 fn. 3 (1963); *Harlem River Consumers Cooperative*, 191 NLRB 314 (1971); and *Caesar's Palace*, 194 NLRB 818 (1972).

A violation of the Labor-Management Relations Act of 1947 was likewise held not to disqualify a petitioner from filing a representation petition. *Chicago Pottery Co.*, 136 NLRB 1247 (1962). As stated in *Lane Wells Co.*, 79 NLRB 252, 254 (1948), "excepting only the few restrictions explicitly or implicitly present in the Act, we find nothing in Section 9, or elsewhere, which vests in the Board any general authority to subtract from the rights of employees to select any labor organization they wish as exclusive bargaining representative." See also *National Van Lines*, 117 NLRB 1213 (1957).

6-130 Public Policy Considerations

339-7527-8300

385-5050-7500

393-7016

530-8080

To the few statutory restrictions, however, may be added the constitutional proscription, through the due-process clause of the Fifth Amendment, against any recognition or enforcement of illegal discrimination by a Federal agency. Thus, in *Hughes Tool Co*., 147 NLRB 1573 (1964), the Board held that unions which exclude employees from membership on racial grounds may not obtain or retain a certified status under the Act. Similarly, the Board has indicated that an unlawful employment practice involving sex discrimination by a labor organization would disqualify that organization from representing a group of employees. See *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 210 NLRB 943 (1974).

In *NLRB v. Mansion House Management Corp.*, 473 F.2d 471 (8th Cir. 1973), the court held that, when an employer in good-faith raises the issue of union racial discrimination as a defense to an 8(a)(5) charge, the Board should inquire whether the union has taken affirmative action to undo its discriminatory practices, and that the Board's remedial machinery cannot be available to a union which is unwilling to correct past practices of racial discrimination. Because the policy underlying this decision implicates the Board's issuance of a certification as well as bargaining orders, the Board, in *Handy Andy, Inc.*, 228 NLRB 447 (1977), held that unfair labor practice procedures are available for dealing with allegations of sex or race discrimination, but that such allegations will not be considered in representation proceedings. See also *Guardian Armored Assets, LLC,* 337 NLRB 556 (2002).

6-200 Statutory Limitation as to "Guards"

339-7575-7550 et seq.

385-5050-8700

401-2575-2800

Section 9(b)(3) provides that the Board shall not certify a labor organization "as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Thus, a petition for employees found to be "guards" was dismissed when the union, which sought to represent them, also admitted to membership employees other than guards, and therefore could not be certified under the Act as statutory representative. *A.D.T. Co.*, 112 NLRB 80 (1955); and *Wackenhut Corp.*, 169 NLRB 398 (1968). On the other hand, the Board will refuse to litigate the collateral issue of whether employees represented by the union elsewhere are guards. *Rapid Armored Corp*., 323 NLRB 709 (1997).

However, a union which accepts its own nonguard employees into the union is not precluded from representing a unit of guards as a union cannot bargain for its own employees. *Sentry Investigation Corp.*, 198 NLRB 1074 (1972). Municipal police officers are not considered "employees other than guards" for purposes of disqualifying a union to represent guards. *Children's Hospital of Michigan*, 299 NLRB 430 (1990).

In *University of Chicago*, 272 NLRB 873 (1984), the Board reversed its practice of permitting nonguard units to intervene in an election sought by a guard union. In the Board's view such a practice was inconsistent with the statutory proscription of Section 9(b)(3). Nor will the Board permit a nonguard unit to enjoy benefits of its unit clarification procedures. Thus, in *Brink's Inc.*, 272 NLRB 868 (1984), the Board dismissed a UC petition. Although it acknowledged that an employer could legally recognize a nonguard union, the Board concluded that use of the Board's processes to further that end should not be permitted.

An indirect affiliation exists when a nonguard union participates in guard affairs to such an extent and for such a duration as to indicate that the guard union has lost the freedom to formulate its own policies. The Board has applied this standard with substantial latitude, particularly when guard unions were in their formative stages. *Magnavox Co*., 97 NLRB 1111 (1951); and *Wells Fargo Guard Services*, 236 NLRB 1196 (1978). Thus, no indirect affiliation was found in which a guard union had free use of a nonguard union's meeting hall (*International Harvester Co.*, 81 NLRB 374 (1949)); when a guard union shared office space with a nonguard union (*Brooklyn Piers, Inc.*, 88 NLRB 1364 (1950)); when a guard union was assisted in preparing unfair labor practice charges and in selecting an attorney (*Midvale Co*., 114 NLRB 372 (1956)); when a nonguard union assisted a guard union in soliciting authorization cards (*Inspiration Consolidated Copper Co.*, 142 NLRB 53 (1963)); and when a guard union and an employer association voluntarily agreed to participate in a pension trust fund arrangement contractually established by the employer association and a nonguard union (*New York Hilton*, 193 NLRB 313 (1971)).

But when a guard union has continued to receive advice and/or financial aid from a nonguard union after the organizational stage, whether or not the nonguard union represents employees in the same plant, Section 9(b)(3) prohibits certification and the Board will revoke the certification of a previously certified union. *Mack Mfg. Corp.*, 107 NLRB 209 (1954); *International Harvester Co*, 145 NLRB 1747 (1964); *Stewart-Warner Corp.*, 273 NLRB 1736 (1985); and *Brink's Inc.*, 274 NLRB 970 (1985). Compare *Lee Adjustment Center*, 325 NLRB 375 (1998), where indirect affiliation was severed before bargaining. See also *Wackenhut Corp. v. NLRB*, 178 F.3d 543 (D.C. Cir. 1999). Note that the language of Section 9(b)(3) is not limited to the possible divided loyalty situation in a particular plant. *International Harvester Co.*, supra.

Actual rather than speculative membership of nonguards is required to refuse certification to the union. The noncertifiability of a guard union must be shown by "definitive evidence." *Children's Hospital of Michigan*, 317 NLRB 580 (1995). The record must establish that the union admits nonguards in order to support disqualification. *Elite Protective & Security Services*, 300 NLRB 832 (1990). The mere fact that the union also represents police officers in the public sector does not present a conflict of interest. *Guardian Armored Assets, LLC,* 337 NLRB 556 (2002).

In *Brink's, Inc*., 281 NLRB 468 (1986), the Board described the nature of the material that can be properly subpoenaed as part of an inquiry into affiliation.

For other guard issues, see section 18-200, infra, and section 18-230 for further discussion of indirect affiliation. Note also the discussion of the effect of a union's constitution in deciding guard issues at section 6-310, infra.

6-300 Administrative Policy Considerations

6-310 A Union's Constitution and Bylaws

339-7525

339-7562

Generally, the willingness of an organization or person to represent employees is controlling, not the eligibility of employees for membership in the organization or the organization's constitutional jurisdiction. *NAPA New York Warehouse,* 75 NLRB 1269 (1948); *"M" System*, 115 NLRB 1316 fn. 2 (1956); and *Community Service Publishing*, 216 NLRB 997 (1975). See also *Kodiak Island Hospital*, 244 NLRB 929 (1979), in which a nurses' association accorded full membership only to registered nurses, but sought to represent other employees as well. Thus, the fact that a union is precluded by its constitution from representing the employees involved does not affect its ability to file a representation petition for those employees and, if it wins the election, to become their bargaining representative. *Hazelton Laboratories*, 136 NLRB 1609 (1962); and *Big "N," Department Store No. 307,* 200 NLRB 935 fn. 3 (1972).

When certain provisions of a petitioner's constitution indicated that its membership was to be drawn from the ranks of Government employees, who are not "employees" within the meaning of Section 2(3) of the Act, but the "import of these provisions [did] not restrict membership exclusively to such government employees" and numerous statutory employees involved in the representation proceeding were participating, dues-paying members of the petitioner, the Board found no basis for disqualification. *Gino Morena Enterprises*, 181 NLRB 808 (1970). Compare *United Trucks & Bus Service Co.*, 257 NLRB 343 (1982), in which the petition was dismissed because the union admitted only "public employees" to membership. See also *Children's Hospital of Michigan*, 299 NLRB 430 (1990), in which the Board found that affiliation with public sector unions was not disqualifying. In a later *Children's Hospital* decision, supra, the Board repeated its policy of considering a union's constitutional restriction against representing nonguards as evidence of certifiability of a guard union.

In the absence of proof that the union will not accord effective representation to all employees in the unit, the Board does not inquire into a labor organization's constitution or charter. *Ditto*, *Inc*., 126 NLRB 135 fn. 2 (1960). Thus, when it was alleged that a union was fraudulently chartered, the Board held that "contentions such as this, having to do with the alleged illegality of the formation of a labor organization, are internal union matters and do not necessarily affect the capacity of the organization to act as a bargaining representative." *Reed & Rattan Furniture Co.,* 117 NLRB 495, 496 (1957). See also *Gemex Corp.*, 120 NLRB 46 (1958).

However, when, despite the facade of a separate identity, the Board was convinced that the petitioning union was not an independent, autonomous organization devoted to the representation of the employees sought because of the manner in which it was organized and its affairs were being conducted, the burden of going forward with the evidence shifted to petitioner. And when the petitioner failed to rebut the inference that it was fronting for another organization which could not qualify as a representative of the employees involved, the Board disqualified it. *Iowa Packing Co.*, 125 NLRB 1408 (1960). See also *McGraw-Edison Co*., 199 NLRB 1017 (1972), in which the Board permitted inquiry into the union's motivation in filing a petition which was alleged to be an attempt to change affiliation and escape from its agreement. Case discussed in section 7-120, infra.

6-320 Trusteeship

339-2550

The fact that a union is in trusteeship, whether in violation of the Labor-Management Reporting and Disclosure Act or not, does not disqualify it from representing employees as this does not, without more, affect its status as a labor organization within the meaning of the

definition of Section 2(5) of the Act. *Terminal System,* 127 NLRB 979 (1960); *E. Anthony & Sons*, 147 NLRB 204 (1964); *Jat Transportation Corp.*, 128 NLRB 780 (1960); *Dorado Beach Hotel*, 144 NLRB 712, 714 fn. 5 (1963). But see *Illinois Grain Corp.*, 222 NLRB 495 (1976), in which conflicting claims resulting from the trusteeship raised a question concerning representation.

A charter from an international is not essential to a local's continued existence as a labor organization if the conditions of Section 2(5) are satisfied. *Awning Research Institute*, 116 NLRB 505 (1957). See also section 9-410, infra, for a discussion of schism.

6-330 Employer Assistance or Domination and Supervisory Involvement

177-3950-7200 et seq.

339-7550

339-7575-9300

393-6068-9050

A labor organization found, in a prior unfair labor practice proceeding, to have received unlawful employer assistance has no standing to seek a Board-conducted election, and its petition is subject to dismissal. *Halben Chemical Co.*, 124 NLRB 1431 (1959). Such an organization may, of course, file a new petition based on an adequate showing of interest obtained after its illegal status of employee representative has been dissipated. *Sears, Roebuck & Co.,* 112 NLRB 559 (1955).

A fortiori, when an organization has been found to be dominated by the employer, it is deemed incapable of qualifying as a bona fide representative of employees. *Douglas Aircraft Co.,* 53 NLRB 486 (1943). It follows that a supervisor cannot represent employees for purposes of collective bargaining (*Kennecott Copper Corp.*, 98 NLRB 75 (1951)), nor may an organization controlled by supervisors do so (*Brunswick Pulp Co*., 152 NLRB 973 (1965)), nor independent contractors who, by definition, are not employees within the meaning of the Act (*Brunswick Pulp*, supra). In *Apex Tankers Co.*, 257 NLRB 685 (1981), the Board found that a contract was not a bar to a petition when supervisors play a crucial role in the administration of the signatory union.

However, mere membership, limited participation, or the holding of a position of a supervisor in a labor organization does not per se destroy its capacity to act as a bona fide representative. *Allen B. Dumont Laboratories*, 88 NLRB 1296 (1950); and *Associated Dry Goods Corp.*, 117 NLRB 1069 (1957). The crucial factors are substantial participation by employee members, as well as goals determined, and negotiations conducted by them. *International Paper Co.*, 172 NLRB 933 (1968). See particularly *Power Piping Co.*, 291 NLRB 494 (1988), in which the Board reviewed the history of this doctrine and set forth the applicable standard for determining whether supervisory participation is unlawful.

Health care cases, particularly in nurses' units, have presented a number of difficult issues of supervisory participation in the affairs of the petitioning labor organization. Very often nurses' unions are composed of both employee nurses and nurses whose duties clearly qualify them as statutory supervisors. In *Sierra Vista Hospital*, 241 NLRB 631 (1979), the Board set the test for determining whether the membership and participation of these supervisors in the union disqualified the union from being certified as the exclusive representative under Section 9 of the Act.

As described in *Sidney Farber Cancer Institute*, 247 NLRB 1 (1980), disqualification depends:

> (1) Upon whether a supervisor or supervisors employed by the employer were in a position of authority within the labor organization and, if so, upon the role of that individual or individuals in the affairs of the labor organization or;

(2) In the instance of supervisory nurses employed by third-party employers and holding positions of authority, upon some demonstrated connection between the employer of the unit employees concerned and the employer or employers of those supervisors which might affect the bargainging agent's ability to single-mindedly represent the unit employees.

The burden of establishing this conflict is on the party opposing the union's qualification as a labor organization and is a "heavy one." See *Sidney Farber*, supra; *Western Baptist Hospital*, 246 NLRB 170 (1980), and *Highland Hospital*, 288 NLRB 750 (1988), in which the burden was not met and *Exeter Hospital*, 248 NLRB 377 (1980), in which the burden of establishing disqualification was met.

As contentions alleging employer domination or assistance are, in effect, unfair labor practice charges, they may not properly be litigated in representation proceedings (*Bi-States Co*., 117 NLRB 86 (1957)), and evidence in support of such allegations is therefore excluded from proceedings designed to determine a bargaining representative (*Lampcraft Industries*, 127 NLRB 92 (1960); and *John Liber & Co.*, 123 NLRB 1174 (1959)). However, this rule does not prevent a determination of a petitioner's alleged supervisory status, and if petitioner is found to be a supervisor within the meaning of the Act the petition will, of course, be dismissed. *Modern Hard Chrome Service Co*., 124 NLRB 1235 (1959); *Carey Transportation*, 119 NLRB 332 (1958). See also section 7-310 and *Canter's Fairfax Restaurant*, 309 NLRB 883 fn. 2 (1992).

6-340 Nature of Representation

The bona fides of labor organization status is not affected by the fact that both office or clerical employees and production and maintenance employees are represented by the same union. The Board does not interfere with the right of employees to choose whomever they wish to represent them. *Swift & Co.*, 124 NLRB 50 (1959).

6-350 The Union as a Business Rival (Conflict of Interest)

339-7575

385-5050

A labor organization which is also a business rival of an employer is not a proper bargaining representative of employees of that employer. *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1558 (1954). In that case, the union operated an optical business which was in direct competition with the employer whose employees it sought to represent in collective bargaining. The disqualification is based on the latent danger that the union may bargain not for the benefit of unit employees, but for the protection and enhancement of its business interests which are in direct competition with those of the employer at the other side of the bargaining table. *Bambury Fashions,* 179 NLRB 447 (1969); and *Douglas Oil Co.,* 197 NLRB 308 (1972). See also *Visiting Nurses Assn.*, 188 NLRB 155 (1971), in which the union through its affiliates was a business rival of the employer. But the danger must be "clear and present." A plan to engage in an activity that might be competitive and even disqualifying is not sufficient. The plans must have materialized. *Alanis Airport Services*, 316 NLRB 1233 (1995), and *IFS Virgin Island Food Service*, 215 NLRB 174 (1974). In *Detroit Newspapers,* 330 NLRB 505 fn. 2 (2000), the Board refused to find a conflict of interest in the publication of an "interim" newspaper that would shut down once the strike was settled.

The Board declined to apply the *Bausch & Lomb* principle in which it found that the alleged rival business was a cooperative store operated by the union for the use of its members only and could therefore not be regarded as being in competition with the employer. *Associated Dry Goods Corp.*, 150 NLRB 812 fn. 4 (1965). In *Garrison Nursing Home*, 293 NLRB 122 (1989), the Board found no conflict based on past relationships but did find a conflict in which there was a debtor/creditor relationship between the employer and a high official of the petitioner's union.

The Board rejected a contention that a disqualifying conflict existed as a result of a relationship between the petitioning union and a taxicab cooperative. The Board found that the union was not engaged in the transportation industry and that the per capita fees paid to the local by the cooperative were no different than other per capita fees and that the purpose of the relationship was not to bargain collectively but rather to advocate on behalf of the cooperative members in forums other than collective bargaining. *Supershuttle International Denver, Inc*., 357 NLRB No. 19 (2011).

In *Russ Toggs, Inc*., 187 NLRB 134 (1971), the petitioner alone sought to represent a unit of the employer's traveling commission salesmen. The Board directed an election despite the petitioner's affiliation with an association disqualified on the ground of conflict of interest, reasoning that the petitioner had existed as a separate labor organization and had separately represented employees for collective-bargaining purposes. The Board cautioned, however, that its processes might properly be invoked to examine the certification if it subsequently appeared that the petitioner was not acting independently, but as an agent of the association, in its representation of the employees.

Investment of union pension funds in a "competitor" of the employer does not disqualify the petitioning union from acting as bargaining representative. *David Buttrick Co.*, 167 NLRB 438 (1967). Neither do loans by the union's pension fund of the union's international affiliate to a "competitor" of the employer where the local, rather than the international, dominated in dealings with the employer. *H. P. Hood & Sons (Hood I)*, 167 NLRB 437 (1967), and 182 NLRB 194 (1970) (*Hood II*).

In *River Consumers Cooperative*, supra, the intervenor labor organization's business agent had a substantial business interest in a company engaged in promoting and selling certain brand name products to retail outlets, including the employer. The Board held that, although this did not disqualify the union generally from representing employees, it was incompatible with its disinterested representation of the employer's employees. Thus, if the intervenor should win the election, it should not be certified so long as its business agent remained in that capacity in the employer's geographical area. Compare *Teamsters Local 2000*, 321 NLRB 1383 (1996).

When no record evidence supported the contention that the petitioner's parent organization was controlled by individuals other than drivers or owner-drivers and, therefore, the fleet owners, through their membership in the parent organization, did not dominate or control the affairs of petitioner, there was no basis for disqualification. *Tryon Trucking*, 192 NLRB 764 (1971); and *Aetna Freight Lines*, 194 NLRB 740 (1972).

In *American Arbitration Assn.*, 225 NLRB 291 (1976), the Board rejected the employer's contention that the role of the employer as a neutral in labor-management relations precluded representation of its employees or alternatively representation by other than an unaffiliated independent labor organization.

As a general rule, the Board will not find a conflict of interest where the union represents both the employees of the employer and a subcontractor doing business with that employer. In *CMT, Inc*., 333 NLRB 1307 (2001), the Board rejected a contention that the petition should be dismissed where the union was seeking to represent the subcontractors employees and had previously grieved about the subcontracting. The Board in *CMT* noted two cases in which the Board did find a disability conflict. See *Catalytic Industrial Maintenance*, 209 NLRB 641 (1974), and *Valley West Welding Co*., 265 NLRB 1997 (1982). Compare *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB,* 297 F.3d 41 (1st Cir. 2002) (union opposed contracting of public employees' work to private sector).

6-360 The Union as an Employer

177-1683-8750

339-7575-2550

A union is not qualified to act as bargaining representative of employees of another union where both it and the union acting as employer are affiliates of the same international union. *Teamsters Local 249*, 139 NLRB 605, 606 (1962). In that case, the union acting as employer and the petitioner were both subject to the same international's constitution and bylaws which provided for control and participation by the international and the joint council in various activities of the locals, and the international and joint council contributed to the petitioner's organizational expenses. Thus, if the petitioning union were permitted to represent the employees of its coaffiliate, it would, in effect, be permitted to bargain with itself. As the Board stated in an earlier case, "a union must approach the bargaining table 'with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent and there must be no ulterior purpose."' *Oregon Teamsters' Security Plan Office*, 119 NLRB 207, 211 (1958). See also *Bausch & Lomb Optical Co*., 108 NLRB 1555, 1559 (1954); and *Centerville Clinics*, 181 NLRB 135 (1970).

In the same vein, the Board has disqualified a "semi-beneficial" local which was considered under its parent's constitution and bylaws as a subordinate body and which gave the parent the right to take over and conduct the affairs of the local if the best interests of the parent so required. *Welfare & Pension Funds*, 178 NLRB 14 (1969).

6-370 Joint Petitioners

316-6767

339-2582

Two or more labor organizations are permitted to act jointly as bargaining representative for a single group of employees. *Vanadium Corp. of America*, 117 NLRB 1390 (1957); and *S. D. Warren Co.,* 150 NLRB 288 (1965).

If the joint petitioners are successful in the election, they will be certified jointly and the employer may insist on joint bargaining. *Florida Tile Industries*, 130 NLRB 897 (1961). However, where each of the two unions which filed a joint petition intends to bargain only for the employees within its own jurisdiction, the Board has held such an intention is inconsistent with the concept of joint representation. *Automatic Heating Co.*, 194 NLRB 1065 (1972); and *Stevens Trucking*, 226 NLRB 638 (1976).

6-380 Effect of Union Violence

The Board has a longstanding policy of denying a bargaining order where the union has engaged in "unprovoked and irresponsible physical assaults" in support of its bargaining efforts. *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963). This is not "routine relief." *Overnite Transportation Co. (Dayton, Ohio Terminal)*, 334 NLRB 1074 (2001). Indeed, as noted in *Overnite*, the Board will not deny a bargaining order in every incident of union picket line misconduct. *Overnite Transportation Co*., 333 NLRB 472 (2001).

In *Laura Modes,* supra, the Board did not preclude union representation of the unit employees involved. The union there had attained its bargaining status through unfair labor proceedings and the Board withheld a bargaining order until the union won a Board election. The Board decision in *Overnite*, supra, suggests a willingness to refuse a bargaining order based on a certification and even to revoke the certification in the event a level of *Laura Modes* violence is established.

See also section 3-930.

7. EXISTENCE OF A REPRESENTATION QUESTION

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

7-100 General Rules

7-110 Prerequisite for Finding a Question Concerning Representation

301-5000

316-3300

316-6701-3300

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

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

7-120 The General Box Rule

316-6783

339-7562

347-4001-4500

347-4030-1800

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

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

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

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

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

7-130 The Effect of Private Dispute Resolution Mechanisms

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

7-131 Grievances and Arbitration

240-3367-8312

316-3301-5000

385-7501-2581

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

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

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

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

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

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

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

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

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

7-133 No-Raid Agreements

240-3367-1731

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

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

7-140 Ability to Determine Unit as Affecting Representation Question

316-6701-5000 et seq.

347-8020

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

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

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

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

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

578-8075-6056

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

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

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

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

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

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

7-200 Rules Affecting Employer Petitions

7-210 Union Claims or Conduct

308-8050

316-3375

316-6725

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

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

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

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

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

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

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

For related discussion, see section 9-620.

7-220 RM Petitions/Incumbent Unions

316-6725-5000

When an employer petitions the Board for an election as a means of questioning the continued majority status of a previously certified incumbent union, it must, in addition to showing the union's claim for continued recognition, demonstrate a basis for seeking an election. Prior to its decision in *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board required that the employer show "by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *U.S. Gypsum Co*., 157 NLRB 652, 656 (1966). This was known as the *U.S. Gypsum* rule and before its promulgation, an employer-petitioner under Section 9(c)(1)(B) had to show only that the union had claimed representative status in the unit and that the employer had questioned it. In *Levitz*, the Board lowered the standard for filing an RM petition in these circumstances to a "good-faith uncertainty" that a majority of the unit employees continue to support the union. In doing so, the Board abandoned the unitary standard that it had applied for withdrawal of recognition, filing RM petitions and polling. See *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). Instead the Board set a higher standard for withdrawal—"actual loss of majority"—and maintained the "uncertainty" standard for filing a RM petition. See also *Raven Government Services*, 331 NLRB 651 (2001).

An employer who has evidence of actual loss of majority can continue to recognize and bargain with the union by filing a RM petition because the Board has held that such a filing will

provide the employer with a "safe harbor" from a finding of an 8(a)(2) violation. *Levitz Furniture* at p.726. See also *Crete Cold Storage, LLC*, 354 NLRB 1000 (2009).

Although in *U.S. Gypsum* and *Levitz*, the union was a *certified* incumbent, the rationale of the decisions do not preclude application to *any* incumbent, certified or not. Nor do they affect employer petitions involving claims by unions asserting representative status in an effort to obtain initial recognition.

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

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

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

7-230 Accretions

316-3301-5000

347-8020-8067

420-2360

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

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

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

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

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

7-240 Changes in Affiliation

316-3390

385-2525

In *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986) (*Seattle-First*), the Supreme Court set forth the standards for determining whether a change in the affiliation status of a certified union raises a question concerning representation. Chapter 11, section 100, infra, fully discusses the Board's AC petition procedures and policies. Briefly, however, an affiliation will raise a representation question where there is not a substantial continuity between the pre- and postaffiliation union. See *Hammond Publishers*, 286 NLRB 49 (1987); *Western Commercial Transport*, 288 NLRB 214 (1988); *City Wide Insulation*, 307 NLRB 1 (1992); *Service America Corp.*, 307 NLRB 57 (1992); *Mike Basil Chevrolet,* 331 NLRB 1044 (2000); *Avante at Boca Raton*, *Inc.,* 334 NLRB 381 (2001); and chapter 11, section 100, infra.

For many years, the Board had a "due process" requirement for union affiliation matters. In *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143 (2007), it abandoned that requirement in light of the Supreme Court's *Seattle-First* decision. See also *Service Employees International Union Local 715*, 355 NLRB 353 fn. 13 (2010). Similarly, the Board holds that lack of participation by nonmembers in an affiliation vote does not create a question concerning representation. *Deposit Telephone Co.,* 349 NLRB 214 (2007). *Kravis* is applied retroactively. See *Allied Mechanical Services,* 352 NLRB 662 (2008).

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

7-250 Employer Waiver

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

7-300 Rules Affecting Decertification Petitions

7-310 Who May File a Decertification Petition

316-6733

324-4060-2500

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

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

and is entitled to vote in the election and deferring this issue to an unfair labor practice proceeding could only result in costly delay of the representation proceeding. Id. at 1236.

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

In *Pan American Airways*, 188 NLRB 121 (1971), the incumbent union contended that a decertification petition should not be processed because the petitioner had misled the employees into supporting the petition by holding out the prospect of a big wage increase if they would decertify the union and support the Teamsters. A question concerning representation was found, however, although the Board noted parenthetically that the Teamsters withdrew from the case after the hearing, sought no place on the ballot, and would be precluded from obtaining an election for a 12-month period after the election directed in this decision. See also *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

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

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

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

355-3350

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

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

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

which the employer's multilocation grouping in the multiemployer unit was not one which the Board would have certified.

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

When the union is the currently recognized majority representative of a mixed unit of guards and nonguards, the general rule would, in effect, constitute an acceptance of the appropriateness of the mixed unit, a position contrary to Section 9(b)(3) of the Act which prohibits the Board from deciding that a unit of guards and nonguards is appropriate. This statutory requirement thus necessitates an exception to the general rule. In such circumstances, a unit limited to guards constitutes the appropriate unit in the decertification election. *Fisher-New Center Co.,* 170 NLRB 909 (1968).

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

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

355-3350-6200

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

7-340 Certification not a Prerequisite

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

7-400 Effect of Delay and Turnover

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

8. DISCLAIMER OF INTEREST AND WITHDRAWAL OF PETITION

A determination of the question concerning representation raised in the filing of a petition may be foreclosed by a disclaimer of interest by the party whose representative status is in issue or by the withdrawal of petition.

8-100 Disclaimer

332-2500 et seq.

A valid disclaimer may be made by the petitioning representative, by the representative named in an employer petition, or by the incumbent union sought to be decertified. To be effective, it must be clear and unequivocal and made in good faith. *Retail Associates,* 120 NLRB 388, 391–392 (1958); *Rochelle's Restaurant*, 152 NLRB 1401 (1965); and *Gazette Printing Co*., 175 NLRB 1103 (1969). In *International Paper*, 325 NLRB 689 (1998), the Board characterized the request as being one of "sincere of abandonment with relative permanency."

Thus, a union's bare statement is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. *3 Beall Bros. 3*, 110 NLRB 685, 687 (1954). Its conduct, judged in its entirety, must not be inconsistent with its alleged disclaimer *H. A. Rider & Sons*, 117 NLRB 517, 518 (1957). *McClintock Market*, 244 NLRB 555 (1979), and *Ogden Enterprises*, 248 NLRB 290 (1980). *Windee's Metal Industries*, 309 NLRB 1074 (1992).

In any inquiry into the effectiveness of a disclaimer, the union's contemporaneous and subsequent conduct receives particular attention. *Miratti's, Inc.,* 132 NLRB 699 (1961); *Holiday Inn of Providence-Downtown*, 179 NLRB 337 (1969); and *Denny's Restaurant*, 186 NLRB 48 (1970). In the latter, the Board rejected a contention that the withdrawal or dismissal by the General Counsel of charges filed by the employer, alleging violations of Section 8(b)(7)(c) based on the picketing involved in the case, precluded a finding of conduct inconsistent with the union's asserted disclaimer. See also *Electrical Workers Local 58 (Steinmetz Electrical),* 234 NLRB 633 (1978), an unfair labor practice case. In *VFL Technology Corp*., 329 NLRB 458 (1999), a union's disclaimer issued pursuant to an article XX (no raid) decision was considered ineffective where the union continued to represent the employees.

The determination whether a disclaimer of interest by a union should be accepted at face value or whether, despite the disclaimer, the union is actually continuing to have an immediate recognitional object comes up with recurring regularity. The question in such cases, the Board has held, is one of fact to be resolved by evaluating the union's course of conduct before and after the disclaimer. See, for example, *Pennisula General Tire Co.,* 144 NLRB 1459 (1963). *McClintock Market* and *Ogden Enterprises*, supra.

In *American Sunroof Corp*., 243 NLRB 1128 (1979), the Board held that a disclaimer by a contracting union would remove that contract as a bar to an election. Compare *Mack Trucks*, 209 NLRB 1003 (1974); *Gate City Optical Co*., 175 NLRB 1059 (1969); *East Mfg. Corp.,* 242 NLRB 5 (1979). For further discussion of this issue see chapter 9, infra. See also *VFL Technology Corp*., 332 NLRB 1443 (2000), in which a divided Board found a clear and unequivocal disclaimer of interest by the union after it had lost a "no raid" proceeding under article XX of the AFL–CIO constitution, and *Garden Manor Farms, Inc.,* 341 NLRB 192 (2004).

The absence of a disclaimer may be considered in assessing whether this is a recognitional objective. *Micromedia Publishing*, 289 NLRB 537 (1988).

An issue arose in the context of a claim by a union that, while it was possibly retaining its interest in representing the employees at some *future* date, it was no longer making a *present* demand for recognition. In rejecting this contention, the Board found it significant that the union was not picketing for reinstatement of one or a small number of employees, but for a mass

reinstatement of all strikers. "Since the strikers," observed the Board, "were union adherents, the immediate consequence of mass reinstatement would have been the reestablishment of the union's earlier majority status." In these circumstances, it could not be realistically said that it had only a future, but not a present, object of recognition. Also taken into consideration was the union's continued picketing in support of bargaining demands for a 16-month period. *Gazette Printing Co*., supra.

In this connection, the Board has stated that, if there is recognitional picketing immediately prior to an alleged shift in purpose, it will review the alleged shift in purpose with "some skepticism." *Waiters & Bartenders Local 500 (Mission Valley)*, 140 NLRB 433, 442 (1963). This is particularly true when the union resumes picketing after "a very brief hiatus" (*Gazette Printing Co*., supra). The holding that the picketing in *Gazette* had a recognitional objective, however, was explicitly based on the particular facts of that case, and in no way modified the position, set forth in *Auto Workers (Fanelli Ford),* 133 NLRB 1468 (1961), that picketing for reinstatement does not necessarily have a recognitional object. (*Gazette Printing Co*., supra at fn. 5.) See also *Don Davis Pontiac*, 233 NLRB 853 (1977). For further discussion of hiatus, see *Philadelphia Building Trades Council (Altemose Construction)*, 222 NLRB 1276 (1970), and *Electrical Workers Local 453 (Southern Sun*), 242 NLRB 1130 (1979).

When, however, the union's picketing is not inconsistent with its disclaimer, an employer's petition is subject to dismissal. *Autohaus-Bugger Inc.,* 173 NLRB 184 (1969). For example, picketing at customer entrances, having as its purpose and effect the notification to the public of the fact that the employer is "not union," is not in and of itself inconsistent with the union's disclaimer. *Cockatoo, Inc.,* 145 NLRB 611, 614 (1964); see also *Raymond F. Schweitzer, Inc.,* 165 NLRB 875 (1974). Cf. *Rusty Scupper*, 215 NLRB 201 (1974).

The pressing of an appeal from a Regional Director's dismissal of a charge alleging violation of Section 8(a)(1) and (5) is not necessarily inconsistent with a union's disclaimer of a present status as majority representative of the employees. *Franz Food Products,* 137 NLRB 340 (1962). Section 9(c)(ii) authorizes the Board to proceed to an election only when there is a *present* claim of representation by the union, while an 8(a)(5) allegation is based on the contention that the union represented a majority *in the past*; i.e., at the time it requested recognition and the employer unlawfully refused to bargain with it. The finding of an 8(a)(5) violation thus necessarily requires an implicit conclusion that no valid question of representation existed at the time of the Board's order. When the union's disclaimer is found to be effective, of course, no election will be held.

On the other hand, 2 days before a disclaimer, the union told the employer that its picketing was designed as a pressure device to force capitulation to its recognition demand made 3 months earlier and, notwithstanding its disclaimer, continued without interruption to picket as it had done before, save for a slight modification in the picket sign language. The union's "entire course of conduct" was inconsistent with its expressed disclaimer. *Capitol Market No. 1*, 145 NLRB 1430, 1432 (1964), *McClintock Market*, supra. Likewise, when the picketing was begun at the instigation of an association which included a number of the employer's competitors and which had asked the union if it could "do anything" about the employer's alleged substandard wages and hours, and when the union alleged that its picketing was assertedly to protest substandard wages and working conditions, but at no time had inquired into these subjects, the picketing was inconsistent with the disclaimer and was designed to force the employer to recognize and bargain with the union. *Pennisula General Tire Co*., supra.

Publicity picketing, or picketing aimed only at organizing the employees with the hope of eventually succeeding and then obtaining recognition, is not necessarily inconsistent with a disclaimer of a *present* claim for recognition. *Martino's, Home Furnishings*, 145 NLRB 604 (1964). In that case, as of the date of the hearing, almost 2 years after the union had last communicated with the employer, it directed its appeal to the public toward persuading potential consumers not to shop at the employer's establishment and distributed leaflets expressly declaring, "We make no demands of any kind" on the employer. This did not constitute a

present claim to recognition and the union's activity was consequently not inconsistent with its disclaimer. See also *Windee's Metal Industries*, 309 NLRB 1074 (1992).

A union's failure to act in furtherance of its recognition, including failure to appear at the representation hearing, has been interpreted by the Board as either an abandonment of its representative status or a disclaimer that it represents the employees in question. *Josephine Furniture Co*., 172 NLRB 404 (1968); and *Texas Bus Lines*, 277 NLRB 626 (1985). Cf. *McClintock Market*, supra at fn. 4; *Brazeway*, *Inc.,* 119 NLRB 87, 88 fn. 3 (1958); *O'Connor Motors*, 100 NLRB 1146 fn. 1 (1951); and *Felton Oil Co*., 78 NLRB 1033, 1034 (1948).

8-200 Withdrawal

332-5000 et seq.

Related to the subject of disclaimer of interest is the prior withdrawal of a petition.

Prior to the transfer of a case to the Board, a petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of a case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case is closed. Rules and Regulations, Section 102.60(a).

When the petitioner moves to withdraw its petition, but the intervenor opposes, the petitioner may withdraw from the election. In a specific instance, this was done "with prejudice" to the petitioner's filing of a new petition for a period of 6 months from the date of the decision "unless good cause is shown why the Board should entertain a new petition filed prior to the expiration of such period." *Carpenter Baking Co*., 112 NLRB 288, 289 (1955). See also *Baltimore Gas & Electric,* 330 NLRB 3 (1999), where a Board majority permitted withdrawal after a second election. The withdrawal request came more than 12 months after the second election and at the time of the request, the Board was considering challenges and objections arising from that second election. And in *Mercy General Hospital*, 336 NLRB 1047 (2001), the Board approved withdrawal of RC petitions on a showing that the petitioner and employer agreed to voluntary recognition. The settlement also involved a vacating order of an earlier Board decision.

Withdrawal from an election is permitted when, for example, the employees in two previous separate units represented by different unions are thereafter included in a combined unit. *Westinghouse Electric Corp*., 144 NLRB 455 (1963). In that case, although neither union claimed to represent all the employees in the combined unit, the employer's petition for such a unit was granted, and in these circumstances either or both unions were permitted to withdraw from the election within 10 days from the date of the Board's decision with the proviso that, if both unions withdrew from the election, the employer's petition would be dismissed. However, if both unions elected to withdraw, and the employer's petition was dismissed, that petition could be reinstated if either or both unions made any claim to represent the employees in question within 6 months of the date of dismissal. Id. at 459. See also *Denver Publishing Co*., 238 NLRB 207 (1978).

In *Transportation Maintenance Services*, 328 NLRB 691 (1999), a divided Board permitted the employee petitioner in an RD case to withdraw the petition after the election but before the count of the impounded ballots. See also *Garden Manor Farms, Inc.,* 341 NLRB 192 (2004), where a divided Board approved withdrawal of a petition that had been pending review by the Board and the union intended to file a second petition.

8-300 Effect of Disclaimer or Withdrawal

Board policies and procedures with respect to disclaimers and withdrawals including the effects thereof are set out in the Board's Representation Casehandling Manual (Part Two). See sections 11110–11118 (withdrawals) and sections 11120–11124 (disclaimers). See also *Stock Building Supply,* 337 NLRB 440 (2002); *NLRB v. Davenport Lutheran Home,* 244 F.3d 660 (8th Cir. 2001); and *Baltimore Gas & Electric*, 330 NLRB 3 (1999).

A withdrawal of a petition after an election and during consideration of determinative challenge ballots does not affect the 1-year election bar rule. *E Center, Yuba Sutter Head Start,* 337 NLRB 983 (2002).

9. CONTRACT BAR

347-4001-2575-5000

When a petition is filed for a representation election among a group of employees who are alleged to be covered by a collective-bargaining contract, the Board must decide whether the asserted contract exists in fact and whether it conforms to certain requirements. If the Board finds that the contract does exist and that the requirements are met, the contract is held a bar to an election. This is known as the contract-bar doctrine. *Hexton Furniture Co.,* 111 NLRB 342 (1955).

The major objective of the Board's contract-bar doctrine is to achieve a reasonable balance between the frequently conflicting aims of industrial stability and freedom of employees' 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. *Roosevelt Memorial Park,* 187 NLRB 517 (1970). "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures." *Seton Medical Center*, 317 NLRB 87 (1995).

For convenience, the contract-bar rules appear under a number of separate headings, although many of the subjects, notwithstanding the headings under which they are found, are necessarily interrelated.

9-100 Adequacy of Contract

347-4001-4300

To serve as a bar to an election, a contract must be a "collective" agreement. *J. P. Sand & Gravel Co.,* 222 NLRB 83 (1976), and be the result of free collective bargaining. *Frank Hager, Inc*., 230 NLRB 476 (1977). The basic requirements are set out in *Appalachian Shale Products Co*., 121 NLRB 1160 (1958), the lead case in this area. They are:

9-110 Written Contract

347-4040-1720

347-4040-1760

347-4040-1790

347-4040-5001-5000

The contract must be reduced to writing. An oral agreement does not constitute a bar. *Empire Screen Printing,* 249 NLRB 718 (1980); and *Sullivan & Sons Mfg. Corp.,* 105 NLRB 549 (1953). Nor does a written agreement which is extended orally. An agreement to arbitrate the provisions of a new agreement does not constitute a bar "for to constitute a bar, a contract must be in writing and signed by all the parties at the time the petition is filed." *Herlin Press*, 177 NLRB 940 (1969). Compare *Stur-Dee Health Products,* 248 NLRB 1100 (1980), in which the interested arbitration was to cover only economic conditions and all other terms were agreed upon.

The contract-bar doctrine does not require "a formal final document." It can be satisfied by a group of informal documents provided that they lay out substantial terms and conditions of employement and that they are signed. *Waste Management of Maryland*, 338 NLRB 1002 (2003), and cases cited therein.

"[R]eal stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems." *Appalachian Shale Products Co*., supra at 1163. See *Raymond's, Inc.*, 161 NLRB 838 (1966), for an application of this rule; see also *Western Roto Engravers,* 168 NLRB 986 (1968). Compare *Seton Medical Center*, supra; and *St. Mary's Hospital*, 317 NLRB 89 (1995).

When the employer has not applied the contract to the employees covered, and the union has not sought to administer it as to them, the contract "does not establish the existence of a stabilizing labor agreement which bars a representation election." *Tri-State Transportation Co.*, 179 NLRB 310 (1969). This condition is not met when the contract is "in reality a set of identical individual contracts" between the employer and each signatory employee, because there is no evidence that the employees intended to be bound as a group by the product of the negotiations nor that the employer expected them to be so bound. *Austin Powder Co.,* 201 NLRB 566 (1973); *Cal-Western Van Storage Co*., 170 NLRB 67 (1968). See also *Brescome Distributors Corp*., 197 NLRB 642 (1972).

When a contract, which meets the contract-bar standards, includes an error through mutual mistake, and another document is later drafted and signed with the intention of reforming the written contract to the actual intention of the parties, the earlier contract, as reformed, constitutes a bar. *Gary Steel Supply Co.,* 144 NLRB 470 (1963); *Gaylord Broadcasting,* 250 NLRB 198 (1980); and *USM Corp*., 256 NLRB 996 (1981).

9-120 Signatures of the Parties

347-4020-3350

347-4040-1740 et seq.

347-4040-1780

The contract must be signed by all the parties before the rival petition is filed. *DePaul Adult Care Communities,* 325 NLRB 681 (1998), and *Freuhauf Trailer Co*., 87 NLRB 589 (1949). The signatures do not, however, have to be on the same formal document. *Holiday Inn,* 225 NLRB 1092 (1976); and *Liberty House*, 225 NLRB 869 (1976). Although the terms of the agreement are applied retroactively, contracts signed after the filing of a petition do not serve as a bar. *Hotel Employers Assn. of San Francisco*, 159 NLRB 143 (1966). Thus, an undated contract was not recognized as a bar where the evidence as to the date of its execution was vague, ambiguous, and inconsistent. *Road & Rail Services,* 344 NLRB 388 (2005), and *Roosevelt Memorial Park*, supra. However, the absence of an execution date in the contract does not remove it as a bar if the date of execution was before the petition and that date can be established. *Jackson Terrace Associates,* 346 NLRB 180 (2005); and *Cooper Tanks & Welding Corp.*, 328 NLRB 759 (1999). A belatedly introduced document, newly signed, and especially prepared at the employer's request to replace its original copy which had been lost or misplaced, was held insufficient to bar an election. *Baldwin Auto Co*., 180 NLRB 488 (1970).

The contract must be signed by an authorized person. See *Wickly*, *Inc.*, 131 NLRB 467 (1961); and *Overhead Door Co*., 178 NLRB 481 (1969). The authorized person in the case of a joint representative is the spokesman for the joint representative and not the respective agents of the individual locals. *Pharmaseel Laboratories*, 199 NLRB 324 (1972).

Unless a contract signed by all the parties precedes a petition, it does not bar an election even though the parties consider it properly concluded and have put into effect some or all of its provisions. This does not mean that contracts must be formal documents or that they cannot consist of an exchange of a written proposal and a written acceptance. *Georgia Purchasing*, 230 NLRB 1174 (1977). It does mean that in such instances the informal document or the documents that are exchanged must be signed by all the parties in order to serve as a bar to an election. *Appalachian Shale Products Co*., supra; *Waste Management of Maryland*, supra; *Yellow Cab,*

131 NLRB 239 (1961); *United Telephone Co. of Ohio,* 179 NLRB 732 (1969); and *Permanente Medical Group*, 187 NLRB 1033 (1971). Similarly, these documents must establish the identity and the terms of the agreement. See *Branch Cheese*, 307 NLRB 239 (1992). The initials of the parties satisfies the signature requirement. *Gaylord Broadcasting,* supra.

A requirement for approval by an international union which is not a named party to the contract is not a substantial requirement necessary to achieve stability in the bargaining relationship of the parties and is therefore not a condition precedent to the functioning of the contract as a bar. *Standard Oil Co.*, 119 NLRB 598 (1958). Compare *Crothall Hospital Services*, 270 NLRB 1420 (1984), in which the named party had not signed and contract therefore held not to be a bar. However, if the contract by its terms makes approval by the international union a condition precedent, the terms may be such that the approval need not be given in writing. *Western Roto Engravers,* supra.

9-130 Substantial Terms and Conditions

347-4040-5000

The contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. It will not serve as a bar if limited to wages alone, or to one or several provisions not deemed substantial by the Board. *Appalachian Shale Products Co.,* supra; *Artcraft Displays*, 262 NLRB 1233 (1982); cf. *Leone Industries,* 172 NLRB 1463 (1968); and *Southern California Gas Co.,* 178 NLRB 607 (1969). Presumably a contract that is no longer applied to the terms of employment will not act as a bar. See *Visitainer Corp.*, 237 NLRB 257 (1978), in which the Board found that it was being applied.

Thus, where a main agreement exempted certain employees from its coverage and a letter did not include them, the letter stating only the "position" of one of the parties, the letter was held not to have met the standards for the valid assertion of a contract bar. "Although the Board does not require that a contract must be embodied in a formal document if it is to serve as a bar, an asserted contract, if it is to meet minimal bar standards, must at least be signed by the parties and must contain terms and conditions of employment sufficiently substantial to stabilize the bargaining relationship." *Hotel Employers Assn. of San Francisco,* supra. See also *Waste Management of Maryland*, supra.

But, the Board does not require that an agreement delineate completely every single one of its provisions in order to qualify as a bar. *USM Corp.,* supra at fn. 18, and cases cited therein. Similarly, an agreement was held to be a bar when the parties had agreed to all matters except economic conditions and had agreed to interest arbitration on those matters. *Jackson Terrace Associates,* 346 NLRB 180 (2005); *Cooper Tanks & Welding Corp.*, 328 NLRB 759 (1999); and *Stur-Dee Health Products,* supra. Cf. *Herlin Press,* supra. In *Madelaine Chocolate Novelties*, 333 NLRB 1312 (2001), the Board found no bar arising from an agreement to adopt the fourth year prior agreement as the first year of a successor agreement. Because the agreement did not provide terms for later years, the Board found no substantial terms.

In *Dana Corp.*, 356 NLRB No. 49 (2010), the Board dismissed an unfair labor practice complaint that alleged premature recognition and bargaining. In doing so, the Board said that an agreement on "principles that would inform future bargaining on particular topics . . . is not enough to constitute exclusive recognition." The Board noted that the limited scope of the topics involved would not have amounted to the "substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship" and thus would not bar an election petition. Id. at fn. 18.

Some variance between the parties' agreement and the written contract may not be enough to remove the contract as a bar. *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998).

For an application of this rule in a case involving handwritten notes, see *Eastwood Nealley Co.*, 169 NLRB 604 (1968).

9-140 Coverage

347-4040-3300

347-4050

The contract must clearly by its terms encompass the employees involved in the petition. *Houck Transport Co*., 130 NLRB 270 (1961); *Bargain City, U.S.A.,* 131 NLRB 803 (1961); *Plimpton Press,* 140 NLRB 975 (1963); and *Moore-McCormack Lines*, 181 NLRB 510 (1970). See also *United Telephone Co. of Ohio*, supra.

It should be noted that the precise wording used in the contract is not necessarily controlling. Thus, when the language was "purely descriptive and intended for the purpose of identifying the employer and not the scope of the contact's coverage,'' the contract was nevertheless upheld as a bar. *Simmons Co.,* 126 NLRB 656 (1960). Furthermore, the parties' intent regarding employee coverage may be elucidated by their bargaining history. *Trade Wind Transportation Co*., 168 NLRB 860 (1968); and *Hyatt House Motel*, 174 NLRB 1009 (1969). See also *RPM Products,* 217 NLRB 855 (1975), in which testimony was admitted as to the scope of the unit.

When newly hired employees are normal accretions to the existing unit, the contract bars a petition. *Firestone Synthetic Fibers Co.,* 171 NLRB 1121, 1123 (1968).

A contract does not cease to be a bar because it refers to the employees at a particular establishment and there has since been a relocation of the establishment. See, for example, *Arrow Co.,* 147 NLRB 829 (1964).

In *G.L. Milliken Plastering*, 340 NLRB 1169 fn. 4 (2003), the Board rejected a contention that limited geographic coverage affected contract bar quality.

In *UMass Memorial Medical Center,* 349 NLRB 369 (2007), the Board affirmed a Regional Director's order of an *Armour-Globe* election for a unit of per diem paramedics. (*Armour & Co.,* 40 NLRB 1333 (1942); and *Globe Machine & Stamping Co.,* 3 NLRB 294 (1937).) The union already represented the regular paramedics and the parties had discussed the per diem paramedics during negotiations. The union did not request recognition at the time. Later, during the term of the agreement, the union filed a petition for a self-determination election to determine whether the per diem paramedics wished to be included in the unit. The Board agreed that a self-determination election was appropriate, that it was not barred by the contract and that the policy against unit clarification petitions during the term of an agreement was not applicable to a self-determination election because it is "meaningfully distinct from an accretion."

9-150 Appropriate Unit

347-8000 et seq.

347-4001-5000

347-4040-3300

The contract must cover an appropriate unit. *Mathieson Alkali Works,* 51 NLRB 113 (1943); *Indianapolis Light Co*., 78 NLRB 136 fn. 4 (1948); and *Moveable Partitions*, 175 NLRB 915 (1969). In considering the appropriateness question, the Board places great weight on bargaining history and "will not disturb an established relationship unless required to do so by the dictates of the Act." *Great Atlantic & Pacific Tea Co*., 153 NLRB 1549, 1550 (1965), quoted in *Canal Carting, Inc*., 339 NLRB 969 (2003). But, the Board said in *Mathieson Alkali Works*, supra at 115: "Where the parties contract on the basis of a unit different from that found appropriate by the Board their agreement is subject to any subsequent determination the Board may make, in a proper proceeding, with respect to the appropriateness of the unit. Otherwise, the parties could in effect set aside the Board's unit finding and foreclose the Board from performing its statutory duty of determining the appropriate unit."

The fact that several individuals were included who would not have been in an otherwise clearly appropriate unit, is insufficient to remove the contract as a bar. *C. G. Willis, Inc.,* 119

NLRB 1677 (1958) (supervisors); *Airborne Freight Corp*., 142 NLRB 873 (1963) (office clericals); and *American Dyewood*, 99 NLRB 78, 80 (1952) (small group of guards in a nonguard unit). But see *Apex Tankers Co.,* 257 NLRB 685 (1981), in which the participation of supervisors in the union was extensive and the Board treated the union as if it were defunct because of the conflict of interest.

The statutory proscription in Section 9(b)(3) against certification of guard units in certain circumstances does not preclude the application of normal contract-bar rules to contracts covering such units. Mixed units of guards and nonguards are never appropriate and hence do not constitute bars. *Monsanto Chemical Co.,* 108 NLRB 870 (1950); and *Corrections Corp. of America,* 327 NLRB 577 (1999). However, if the unit is appropriate, e.g., was an all guards unit, and the contract is otherwise lawful, it serves as a bar. *Burns International Detective Agency*, 134 NLRB 451 (1962). *Burns* was reaffirmed in *Corporacion de Servicios Legales*, 289 NLRB 612 (1988), in which the Board found as a bar a contract containing a mixed unit of professionals and nonprofessionals and the professionals had not voted on inclusion in the unit. *Burns* and *Corporacion de Servicios Legales*, were reaffirmed in *Stay Security*, 311 NLRB 252 (1993).

For further discussion of "guards" issues see section 18-200. For discussion of the history of collective bargaining in considering appropriate unit see section 12-220.

9-160 "Members Only"

347-4040-3367

A contract for "members only" does not operate as a bar. *Appalachian Shale Products Co*., supra; and *G. C. Murphy Co.,* 80 NLRB 1072 (1949); see also *N. Sumergrade & Sons,* 121 NLRB 667, 669–670 (1958).

Section 9(a) of the Act provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." As the statute contemplates the representation of *all* employees, not just those who are union members, a contract for members only does not constitute a bar to an election. In *Bob's Big Boy Family Restaurant,* 235 NLRB 1227 (1978), the Board held that a contract clause that benefited "members only" removed the contract as a bar. But see *NLRB v. Bob's Big Boy Family Restaurant,* 625 F.2d 850 (9th Cir. 1980).

When ambiguity exists as to the intended coverage of a contract—whether for members only or equally to all employees regardless of membership—extrinsic evidence of intent and practice is admissible in the representation case hearing to establish the contract coverage. *Post Houses,* 173 NLRB 1320 (1969). See *A & M Trucking*, 314 NLRB 991 (1994), for an extensive analysis by the Board of a "members-only" contention.

9-170 Master Agreement

347-4040-1760-2500

A master agreement covering more than one plant or a multiemployer group is no bar to an election at one of the plants where by its terms it is not effective until a local agreement has been completed, or until the inclusion of the plant has been negotiated by the parties as required by the master agreement, and a petition is filed before these events occur. *Burns Security Services*, 257 NLRB 387, 387–388 (1981). However, when the master agreement is found to be the basic agreement, and local supplement merely serves to fill out its terms as to certain local conditions, it will constitute a bar to an election. *Appalachian Shale Products Co.,* supra; and *Pillsbury Mills*, 92 NLRB 172 (1951). When the master agreement and the supplemental agreement have different termination dates, the one to be considered for election-bar purposes is the agreement which embodies the basic terms and conditions of employment. *Tri-State Transportation Co*., supra.

A master agreement cannot be recognized for contract-bar purposes where its terms require, as a condition of extension of its terms to noncovered units, that the majority status of the signatory union in such a unit be evidenced by a card check and the record fails to establish that the condition was ever met. *Long Transportation Co.,* 181 NLRB 7 (1970).

9-180 Prior Ratification

347-4020-3350-5000

When ratification is a condition precedent to contractual validity by *express* contractual provision, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition. *American Broadcasting Co.,* 114 NLRB 7 (1956); and *Kennebec Mills Corp.,* 115 NLRB 1483 (1956). But for this condition to be operative, it must be *express*, otherwise prior ratification is not required. *International Paper Co*., 294 NLRB 1168 fn. 1 (1989).

This question arises when a contract by its terms requires that the union membership must first ratify the contract before it is deemed valid, or when it is contended that the parties had orally agreed to make prior ratifications a condition precedent, or when, although no express provision for prior ratification is included in the contract, it is contended that prior ratification is required by the union's constitution or bylaws. Under this rule, prior ratification by the membership is required only when it is made an *express* condition precedent in the contract itself. *Appalachian Shale Products Co.,* supra. See also *Merico*, *Inc.*, 207 NLRB 101 (1973); *Aramark Sports & Entertainment Services,* 327 NLRB 47 (1998); and *United Health Care Services,* 326 NLRB 1379 (1998). In such circumstances, a report to the employer that the contract has been ratified is normally sufficient to bar a petition. *Swift & Co*., 213 NLRB 49 (1974).

9-200 Changed Circumstances Within the Contract Term

347-4050

347-4020-3350-1600

Contracts executed before any employees have been hired or prior to a substantial increase in personnel do not bar an election, since the contracting union does not in fact enjoy a true representative status, the real unit for purposes of representation still being in an inchoate stage. The lead decision for this general category is *General Extrusion Co*., 121 NLRB 1165 (1958).

9-210 Change in the Size of the Unit

The contract-bar rules involving changes in size of units within the contract term are:

9-211 Prehire Contracts

347-4020-3350-1600

347-4080

347-8020

A contract does not bar an election if executed before any employees have been hired. *Price National Corp.,* 102 NLRB 1393 (1953); *Potlatch Forests,* 94 NLRB 1444 (1951); *General Extrusion Co*., supra at 1167; and *Western Freight Assn.,* 172 NLRB 303 (1968).

Even prehire contracts in the construction industry under Section 8(f) do not constitute bars to a representation election under Section 9(c). This is due to the express language in Section 8(f) which, among other things, provides that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." *S. S. Burford, Inc*., 130 NLRB 1641, 1642 (1961); and *John Deklewa & Sons*, 282 NLRB 1375 (1987). But a contract will be a bar if it is continued in effect after the conversion of the bargaining relationship from 8(f) to 9(a). *VFL Technology Corp*., 329 NLRB 458 (1999).

For other construction industry issues, see sections 5-210, 9-1000, 10-600–700, and 15-130.

9-212 The Yardsticks

347-4010-2001-5000

347-8020-2025-3300 et seq.

A contract bars 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 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 Co*., supra; *Rheem Mfg. Co*., 188 NLRB 436 (1971); *Guy H. James Construction Co.,* 191 NLRB 282 (1971); *Cheney Bigelow Wire Works,* 197 NLRB 1279 (1972); *National Cash Register Co*., 201 NLRB 846 (1973); and *A-1 Linen Service*, 227 NLRB 1469 (1977). In establishing the required percentage of employees, supervisors may not be counted. *Permaneer California Corp*., 175 NLRB 348 (1969). Trainees or probationary employees, however, may count as employees when the employer is committed to employ them in its operation on successful completion of their training. Performance of work even when full operations are in the preparatory stage has been held to be the equivalent of having positions in existence. *California Labor Industries*, 249 NLRB 600 (1980); *Kleins Golden Manor*, 214 NLRB 807, 815–816 (1974); and *Leone Industries*, supra.

These criteria are used in all cases where it must be decided whether a contract was prematurely executed. Originally, they were applied as of the time the new contract was executed. *Foremost Appliance Corp*., 128 NLRB 1033, 1035 (1960). Subsequently, the determinative date was found to be the date when the parties "agreed to apply the contract" to a new facility, and in such circumstances the actual date of the signing of the contract was not the determinative one. *H. L. Klion, Inc.,* 148 NLRB 656 (1964). But when the execution date is plainly set out in a contract and there is no reference to retroactivity from a later date of execution, parol evidence is inadmissible to establish that the new contract was agreed on when employer had a substantial and representative complement. *Consolidated Novelty Co*., 186 NLRB 197 (1970).

It should be noted that the 30-percent ratio articulated in *General Extrusion* is also relevant to the issue of the validity of a contract in an unfair labor practice proceeding. See *Herman Bros., Inc.,* 264 NLRB 439, 441 fn. 8 (1982).

9-220 Change in the Nature of the Unit

347-4050-0133

At times, between the execution of the contract and the filing of a petition, a change may occur in the *nature* of the operations, as distinguished from the *size* of the unit. The rules applicable to these situations are:

9-221 Merger

347-4050-0133-3300

347-4050-3300

A contract does not bar an election when a merger of two or more operations results in the creation of an entirely new operation with major personnel changes. *New Jersey Natural Gas Co.,* 101 NLRB 251, 252 (1953); *General Extrusion Co.,* supra at 1167; see also *Kroger* Co., 155 NLRB 546, 548–549 (1965), distinguishing *Bowman Dairy Co*., 123 NLRB 707 (1959). See also *Panda Terminals*, 161 NLRB 1215, 1222–1223 (1966), and *Massachusetts Electric Co*., 248 NLRB 155–157 (1980), where the two relatively equal groups to be merged were separately represented by different unions. See also *General Electric Co*., 185 NLRB 13 (1970). *General Electric Co.,* 170 NLRB 1272 (1968); and *General Electric Co*., 170 NLRB 1277 (1968). Compare *Builders Emporium*, 97 NLRB 1113 (1952), where two companies owned by a single employer were consolidated at the location of one of the companies and the Board found the contract at that location to bar an election.

9-222 Shutdown

347-4050-8300

When a plant is shut down for an indefinite period of time and operations resume with new employees at either the same or new location because the former employees were no longer available, a contract does not serve as a bar. *Sheets & Mackey*, 92 NLRB 179 (1951); *General Extrusion Co*., supra at 1167. When, however, the shutdown is temporary and the employer reopens at the same location with substantially the same business, the existing contract must be honored and will bar a representation petition. *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989).

9-223 Relocation

347-4050

347-8020-2050

347-8020-8000

A mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit, does not remove the contract as a bar. *Builders Emporium,* supra; *General Extrusion Co*., supra; and *Electrospace Corp.,* 189 NLRB 572 (1971). And see *Rock Bottom Stores*, 312 NLRB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995).

Thus, when one of two operations is closed and the employees are transferred to the other operation, the changed circumstances are not sufficient in themselves to remove the contract as a bar. *Jones & Laughlin Steel Corp.,* 130 NLRB 259 (1961). See also *Arrow Co*., 147 NLRB 829 (1964) (new warehouse merely a relocation and consolidation of facilities in two other cities); and *H. L. Klion, Inc*., supra (employer and intervenor had agreed to apply existing written contract as modified to new facility). In both *Arrow* and *Klion,* the existing contract barred an election. See also *Pepsi-Cola General Bottlers*, 173 NLRB 815 (1969). In *Electrospace Corp*., supra, the employer moved a portion of its operation producing civilian goods to another nearby building together with 50 to 60 employees who had been performing this work. The latter were transferred without any changes in their jobs and without any changes in wages, benefits, seniority, or any other conditions of employment. These transferred employees also produced the same products and utilized the same skills as they had at the old location. Compare *Consolidated Fibres, Inc*., 205 NLRB 557 (1973), where the relocation resulted in an entirely new operation.

In determining whether a relocation has been accompanied by a transfer of a considerable portion of employees from the old to the new plant, the number of these transferees at the time of the hearing is a relevant factor. *Montville Warehousing Co*., 158 NLRB 952 (1966); and *Arrow Co.,* supra. See *Harte & Co*., 278 NLRB 947 (1986), where the Board set an approximate figure of 40 percent of the work force transferring as the standard for determining whether the existing contract remains in effect assuming the operations remain substantially the same.

When the new employees hired at the relocated facility are not normal accretions to the unit covered by the existing contract, the Board will not find a bar. *Towmotor Corp*., 182 NLRB 774 (1970); and *Public Service Co.*, 190 NLRB 350 (1971). This holds even if an arbitrator should decide that the existing contract was intended to cover such employees. Cf. *Beacon Photo Service*, 163 NLRB 706 (1967); and *Textron, Inc*., 173 NLRB 1290 (1969). The contract-bar claim has also been rejected where there was no evidence that employees in a new department created at the new facility were actually represented by the intervenor. *Flint Steel Corp*., 168 NLRB 271 (1968).

A storewide contract was held no bar to a petition for the employees in a particular department when, at the time of the employer's negotiations with the incumbent union, the department was not yet in existence, the incumbent did not wish to represent the employees in the

new department and has not theretofore bargained for them, and the department was a functionally distinct and homogeneous unit. *J. C. Penney Co.,* 151 NLRB 53 (1965).

When a contract exists between an employer and an incumbent in a multistore unit, its coverage may be extended to a subsequently established store only if it is an accretion to the existing unit. Otherwise the contract covering the multistore unit does not constitute a bar. *Melbet Jewelry Co.,* 180 NLRB 107 (1970); *Kroger Co*., 219 NLRB 388 (1975); and *Almacs Inc*., 176 NLRB 670 (1969).

9-224 Assumption of Contract

347-4050-3300 et seq.

530-4850-6700

The assumption of the operations by a purchaser in good faith, who had not bound itself to assume the bargaining agreement of the prior owner of the establishment, removes the contract as a bar. *General Extrusion Co*., 121 NLRB 1165, 1168 (1958). In addition, the Board has required that, for contract-bar purposes, such an assumption of a prior contract by a new employer must be express and in writing. *American Concrete Pipe of Hawaii*, 128 NLRB 720 (1960); and *M. V. Dominator,* 162 NLRB 1514, 1516 (1967). This policy has been reaffirmed since *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). See *Great Atlantic & Pacific Tea Co*., 197 NLRB 922 (1972); and *Trans-American Video*, 198 NLRB 1247 (1972). Finally, at the time of the assumption agreement, the original employer must have employed at least 30 percent of those employed on the date of the hearing. *Baggett Bulk Transport,* 193 NLRB 287, 288 (1971).

The rule requiring a written contract assumption is inapplicable where changes in stock ownership or managerial hierarchy have no effect on the legal identity or responsibility of the corporate employer, the composition of the contract unit, or the operations of the company (*M. B. Farrin Lumber Co.,* 117 NLRB 575 (1957)), or when the employer becomes a wholly owned subsidiary of a larger corporation and its name is changed slightly, but no changes result in the nature of the operation, the management, the composition of the contract unit, or the stability of the bargaining relationship (*Grainger Bros. Co.,* 146 NLRB 609 (1964)). But see *MPE, Inc.*, 226 NLRB 519 (1976); and *Spencer Foods*, 268 NLRB 1483 (1984).

It should be noted that where the successor employer had no good-faith doubt that the union represented a majority of the employees in the unit and accordingly negotiated a new contract with the incumbent, the new agreement constituted a bar. Otherwise, said the Board, "we would be discouraging a successor Employer and incumbent Union from creating a new and stable bargaining relationship." *Ideal Chevrolet,* 198 NLRB 280 (1972).

See also section 10-500.

9-300 Duration of Contract

347-4010-2000

347-4040-5060

725-6733-8010

Whether the duration of a contract contravenes the policy assuring employees a free choice of representatives at reasonable intervals must be determined as part of contract-bar policy.

The lead decision is *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958), as modified in *General Cable Corp*., 139 NLRB 1123 (1962). In *General Cable*, the Board enlarged the period of the basic contract-bar rule from 2 to 3 years, but emphasized that "All other contract-bar rules, whether related or unrelated to the subject of contract term, remain unaltered; our new 3-year rule is to be read in harmony with them." Id. at 1125. Accord: *Dobbs International Services*, 323 NLRB 1159 (1997). But see UGL-UNICO discussed infra of 9-130. See also *Crompton Co.*, 260 NLRB 417, 418 (1982), holding that agreements of less than 90 days do not bar a petition.

Since contracts of unreasonable duration are treated as if they were limited to a reasonable period (3 years), a petition is dismissed where it is not filed 60 days prior to the third anniversary date rather than the expiration date designated in the contract. *Union Carbide Corp*., 190 NLRB 191, 192 (1971).

Note: In *Shaw's Supermarkets,* 350 NLRB 585 (2007), a Board majority permitted an employer to withdraw recognition in the fourth year of a 5-year contract when the employer was confronted with evidence of loss of majority.

9-310 Fixed-Term Contracts

347-4010-2000

4040-1760

347-4040-5060

A contract having a fixed term of more than 3 years operates as a bar for as much of its term as does not exceed 3 years. *General Cable Corp*., supra; and *General Dynamics Corp*., 175 NLRB 1035 (1969). The 3-year period during which a contract is operative as a bar runs from its *effective date. Benjamin Franklin Paint Co*., 124 NLRB 54 (1959).

More recently the Board varied the 3-year rule in certain successorship situations. Thus, in *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op at 10 (2011), the Board held that the 3 year period would be reduced to 2 years in circumstances where a successor employer and an incumbent union reach a first contract and "there was no open period permitting the filing of an election petition during the final year of the predecessors bargaining relationship with the union."

To achieve its contract-bar objectives, the Board looks to the contract's fixed term or duration, because it is this term on the face of the contract to which employees and outside unions look to determine the appropriate time to file a representation petition. The length of the term of the contract as well as its adequacy must therefore be ascertainable on its face, with no resort to parol evidence, for it to be a bar. *South Mountain Healthcare & Rehabilitation Center*, 344 NLRB 375 (2005); *Union Fish Co.,* 156 NLRB 187 (1966); and *Cind-R-Lite Co.*, 239 NLRB 1255 (1979). Cf. *Cooper Tire & Rubber Co*., 181 NLRB 509 (1970).

However, a significant exception is made where the party challenging the contract is either the employer or the contracting union. In those circumstances, the contract continues as a bar for its *entire* term. *Montgomery Ward & Co*., 137 NLRB 346, 348–349 (1962). The petition in that case was filed by the employer in the third year of a current 5-year contract with a certified union. The contract-bar rules, the Board explained, should not be interpreted so as to permit the contracting parties to take advantage of whatever benefits may accrue from the contract "with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election."

In *Absorbent Cotton Co.,* 137 NLRB 908 (1962), the employer filed a petition in the third year of a 3-year contract. The incumbent union was uncertified. The Board saw no valid reason for according to such an employer rights which are different from those of an employer who has a current contract with a certified union and held that, whether or not the union is certified, an employer's petition is barred by a current contract to which it is a party for the entire term of the contract.

When, after the end of the first 3 years of a long-term contract, and before the filing of a petition, the parties execute a new agreement which embodies new terms and conditions, or incorporate by reference the terms and conditions of the long-term contract or a written amendment which *expressly* reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period, the new agreement or amendment is effective as a bar for as much of its term as does not exceed 3 years. *Southwestern Portland Cement Co.,* 126 NLRB 931 (1960); and *Santa Fe Trail Transportation Co*., 139 NLRB 1513, 1514 fn. 2 (1962). In order to qualify as a bar under these circumstances the agreement must

satisfy either of the terms of the Southwestern Portland test. In *Coca Cola Enterprises, Inc*., 352 NLRB 1044 (2008) (two Member decision), the Board rejected bar status for a Memorandum of Understanding (MOU) that was not intended to be a new agreement. Nor did the MOU incorporate by reference the terms of the long term agreement between the parties. See also *Shen-Valley Meat Packers*, 261 NLRB 958 (1982). *Shen-Valley* was reaffirmed in *M.C.P. Foods*, 311 NLRB 1159 (1993), where the parties signed a 5-year contract and an amendment which reaffirmed the expiration date prior to the 3-year anniversary date of the initial agreement. The Board held this to be a "premature extension." For discussion of this doctrine, see section 9-580.

Where the employees, during the period of a long-term contract, vote in an election to redesignate the contracting union as their representative, the current contract between the parties is a bar to a subsequent petition for a new period of reasonable duration; i.e., up to 3 years, running from the date of the election. *Montgomery Ward & Co.,* 143 NLRB 587 (1963). The election date is used as the beginning of the new period instead of the date of recertification because the election date is the critical date on which the employees manifested their decision to retain the incumbent as their representative. Id. at 588 fn. 3.

9-320 Contracts With no Fixed Term

A contract which has no fixed term does not bar an election for any period. *Pacific Coast Assn. of Pulp & Paper Mfrs*., supra, and *McLean County Roofing,* 290 NLRB 685 fn. 5 (1988). Contracts with no fixed duration include contracts of indefinite duration (9-321), contracts terminable at will (9-322), temporary agreements to be effective pending a final agreement (9-323), and extensions of expired agreements pending negotiations (9-324). They are defined as follows.

9-321 Indefinite Duration

347-4010-2042

A contract of indefinite duration is a contract without stated provisions for termination or which terminates on the occurrence of some event the date of which cannot be established with certainty before its occurrence. *W. Horace Williams Co.,* 130 NLRB 223 (1961); and *Pacific Coast Assn. of Pulp & Paper Mfrs*., supra.

It should be noted that, when a contract is for a fixed term, an employer's notice of intention to close the plant does *not* demonstrate that the plant is operating under a contract of indefinite duration; the only indefiniteness is as to whether the plant will remain open for the duration of the contract period. *Swift & Co.*, 145 NLRB 756, 761 (1963).

9-322 Terminable at Will

347-4010-2056

A contract terminable at will is a contract which terminates immediately on, or a stated period after, notice, and such notice can be given at any time by either party. *Pacific Motor Trucking Co*., 132 NLRB 950 (1961).

9-323 Temporary Agreements

347-4010-2070

A temporary agreement, within the meaning of these rules, is one which is to be effective until a complete and final agreement can be negotiated. *Bridgeport Brass Co*., 110 NLRB 997 (1955).

9-324 Extensions

347-4040-1760-7500

347-4040-8384

An extension of an expired agreement, for the purpose of these rules, means an extension made pending the negotiation of a new agreement or the modification of the old agreement. *Union Bag Corp*., 110 NLRB 1831 (1955); and *Frye & Smith, Ltd.,* 151 NLRB 49 (1956). See also *Crompton Co.,* supra. In *Madelaine Chocolate Novelties*, 333 NLRB 1312 (2001), the Board found that an alleged new contract was nothing more than an attempt to convert the fourth year of a prior agreement into the first year of a new contract.

In *Direct Press Modern Litho, Inc.,* 328 NLRB 860 (1999), the Board extended the duration of a contract bar where the employer had filed for Chapter 11 reorganization under the Bankruptcy Code. The Bankruptcy Court ordered the collective-bargaining agreement extended beyond its original expiration date for an additional 6-1/2 months. The Board found the 6-1/2-month extension consistent with its policy of industrial stability between the employer and the union, and was an appropriate accommodation between the NLRA and the Bankruptcy Code. The Board said that the Bankruptcy Court's action was not prohibited by the Board's "premature extension" doctrine. Id. at 862.

9-400 Representative Status of Contracting Union

347-4030

During the term of a contract, questions may arise concerning the representative status of the contracting party. Unlike other subjects of contract-bar policy, these involve the status of the contracting union rather than the nature or content of the collective-bargaining agreement. Generally, the issue is raised in the context of (a) an alleged schism in the bargaining representative, or (b) a claim that the bargaining representative is defunct. The lead case is *Hershey Chocolate Corp*., 121 NLRB 901 (1958). Although the Court of Appeals for the Third Circuit denied enforcement in the unfair labor practice case which grew out of the representation case (*NLRB v. Hershey Chocolate Corp*., 297 F.2d 286 (3d Cir. 1981)), the court's decision, which was based on a disagreement with the Board in the interpretation of the facts, apparently has not impaired the validity of the schism doctrine as such. See *Dorado Beach Hotel*, 144 NLRB 712, 714 fn. 6 (1963).

9-410 Schism

347-2017-7533-6700

347-4030-5000

A contract does not bar an election if there has been a schism in the contracting representative which is coextensive in scope with the existing unit. To make a schism finding, all three of the following conditions, spelled out by the Board in *Hershey Chocolate Corp*., supra, must exist.

9-411 Basic Intraunion Split

177-3987

347-2017-7533-6700

347-4030-5000

The first element is a basic intraunion conflict affecting the contracting representative. A basic intraunion conflict is defined as 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. See *Clayton & Lambert Mfg. Co.*, 128 NLRB 209, 210 (1960); cf. *Saginaw Furniture Shops*, 97 NLRB 1488 (1951).

As illustrations of the type of disruption envisaged, the Board in *Hershey* cited the disaffiliation or expulsion of an international from a federation, coupled with the creation by the federation of a rival; a split in an international combined with the transfer of affiliation of some officials to an existing rival or a new union; any realignment which has substantially the same effect on the stability of bargaining relationships.

In *B & B Beer Distributing Co.*, 124 NLRB 1420, 1422 (1960), the Board reemphasized the requirement that in order to warrant a schism finding the conflict have a substantial disruptive effect on the industrial stability normally flowing from the existence of a collective-bargaining contract. The rationale for the requirement is explained in *Allied Chemical Corp.,* 196 NLRB 483, 484 (1972), where the Board notes that one of its concerns, in *Hershey* was to preclude an otherwise untimely election "when the alleged schism was in fact no more than a raid or an effort by dissident elements to repudiate their representative's bargain."

A distinction thus exists between schism and "mere individual dissatisfaction with the collective bargaining apparatus." *Southwestern Portland Cement Co*., 126 NLRB 931, 934 (1960). A mere disaffiliation movement within a local, born out of a policy conflict between the local and its international, does not alone satisfy the Board's requirements for a schism. *Swift & Co.,* supra at 763. And the Board rejected the assertion of schism when it found merely competition between two individuals with conflicting sympathies for control of the existing unit to which both continued to belong. *Allied Chemical Corp*. , supra. See also *Georgia Kaolin Co.,* 287 NLRB 485 (1987), where the Board found no conflict at the highest level and therefore did not reach the question of whether the other conditions existed for a schism.

9-412 Opportunity at a Meeting

347-2017-7533-6700

370-9500

The second element: 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.

Thus, where several meetings were held but no advance notice was given of their purpose, the requirement that employees have an opportunity to express their views was not satisfied, and a schism finding was not warranted. *Wm*. *Wolf Bakery*, 122 NLRB 1163, 1164 (1959).

9-413 Reasonable Time

177-3987

347-2017-7533-6700

347-4010-4033-5040

The third element is that 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. A year and a half was regarded as a reasonable period of time in light of all the circumstances. *Great Atlantic & Pacific Tea Co.,* 126 NLRB 580, 583 (1960); and *Oregon Macaroni Co.,* 124 NLRB 1001, 1004 (1959). But in *Standard Brands,* 214 NLRB 72 (1974), a 3-month delay between a special convention and a disaffiliation vote was deemed unreasonable where the possible merger discussed at the special convention had been well known and long publicized.

9-414 Other Schism Issues

Apart from the above basic elements comprising the definition of "schism," additional rules spelled out in *Hershey* relate to filing, intervention, and a place on the ballot in the election, and also concern the effect on the existing contract. These are:

In the processing of cases involving a schism finding, any labor organization having an adequate showing of interest and otherwise entitled to participate in the election may file a petition or intervene in the proceeding. The ballot, as in all elections other than craft severance elections, provides for a "no union" or "neither" vote. Furthermore, the winning union, if any, is *not* required to assume the existing contract. *Hershey Chocolate Corp*., supra at 909–910.

In a situation involving joint representation by two or more local unions, disaffiliation action by members of one or more of the locals concerned a substantial number of employees in the contract unit, and was therefore regarded as sufficient to cause the kind of confusion which unstabilizes the bargaining relationship and justifies a schism finding. *St. Louis Bakery Labor Council*, 121 NLRB 1548, 1550–1551 (1958). The same result was reached where a disaffiliation action by one of three joint representatives occurred affecting four plants of a seven-plant single-employer contract unit. *Purity Baking Co.,* 121 NLRB 75 (1958).

With specific reference to the expulsion of the Teamsters from the AFL–CIO, the Board found no evidence that such expulsion "has resulted either in the creation of a new rivalry or the aggravation of an existing rivalry, based on policy conflict." It therefore concluded that the expulsion, standing alone, was "insufficient to establish the existence of the basic intraunion conflict which is a necessary prerequisite to a schism finding." *B & B Beer Distributing Co*., supra.

In *Polar Ware Co.,* 139 NLRB 1006 (1962), the Board rejected a claim that a basic intraunion conflict had arisen over the issue of Communist domination of the international union. On three occasions subsequent to the expulsion of the international from the CIO, the employees had reaffirmed their affiliation with the expelled union and not until the latest contract was negotiated by that union did they vote to disaffiliate. Some employees supported the disaffiliation movement for reasons unrelated to the Communist issue. In these circumstances, the employees' disaffiliation action did not meet the standards established for a schism finding.

In *Packerland Packing Co*., 181 NLRB 284 (1970), the Board found no schism creating confusion as to the identity of the bargaining representative under the existing contract. In that case, an ambiguously worded ballot in an internal union poll did not conclusively indicate whether the majority of the unit had voted against continued representation by the intervenor or merely against management's most recent contract proposal. Subsequent to the election, the intervenor had continued to negotiate new contracts, process grievances, and receive checked off dues despite the advent of a rival faction claiming to be the intervenor's successor.

In *Kimco Auto Products,* 183 NLRB 993 (1970), the Board dealt with a situation where no new organization resulted from the disaffiliation action of the contracting local and no "assignment" of the existing agreement was effected, so that the local, which alone had executed the agreement, remained the same after the disaffiliation action and continued to administer the agreement. As there was no open split at the highest level of the international union and within the certified local, "followed by intensive campaigning to secure the allegiance of the local union members on the basis of the policy differences which were initially responsible for the basic conflict," the disaffiliation action did not create such confusion in the bargaining relationship as to remove the contract as a bar to an election. See also *Bluff City Transfer Co.,* 184 NLRB 604 (1970); and *Buckeye Cellulose Corp*., 184 NLRB 606 (1970).

The Board has long held that the mere change in designation or affiliation of the contractual representative does not of itself warrant a finding that an otherwise valid preexisting contract is no longer a bar. This is true whether there is a specific assignment of the contract (see, for example*, Louisville Railway Co*., 90 NLRB 678 (1950)). However, this Board holding was not

applied to "a true schismatic situation" as defined in *Hershey* but rather to agreements with respect to the transfer among all interested unions, or, at most, a disaffiliation based on a disagreement between an international and an individual local which did not result in the confusion and instability inherent in a true schismatic situation (see, for example, *Prudential Insurance Co.,* 106 NLRB 237 (1953)).

"[A]pplication of this principle to a true schism," said the Board in *Hershey*, supra at 911, "would tend to place resolution of the representation issue in the hands of the local officers who may or may not reflect the employees' wishes."

9-420 Defunctness and Disclaimer

347-2017-7533-5000

347-4030-2500 et seq.

347-4030-6700

(a) *Defunctness*

The rules as to defunctness, also enunciated in *Hershey Chocolate Corp*., 121 NLRB 901 (1958), are:

A contract does not bar an election if the contracting representative is defunct. *Hershey Chocolate Corp*., supra at 911; and *International Harvester Co*., 111 NLRB 276 (1955).

In *Hershey*, 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." Id. at 911. The "relative inactivity of the union" is irrelevant to a defunctness determination. *Rocky Mountain Hospital,* 289 NLRB 1347 (1988); and *Kent Corp.,* 272 NLRB 735 (1984). On the other hand, a clear and unequivocal disclaimer of interest, made in good faith, will remove the contract as a bar. *American Sunroof Corp.,* 243 NLRB 1128 (1979).

See also *Moore Drop Forging Co.,* 168 NLRB 984 (1967); *Aircraft Turbine Service,* 173 NLRB 709 (1969); *Nevada Club,* 178 NLRB 81 (1969); *Automated Business Systems,* 189 NLRB 124 (1971); *Road Materials,* 193 NLRB 990 (1971); and *Loree Footwear Corp.,* 197 NLRB 360 (1972). In *Apex Tankers Co.,* 257 NLRB 685 (1981), the Board treated as if it were defunct, a union that was dominated by supervisors. Although the union was not actually defunct, the disabling conflict of interest created by supervisory involvement prompted the Board to reject the contract as a bar.

A resolution purporting to "dissolve and disestablish" a union will not compel a finding of defunctness if the surrounding circumstances indicate that it is not *in* fact defunct. *News-Press Publishing Co*., 145 NLRB 803 (1964). The Board noted that the union remained a functioning organization with previous collective-bargaining experience, and could once again assume such a role if it wished or were required to do so; the meeting at which the resolution was voted was announced informally, with no statement of its purpose; fewer than half of the employees in the unit attended; the petitioner was instrumental in the efforts to terminate the allegedly defunct group's status as a labor organization; and, in voting to dissolve it, the members who attended the meeting seemed to have been motivated by a desire to rid themselves of the recently executed contract between the union and the employer. See *East Mfg. Corp.,* 242 NLRB 5 (1979). See also *Gate City Optical Co*., 173 NLRB 1709 (1969), in which a union that succeeded to the contracting union could not escape its contractual obligations by claiming its predecessor was defunct.

Defunctness was *not* found in *Polar Ware Co*., supra (the union continued to hold regular meetings and to meet with employer to settle grievances and emphatically claimed willingness to administer the contract); *Dorado Beach Hotel,* 144 NLRB 712 (1963) (the union experienced only temporary inability to function); *Swift & Co.,* 145 NLRB 756 fn. 6 (1963) (the union maintained a bank account, held membership meetings, and conferred with the employer to discuss plant shutdown); *Gary Steel Supply Co*., 144 NLRB 470 fn. 3 (1963) (the union had elective officers and was in fact administering the contract); *Moore Drop Forging Co*., supra (the union's inactivity was due to its shop steward's erroneous legal conclusion that the posting of an election notice by the Board precluded the union from continuing to negotiate with the company); *Nevada Club*, supra (an attempted merger failed, and the original local was reactivated); and *Wahiawa Transport System*, 183 NLRB 991 (1970) (the union was actively representing the employees at the time of an inadequately announced meeting at which a small percentage of the union's members voted to merge with the intervenor).

On the other hand, defunctness was found in *Bennett Stone Co*., 139 NLRB 1422 (1962) (the union's charter had been canceled; most of its members had joined the petitioner; all of its books and other property had been transferred to the petitioner; and no one appeared on its behalf at the hearing).

Although the Board found no defunctness in *Nevada Club*, supra, the contract involved did not serve as a bar because the Board's decision issued after the contract's expiration date. Similarly, in *Automated Business Systems*, 189 NLRB 124 (1971), the no-defunctness finding did not restore as a bar a contract which had been canceled by the officers and bargaining committee members who had signed it.

It should be added that action by an international union or intermediate body evidencing its willingness and ability to assume the representative functions of a local, which is no longer capable of performing such functions, will be deemed relevant to the issue of defunctness only if the international or intermediate body is a party signatory to the contract. *Hershey Chocolate Corp*., 121 NLRB 901, 911–912 (1958).

(b) *Disclaimer*

See section 8-100.

9-500 Effect of Contract on Rival Claims or Petitions

347-4020-6725

The issue of the timeliness of a rival petition as affecting contract bar arises often in representation cases. Because this has many potential complex ramifications, the Board has formulated a set of rules in an attempt to simplify the procedure. The lead case decision in this decisional area is *Deluxe Metal Furniture Co*., 121 NLRB 995 (1958).

9-510 Time of Filing of Petition

347-2067-3333

347-4020-6700

393-6007-1700

A contract does not bar an election if a petition is filed with the Board before the execution date of the contract (where it is effective immediately or retroactively), or if a petition is filed with the Board before the effective date of the contract (where it is effective at some time after its execution). *Deluxe Metal Furniture Co*. , supra; *National Broadcasting Co.*, 104 NLRB 587 (1953); and *Herdon Rock Products*, 97 NLRB 1250 (1951). See also *Aramark School Services,* 337 NLRB 1063 (2002).

The Board's "postmark rule" applies to the filing of petitions during the open period for filing a petition. *Cargill Nutrena, Inc.,* 344 NLRB 1125 (2005). See also section 9-550.

A contract executed on the same day that a petition is filed with the Board bars an election provided the contract is effective immediately or retroactively, and the employer did not have actual notice at the time of its execution that a petition had been filed. For an application of this rule, see *Santa Fe Trail Transportation Co*., 139 NLRB 1513, 1514 fn. 3 (1962). But the petition is regarded as received in the Regional Office even if the mechanical details of filing have not been completed by the affixing of the date and time stamp *Campbell Soup Co*., 175 NLRB 452 (1969). The petition, to be considered filed, need not be on an official Board form. *Duke Power Co*., 191 NLRB 308, 311 fn. 10 (1971). Also, the Board has found no prejudice to the employer where it received notice of the filing of the petition a few hours before the petition was actually received in the Regional Office. As long as the employer was informed prior to its signing of the contract, the notice requirement was held fulfilled. *Rappahannock Sportswear Co.,* 163 NLRB 703 (1967). Merely informing the employer of petitioner's representative interest, however, and not of the filing of the petition, does not meet the requirement. *Boise Cascade Corp.,* 178 NLRB 673 (1969).

The "postmarking" rule—date of deposit in mail—also governs the filing of petitions under this doctrine. See Rules Section 102.111(b).

In *Weather Vane Outerwear Corp.*, 233 NLRB 414 (1977), the Board held that when one petition filed under Section 9(e) is timely filed, and a second petition is filed during the pendency of the unresolved question concerning representation raised by the earlier one, the contract-bar doctrine is rendered inoperative as to the later petition.

See also *Hamilton Park Health Care Center*, 298 NLRB 608 (1990), where the Board held that knowledge of the rival union campaign is irrelevant to a contract-bar determination.

A contract may be deprived of its bar quality if it does not clearly reflect its expiration date. *Bob's Big Boy Family Restaurants*, 259 NLRB 153 (1981). But in *Suffolk Banana Co.,* 328 NLRB 1086 (1999), the limited confusion of two different expiration dates in the contract was not detrimental to the employees. Since they did not rely on either date in filing their petition, the contract was held to be a bar.

9-520 Amendment of Petition

347-4020-6750 et seq.

Where a petition is amended, and the employers and the operations or employees involved were contemplated under the original petition, and the amendment does not substantially enlarge the character or size of the unit or the number of employees covered, the filing date of the original petition is controlling. *Deluxe Metal Furniture Co*., supra, 1000 fn. 12. See also *Illinois Bell Telephone Co*., 77 NLRB 1073 (1948). When the Board itself finds a larger unit appropriate, an intervening contract will not be found a bar, *Brown Transport Corp*., 296 NLRB 1213 (1989). But see *Centennial Development Co.,* 218 NLRB 1284 (1975). The filing date of the original petition is also controlling when a favorable ruling is made on a petitioner's appeal from a Regional Director's dismissal of a petition or on a motion for reconsideration of a decision. Id. However, when the original petition sought a craft in a departmental unit and was amended to seek a production and maintenance unit, the date of the amended petition was deemed controlling. *Hyster Co*., 72 NLRB 937 (1947). Also, when the original petition misnamed the employer in a material manner, the Board used the date of the amended petition as the date of filing. *Allied Beverage Distributing Co.*, 143 NLRB 149 (1963); and *Baldwin Co*., 81 NLRB 927 (1949).

9-530 "Substantial Claim" Rule

347-4020-6725

530-8019

A contract between an employer and a rival union has been held not to bar an election if (1) when it was executed an incumbent union continued its claim to representative status, or (2) a

nonincumbent union had refrained from filing a petition in reliance upon an employer's conduct which indicated that recognition had been granted or that a contract would be obtained without an election. This is known as the substantial claim rule. *Deluxe Metal Furniture Co*., supra at 998–999; see also *Acme Brewing Co*., 72 NLRB 1005 (1947); *Chicago Bridge Co*., 88 NLRB 402 (1950); *Southern Permanente Services*, 172 NLRB 1399 (1968); and *Riverdale Manor Home for Adults*, 189 NLRB 176 (1971). But see *RCA Del Carribe*, 262 NLRB 965 (1982), an unfair labor practice case.

Thus, when a petitioner, an incumbent union, asserted a substantial representative claim by (1) urging that the employer's notice of termination was untimely and that the contract remained in force for another year; (2) filing suit in the State court to vindicate this claim; and (3) filing a petition with the Board on the same date that the employer and the intervening union executed their contract, that contract did not serve as a bar to an election. *General Dynamics Corp.,* 144 NLRB 908, 909–910 (1963).

All other claims of majority status or demands for recognition (generally called "bare claims") have no effect on the determination of whether a contract is a bar to a rival petition. The "substantial claim" rule is applied in a situation when a petitioner is lulled into a false sense of security by an employer who led it to believe that recognition would not be granted, or any contract be entered into with any union, until after a Board election. *Greenpoint Sleep Products*, 128 NLRB 548 (1960).

9-540 The "Insulated Period"

347-4010-4067 et seq.

530-6083-2033

A significant element in contract-bar policy is the concept of an "insulated period." The parties to a contract which is approaching its expiration date are provided with a 60-day "insulation period" immediately preceding and including the expiration date to negotiate and execute a new contract.

Representation petitions filed timely under the "postmark rule" (Sec. 102.111(b)) will be processed even though received in the Regional Office during the insulated period. *John I. Haas, Inc.,* 301 NLRB 300 (1991); and *Central Supply Co. of Virginia,* 217 NLRB 642 (1975). See also *Cargill Nutrena, Inc.,* 344 NLRB 1125 (2005).

The "insulated period" was adopted to afford the parties to an expiring contract an opportunity to negotiate and execute a new or amended agreement without the disrupting effect of rival petitions. See *Crompton Co*., 260 NLRB 417, 418 (1982), for a discussion of the policies involved and for holding that contracts for less then 90 days are not a bar because they do not stabilize the relationship and provide no "insulation period." The insulated period rule was, announced in *Deluxe Metal Furniture Co.*, supra at 1000, and holds petitions filed during the 60-day (or other applicable) period immediately preceding and including the expiration date of an existing contract are dismissed, regardless of whether the contract contains an automatic renewal clause and regardless of the length of the renewal period.

An "insulated period" applies to every kind of representation petition, including employer petitions (*Nelson Name Plate Co.,* 122 NLRB 467 (1959)), and regardless of the seasonal nature of the employer's business (*Cooperativa Azucarera Los Canos,* 122 NLRB 817 fn. 2 (1959)), but the period is different in health care institution cases. See section 9-550 infra.

It does *not* apply when the contract is not a bar for other reasons under the contract-bar rules. *National Brassiere Products Corp*., 122 NLRB 965 (1959); and *Stewart-Warner Corp.,* 123 NLRB 447 (1959).

The net effect of the "insulated period" rule is to require all petitioners to have their petitions on file at least 61 days before the contract's termination date or undergo a risk that a contract executed during the 60-day insulated period will foreclose another petition for the new contract's

term. Moreover, the rule prevents "overhanging rivalry and uncertainty during the bargaining period, and will eliminate the possibility for employees to wait and see how bargaining is proceeding and use another union as a threat to force their current representative into unreasonable demands." *Deluxe Metal Furniture Co*., supra at 1001; *Electric Boat Division*, 158 NLRB 956 (1966); and *National Cash Register Co.,* 201 NLRB 846 (1973).

The *Electric Boat* policy of granting an additional 60-day insulated period applies only when an untimely petition is processed under conditions denying the parties to an existing bargaining relationship an opportunity to execute a new contract within the original 60-day insulated period. Thus, when an untimely filed petition was administratively dismissed about 26 days before expiration of the insulated period and there was no showing that an additional insulated period could be justified on other grounds, a newly executed contract was held not to bar a petition filed before its execution. *Kroger Co*., 173 NLRB 397 (1969); and *Royal Dean Coal Co*., 177 NLRB 700 (1969). In another context, when any prejudice to the parties, caused by the processing of the untimely filed petition, resulted from their own conduct in waiting 2 weeks to apprise the Regional Director of the existence of the contract, the request for an additional insulated period was denied. *Utilco Co*., 197 NLRB 664 (1972).

In *Vanity Fair Mills,* 256 NLRB 1104 (1981), the Board reinstated a petition that had been dismissed as untimely filed. In doing so, the Board noted that the petitioning employee relied on erroneous advice by an NLRB agent.

A Presidential wage-price freeze led to a special exception to the *Deluxe Metal* rule. In several cases, the Board dismissed as untimely petitions which would be considered timely under ordinary contract-bar rules because the freeze in effect during the parties' insulated period created an uncertainty which deprived the parties of a 60-day period in which to bargain intelligently. The parties were then granted a new 60-day insulated period. *West India Mfg. Co*., 195 NLRB 1135 (1972); *Hill & Sanders-Wheaton, Inc.*, 195 NLRB 1137 (1972); *Dennis Chemical Co*., 196 NLRB 226 (1972); and *Litton Business Systems*, 199 NLRB 354 (1972). This approach was also applied when agreement between the union and an employer association had been a firm precondition, acquiesced in by the employer, to an agreement between the union and the employer, and negotiations had been effectively suspended during the freeze. *California Parts & Equipment*, 196 NLRB 1108 (1972). However, a contract agreed on but not signed because of uncertainties created by phases I and II of the President's economic program was held not a bar when the union had ample time, prior to the filing of the petition and after sufficiently clear guidelines had been established by the Pay Board, to resume negotiations obstructed by the freeze. *Bowling Green Foods*, 196 NLRB 814 (1972).

9-550 The Period for Filing

347-4010-4000 et seq.

347-4010-8080

347-4020-6700

Except in the health care industry and seasonal operations to be timely with respect to an existing contract, the petition must be filed more than 60 days but less than 90 days before the expiration date of the contract. *Leonard Wholesale Meats,* 136 NLRB 1000 (1962) (which modified the *Deluxe Metal* decision in one respect; i.e., by changing the maximum limit from 150 days to 90 days). In health care cases, the petition must be filed not more than 120 days or less than 90 days before expiration. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

The Board's "postmark rule" applies to the filing of petitions during the open period for filing a petition. *Cargill Nutrena, Inc.,* 344 NLRB 1125 (2005). See also section 9-510.

A petition filed untimely will be regarded as premature under this rule and may be dismissed unless (1) the contract would not be a bar under some other rule, or (2) a hearing is directed despite the prematurity of the petition in order to resolve doubts as to the effectiveness of the

contract as a bar, and the decision issues on or after the 90th day preceding the expiration date of the contract. *Deluxe Metal Furniture Co*., 121 NLRB 995, 999 (1958), and *Mosler Safe Co*., 216 NLRB 9 (1975). See, for example, *Royal Crown Cola Bottling Co.*, 150 NLRB 1624 (1964); *General Time Corp*., 195 NLRB 1107 (1975); and *Maramount Corp.*, 310 NLRB 508 (1993).

When a substantial number of the employers comprising the appropriate unit are neither named in nor notified of a petition until the filing and service of an *amended* petition, the filing date of the amended petition is controlling and, if it was filed within the "insulated period," it is subject to dismissal. *Allied Beverage Distributing Co*., 143 NLRB 149 (1963). See also *Baldwin Co*., 81 NLRB 927 (1949), and in connection with the discussion of amended petitions on 33, ante.

An interim arrangement extending the expiration date of a contract pending the negotiation and execution of a new agreement cannot change the expiration date for purposes of the timely filing of a petition. *Metropolitan Life Insurance Co*., 172 NLRB 1257 (1968).

A petition filed after the execution of a supplemental agreement amending the original agreement so as to cover employees who, in effect, were an accretion to the unit is barred by the contract as amended, so long as the petition would be untimely with respect to the expiration date of the original contract. *California Offset Printers*, 181 NLRB 871 (1970). See also *Firestone Synthetic Fibers Co.,* 171 NLRB 1121 (1968).

When a unit was covered by two contracts which were jointly negotiated and administered but which expiration dates were 30 days apart, a petition filed 90–60 days before the later of the two expiration dates was held timely as to both contracts. *Midway Lincoln-Mercury,* 180 NLRB 58 (1969).

Conflicting contracts offered as a bar create no bar since such a situation precludes a clear determination by a potential petitioner of the proper time for filing a new petition. *Cabrillo Lanes*, 202 NLRB 921 (1973). Similarly, when the contract distributed to employees showed different dates than the actual contract dates, a petition filed within the dates known to employees was considered timely. *Bob's Big Boy Family Restaurant,* 235 NLRB 1227 (1978).

With respect to seasonal industries, while the 60-day insulated period is applicable, the 90-day filing rule (formerly 150-day rule under *Deluxe*) is not. *Cooperativa Azucarera Los Canos*, 122 NLRB 817 fn. 2 (1959).

9-560 The Impact of Bargaining History on Rival Petitions

347-4060-5000

When there has been a prior bargaining history on a single-employer basis, a rival petition for a single-employer unit will prevail if timely filed before the insulated period of the last individual contract, even if the employer has adopted or joined in a multiemployer contract and whether that multiemployer contract would otherwise be a bar to a petition. *U.S. Pillow Corp.,* 137 NLRB 584 (1962). See also *West Lawrence Care Center,* 305 NLRB 212 (1991). Compare *Albertson's Inc.,* 307 NLRB 338 (1992). This rule has been held not to apply where there has been no single-employer bargaining history. *Thos. de la Rue, Inc*., 151 NLRB 234 (1965).

9-570 Automatic Renewal Provisions

347-4010-9000

347-4040-8300

These are provisions under which contracts automatically renew themselves unless either party notifies the other of its desire to modify or terminate the contract. The parties sometimes forestall automatic renewal by notice as provided in the contract. If they do not, the contract renews itself and constitutes a bar unless a timely petition is filed before the beginning of the insulated period. *ALJUD Licensed Home Care Services,* 345 NLRB 1089 (2005). If automatic

renewal is forestalled, the situation is precisely the same as if the contract had no automatic renewal clause.

The pertinent rules pertaining to automatic renewal are:

a. The question of whether or not automatic renewal of a contract has been forestalled should be considered only after the parties have failed to execute a new agreement during the 60-day "insulated period." *Deluxe Metal Furniture Co*., supra at 999, 1001.

b. Any notice of a desire to negotiate changes received by the other party immediately preceding the automatic renewal date provided in the contract will prevent its renewal for contract-bar purposes unless there is a provision or agreement for the continuation of the existing contract during negotiations. *KCW Furniture Co.,* 247 NLRB 541 (1980). Compare *Bridgestone/Firestone, Inc.*, 331 NLRB 205 (2001).

c. A written agreement which reinstates the old automatically renewable contract is treated as a new contract.

d. A notice given shortly before the automatic renewal date is treated as one to forestall renewal, even if the contract contains separate modification and renewal clauses, except where the contract *specifically* provides that it will be renewed despite notice given pursuant to the modification provisions and the notice is in fact specifically given pursuant to these provisions. Id. at 1003; *Wagoner Transportation Co.*, 177 NLRB 452, 453 fn. 2 (1969).

e. A midterm modification provision, regardless of its scope, does not remove the contract as a bar unless the parties actually terminate the contract. *Deluxe Metal Furniture Co*., supra at 1003; *Ellison Bros. Oyster Co*., 124 NLRB 1225 (1959); *Penn-Keystone Realty Corp*., 191 NLRB 800 (1971); and *Providence Television*, 194 NLRB 759, 760 (1972).

f. If the contract specifies an automatic renewal period other than 60 days, the parties are deemed bound by their agreement for purposes of forestalling renewal, but the timeliness of the petition is "keyed" to the 60-day period. *Deluxe Metal Furniture Co*., supra at 1000.

g. When the administration of the contract has been abandoned, it cannot automatically renew. Id. at 1002 fn. 15.

h. The effectiveness of a timely notice to forestall automatic renewal is not changed by inaction of the parties after such notice, even though the contract required certain action within a specified period, or by rejection of the notice, or by its withdrawal. Id. at 1002 fn. 16.

i. The employer, by repeatedly negotiating with the union in the absence of timely notice, does not thereby waive the untimeliness of such notice. Therefore, in *Moore Drop Forging Co.,* 168 NLRB 984 (1967), automatic renewal was not forestalled and the contract was held a bar.

j. Automatic renewal is not forestalled by oral notice. *Appalachian Shale Products Co*., 121 NLRB 1160 fn. 6 (1958). For other cases dealing with automatic renewal, see *Carter Machine Co*., 133 NLRB 247 fn. 2 (1961); *New England Lead Burning Co*., 133 NLRB 863, 866 (1961); *Long-Lewis Hardware Co*., 134 NLRB 1554 (1962); *General Dynamics Corp.*, 144 NLRB 908, 909–910 (1963); *Stox Restaurant,* 172 NLRB 1474 (1968); and *Herlin Press*, 177 NLRB 940 (1969).

9-580 The "Premature Extension" Doctrine

347-4010-4033-5060 et seq.

347-4040-8384

If the parties, during the term of an existing contract, execute an amendment or a new contract containing a later termination date, the contract is deemed prematurely extended. *Deluxe Metal Furniture Co*., supra at 1001–1002; *Lord Baltimore Press*, 144 NLRB 1376 (1963); *New England Telephone Co*., 179 NLRB 53 (1969); *M.C.P. Foods*, 311 NLRB 1159 (1993); and *Shen-Valley Meat Packers*, 261 NLRB 958 (1982).

In *New England Telephone*, the Board, reiterating this doctrine, explained that a new contract for a longer period, signed during the term of a previously executed agreement at a time when that prior agreement would bar a petition, can itself prevent the processing of a rival petition only for the remainder of the period when the prior contract would have been such a bar. Thus, when such a "premature extension" occurs, the proper time for the filing of a rival petition is the 30-day period between the 90th and 60th day prior to the expiration date of the original contract of 3 years' duration or less. See also *Hertz Corp*., 265 NLRB 1127 (1982).

For an earlier application of the "premature extension" doctrine, see *Republic Aviation Corp*., 122 NLRB 998 (1959), noting, of course, that the period for filing the petition, under *Leonard Wholesale Meats*, supra, was changed from a maximum of 150 days to 90 days prior to the expiration of the initial 3-year period, and that a prematurely extended contract therefore does not bar an election if the petition is filed more than 60 days but less than 90 days before the terminal date of the original contract.

It should be noted, however, that a contract is *not* prematurely extended when executed (1) during the 60-day insulated period preceding the terminal date of the old contract; (2) after the terminal date of the contract if automatic renewal was forestalled or if the contract contained no renewal provision; and (3) at a time when the existing contract would not have barred an election because of other contract-bar rules. *Deluxe Metal Furniture Co*., 121 NLRB 995, 1001–1002 (1958). An illustration of the third exception is where the contract had been in effect for its reasonable term, such as in *Cushman's Sons, Inc*., 88 NLRB 121 (1950).

It is immaterial that the premature extension is embodied in an entirely new and separate agreement rather than in an amendment, supplement, or extension of an existing contract. *Stubnitz Greene Corp.,* 116 NLRB 965 (1957); and *Auburn Rubber Co.*, 140 NLRB 919 (1963). Such a prematurely extended contract does not bar a petition even though (1) the employer gave notice to employees of an intent to negotiate a new contract; (2) the new contract was entered into in good faith; and (3) the new contract was ratified by members of the incumbent union. The vice the Board sought to avoid was that of requiring employees, who desire to change representatives, to accelerate organizational activities so that they would be ready to assert a claim of majority representation at any time the parties might elect to discuss modification of the existing contract. Id. at 921.

When an employer was not a party to the original contract between its predecessor owner and the incumbent union, but instead, following purchase of the plant, entered into new obligations, separately undertaken, by executing with the union a new contract containing different starting and termination dates, the contract was not deemed an extension of the contract executed by the employer's predecessor, even though it was labeled "Extension Agreement.'' Thus, the new contract barred a petition for 3 years from its execution. *Chrysler Corp*., 153 NLRB 578 (1965).

When a multiplant contract is found to constitute a premature extension of a single-plant contract and a petition is timely filed with respect to the single-plant contract, the multiplant contract does not bar the petition. *Continental Can Co*., 145 NLRB 1427 (1964). This situation is distinguishable from that in which the agreement in question is intended solely to implement a long considered determination by the employer and the union to join in multiemployer bargaining. Under these circumstances, the premature extension doctrine is *not* applied. *Sefton Fibre Can Co*., 109 NLRB 360 (1954).

When the antecedent contract contains a discriminatory provision, it does not bar an election and therefore does not come within the premature extension rule. However, the Board does not admit extrinsic evidence in a representation proceeding to establish the unlawful nature of a contract provision. Thus, in *St. Louis Cordage Mills*, 168 NLRB 981 (1968), because the Board could not determine, in the absence of extrinsic evidence, that sex was not a bona fide qualification for the jobs covered by a seniority clause, the clause was not found unlawful on its face. Therefore, the contract was held a premature extension and, consequently, no bar to an election.

Where there may be a question of premature extension, but the department involved in the petition is a new and separate unit, prior contracts covering other units in the employer's operations can have no impact on the contract between the employer and the intervenor covering employees in the new unit, and this latter contract serves as a bar. *Michigan Bell Telephone Co*., 182 NLRB 632 (1970).

The Board's rule is not an absolute ban on premature extensions; rather, it applies to petitions not timely filed with respect to antecedent agreements. Since contracts of unreasonable duration are treated as if they were limited to a reasonable period (3 years), a petition is dismissed where it is not filed 60 days prior to the third anniversary date rather than the expiration date designated in the contract. *Union Carbide Corp*., 190 NLRB 191, 192 (1971). A prematurely extended contract also bars a petition filed *after* the date on which the original contract would have expired if the new contract had not been executed. *H. L. Klion, Inc.,* 148 NLRB 656 (1964). See also *Baldwin Auto Co*., 178 NLRB 88 (1969). As stated in *Klion*, supra at 660:

> The primary purpose of the premature-extension rule is to protect petitioners in general from being faced with prematurely executed contracts at a time when the Petitioner would normally be permitted to file a petition. However, the Board's rule is not an absolute ban on premature extensions, but only subjects such extensions to the condition that if a petition is filed during the open period calculated from the expiration date of the old contract, the premature extension will not be a bar.

Thus, a premature extension cannot serve to deprive a petitioner of the open period under the original contract. *M.C.P. Foods*, 311 NLRB 1159 (1993).

For an interesting case on a related subject, see *Madelaine Chocolate Novelties,* 333 NLRB 1312 (2001), discussed at 9-130 and 9-324, supra. See also discussion of this doctrine in a bankruptcy context. *Direct Press Modern Litho, Inc.,* 328 NLRB 860 (1999). Section 9-224, supra.

9-600 Private Agreements

9-610 Agreements not to Represent Certain Employees

347-4070

Under the *Briggs Indiana* rule (*Briggs Indiana,* 63 NLRB 1270 (1945)), an agreement in which a union agrees not to seek representation of certain employees bars a petition by that union for the specified employees during the life of the agreement. The agreement does not have to be part of the collective-bargaining agreement. *Lexington House*, 328 NLRB 894 (1999).

This rule was restated, with certain qualifications in *Cessna Aircraft Co*., 123 NLRB 855 (1959). See also *Allis-Chalmers Mfg. Co*., 179 NLRB 1 (1969), and *United Broadcasting,* 223 NLRB 908 (1976). In *Northern Pacific Sealcoating*, 309 NLRB 759 (1992), the Board applied the *Briggs Indiana* rationale to bar petitions filed by employers to 8(f) agreements where the employer agreed not to file a petition.

When a union, which has agreed not to represent certain employees during the term of a contract, files a petition for those employees during the contract term, but explicitly states at the hearing that it does not wish to represent them until after the contract has expired, the *Briggs Indiana* rule does not apply. *Fullview Industries*, 149 NLRB 427 (1965). In such a situation, the Board noted, it is not expending its efforts to assist a union in breaching its agreement.

The revised rules are:

(1) Such a promise will not be implied from a mere unit exclusion. *UMass Memorial Medical Center,* 349 NLRB 369 (2007); *Budd Co*., 154 NLRB 421 (1965); and *Women & Infants' Hospital of Rhode Island*, 333 NLRB 479 (2001). See *Springfield Terrace, LTD*, 355 NLRB 951 (2010), where the Board was divided over whether the language involved amounted to an agreement not to represent. The majority found that it did not.

(2) The rule will not be implied on the basis of an alleged understanding of the parties during contract negotiations. *Cessna Aircraft Co*., supra at 857. However, it is not required that the agreement be included in the contract. *Lexington House*, supra.

(3) When an international union is a party to a contract containing a provision within the meaning of this rule, the rule will be applied to any locals of the international as well as to the international itself, and where a local is a party to such a contract, the rule will be applied to any other local of the same international union. *Cessna Aircraft,* supra at 857.

In *Allis-Chalmers Mfg. Co*., supra, a contract provision read: "The Union shall not, during the term of this agreement, solicit or accept into membership any person in the employ of the Company excluded from the coverage of the agreement under the provisions of paragraph 3 above [which expressly excluded seven specific categories]." The Board, construing the provision to apply to the petitioner (the international), which was a signatory to the contract, stated that it did not view this rule as an undue encroachment on rights guaranteed by Section 7 of the Act; employees excluded by such provisions are *not* disenfranchised; "rather, their options as to which unions are available to them are merely diminished by one"; and the Act does not declare unlawful a union's decision not to organize and represent certain employees. See also *Budd Co*., supra; *Montgomery Ward & Co.,* 137 NLRB 346 (1962); and *Huron Portland Cement Co*., 115 NLRB 879 (1956).

(4) The rule is inapplicable to a contract by a certified union, which contains a provision not to represent certain of the employees in the certified unit. Id.

9-620 Neutrality Agreements

It is beyond the scope of this book to cover all aspects of neutrality agreements; a broad term that can cover agreements calling for a "gag order" on employer speech, agreements for card checks, or even agreements for arbitration of first contracts.

The Board has held that a provision for recognition of "after-acquired" facilities is a mandatory subject. *Pall Biomedical Products Corp*., 331 NLRB 1674 (2000). These clauses are often referred to as *Kroger* clauses. See *Houston Div. of the Kroger Co*., 219 NLRB 388 (1975). Compare *Raley's,* 336 NLRB 374 (2001).

Where the parties agree to such a clause, the Board will hold them to it and will dismiss a petition filed by the union party thereto even in circumstances where the union argues that the agreement will result in an arbitrator deciding unit placement and scope issues. *Verizon Information Systems*, 335 NLRB 558 (2001). See also *Central Parking System*, 335 NLRB 390 (2001).

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

On December 8, 2004, the Board granted review in *Shaw's Supermarkets*, 343 NLRB 963 (2004). The Regional Director had dismissed the RM petition "finding that the Union's demand for recognition based on an alleged contractual" after-acquired clause does not entitle the Employer to demand an election under Section 9(c)(i)(B). The Board granted review and remanded for hearing on the following issues:

(1) Whether the Employer clearly and unmistakably waived the right to a Board election;

(2) If so, whether public policy reasons outweigh the Employer's private agreement not to have an election.

In granting review, the Board commented that the *Central Parking* decision is "contrary to the general rule that the Board does not defer representation case issues to arbitration [and that]by granting review here we keep open the possibility that the Board will abide by the general rule

rather than *Central Parking*." The petition in *Shaw's* was later withdrawn. There was no subsequent decision by the Board.

See *Lamons Gasket Co*., 357 NLRB No. 72 (2011), reversing *Dana Corp.,* 351 NLRB 434 (2007). (See Sec. 10-500, infra.)

See also section 7-131.

9-700 Unlawful Union-Security and Checkoff Provisions

Another type of contract infirmity which renders it incapable of barring a representation petition is an unlawful union-security provision.

The lead case for this area of contract-bar policy is *Paragon Products Corp*., 134 NLRB 662 (1962), which overruled in several material respects the initial lead case, *Keystone Coat Supply Co*., 121 NLRB 880 (1958). For more recent discussion of *Paragon*, see *Electrical Workers Local 444 (Paramax Systems)*, 311 NLRB 1031, 1035, 1037 fn. 32 (1993).

For convenience, the effect on contract bar of certain types of contract checkoff provisions is also treated here.

9-710 Union-Security Provisions

347-4040-3367

347-4040-6725

A contract containing a union-security clause which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, does not bar an election. "A clearly unlawful union-security provision for this purpose is one which by its terms clearly and unequivocably goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation.'' *Paragon Products Corp*., supra at 666. This principle was reaffirmed in *Paramax,* supra at 1037 fn. 32. The clause itself and not extrinsic evidence must establish the illegality. *Jet-Pak Corp*., 231 NLRB 552 (1977) (stipulation of parties not admissible to remove bar).

Such unlawful provisions include those which (1) require the employer expressly and unambiguously to give preference to union members in hiring, laying off, seniority, wages, or other terms and conditions of employment; (2) specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period; and (3) expressly require, as a condition of employment, the payment of sums of money other than the "periodic dues and initiation fees uniformly required."

While a union owes a duty to advise its members of their *General Motors* (373 U.S. 734 (1963)), and *Beck* (*NLRB v. Beck Engraving Co.,* 487 U.S. 735 (1988)) rights, it does not breech its duty of fair representation by negotiating a union security clause that tracks that statutuory language of Section 8(a)(3), i.e., uses the term "Membership" without expressly explaining to the employees their *General Motors* and *Beck* right. Thus, the use of that language would not make such a union-security clause illegal on its face. *Assn. for Retarded Citizens* (*Opportunities Unlimited)*, 327 NLRB 463 (1999).

Contracts containing ambiguous though not clearly unlawful union-security provisions bar an election in the absence of a determination of illegality as to the provision involved by the Board or a Federal court pursuant to an unfair labor practice proceeding.

In this connection, the Board has had occasion to distinguish *Paragon Products Corp*., supra, and also *St. Louis Cordage Mills*, supra, from circumstances which involved an ambiguity existing "as to the extended coverage of the contract'' in *Post Houses,* 173 NLRB 1320 (1969). The Board held in *Post Houses* that the ambiguity "must be resolved by considering the intent and practice of the contracting parties," relying therefore on such evidence in arriving at a determination that a contract was not a "members only" contract.

This approach, however, is *not* used in cases involving determination as to the validity of union-security provisions. As we have indicated at the outset of this discussion, contracts

containing ambiguous union-security (though not clearly unlawful) provisions are *not* litigated in representation proceedings and do bar an election. A similar result is reached where the issue is whether a seniority provision renders a contract ineffective as a bar. This determination, too, "depends on whether the provision was unlawful on its face, as the Board will not admit extrinsic evidence in a representation proceeding to establish its unlawful nature." *St. Louis Cordage Mills*, supra at 982. The Board has stated that it would view the contract itself and that no testimony or evidence relevant only to the practice under the contract would be admissible in a representation proceeding. See discussion in *Peabody Coal Co.,* 197 NLRB 1231 (1972).

When one article of a contract requires certain employees to become and remain members of the union after 3 months' service, a clause stating that these employees will receive a pay increase after 3 months' service if they join the union is not clearly unlawful, and the fact that an ambiguity is present does not, consistent with *Paragon Products*, remove the contract as a bar. *H. L. Klion, Inc*., supra at 660.

It is clear, of course, that a contract containing an unambiguous closed-shop clause does not bar a petition. *Horizon House 1*, *Inc*., 151 NLRB 766 (1965). Similarly, when a contract shows on its face that it is retroactively effective and that its grace period is geared to that effective date, and thereby fails to accord nonmember incumbent employees the required 30-day grace period following the date of its execution, it is not a bar. *Standard Molding Corp*., 137 NLRB 1515, 1516 (1962). The Board, in arriving at its conclusion, stated it was therefore "a provision incapable of a lawful interpretation and does not bar the instant petition.'' But in *Federal Mogul Corp*., 176 NLRB 619 (1969), the Board found that it was clear "from the terms of the contract itself" that it was not retroactively effective. Accordingly, *Standard Molding* was inapplicable and, as the union-security provision of the contract was "not clearly unlawful on its face," it operated as a bar to a petition which was untimely filed after its execution date.

Where a union-security contract is renegotiated during its term with a retroactive effective date, the new contract will operate as a bar to a petition. As the terms of the contracts overlap and coverage under lawful union-security clauses is continuous, it cannot be said that the current contract specifically withholds from incumbent nonmembers and/or new employees the statutory 30-day grace period. *Weyerhaeuser Co*., 142 NLRB 702 (1963). A union-security clause requiring employees, upon employment, to sign a union membership application to become effective 30 days after date of hiring is unlawful. It denies to employees the 30-day grace period during which they may consider the matter of joining the union. *Sentry Investigation Corp*., 198 NLRB 1074 (1972).

A contract clause requiring all employees to pay, in addition to initiation fees and dues, "assessments [not including fines and penalties]" is unlawful, since "assessments" are not included within the meaning of the term "periodic dues" as used in Section 8(a)(3) of the Act. *Santa Fe Trail Transportation Co*., 139 NLRB 1513 (1962). Compare *Suffolk Banana Co.,* 328 NLRB 1086 (1999), bar status not lost because the contract did not require payment of assessments.

On the other hand, a contract requiring employees to become and remain union members in accordance with the union's constitution and bylaws is lawful as such a clause may be interpreted to require no more than the tender of periodic dues and initiation fees. *Stackhouse Oldsmobile*, 140 NLRB 1239 (1963).

A contract clause conditioning the relative seniority standing of supervisors returning to that unit upon the quantum of payment of the equivalent of union dues during a period when such employees were outside the unit is clearly unlawful and, therefore, renders the contract inoperable as a bar. *Steelworkers Local 1070 (Columbia Steel & Shafting Co.),* 171 NLRB 945 (1968). The same finding was made in *Pine Transportation*, 197 NLRB 256 (1972), where the objectionable clause conditioned retention and further accumulation of seniority by employees in or promoted outside the bargaining unit upon maintenance of membership.

In *Ace Car & Limousine Service, Inc*., 357 NLRB No. 43 (2011), a divided Board found that a contract's "savings clause" did not preserve the contract bar quality of an agreement that contained an unlawful union-security provision.

9-720 Checkoff Provisions

347-4040-6750

536-2554-2500

725-6733-8045

The lead case for the impact of checkoff provisions is *Gary Steel Supply Co*., 144 NLRB 470 (1963). In that case, the Board codified its rules in relation to contracts containing checkoff provisions.

Section 302 of the Act provides that an employer may deduct union membership dues from wages of employees only if "the employer has received from each employee, on whose account such deductions were made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." However, a contract will not lose its effectiveness as a bar to a representation proceeding simply because it contains a checkoff provision which fails to spell out the requirements of the proviso to Section 302 quoted above.

This rule does not apply to a checkoff provision, which is either (a) unlawful on its face, or (b) found to be illegal in an unfair labor practice proceeding or in a proceeding initiated by the Attorney General. *Gary Steel Supply Co*., supra at 472–473 fn. 10. The Board reiterated its holding in *Paragon Products Corp.*, supra, that no testimony or evidence will be admissible in a representation proceeding when the testimony or evidence is only relevant to the question of the practice under a contract urged as a bar to the proceeding.

In *American Beef Packers*, 169 NLRB 215 (1968), the following contract clause was the subject of a contract-bar issue:

> During the period of this agreement, the Company shall deduct, as to each employee who shall authorize it in writing in the appropriate form or whose valid and effective authorization is now on file with the Company, and for so long as such authorization shall remain valid or effective, from the first pay payable to each member each month, the regular monthly union dues and the initiation fee of the Union and promptly remit the same to Arthur L. Morgan.

It was contended that this provision for employer payments to an individual representative of his employees was a misdemeanor under Section 302 of the Landrum-Griffin Act of 1959, and the checkoff clause therefore rendered the contract no bar. Applying *Gary Steel*, the Board held that the checkoff provision was not unlawful under the standards of that case and that the contract operated as a bar. "Such a contract," said the Board in the language of *Gary Steel*, "will be considered effective as a bar to a representation proceeding, even though it contains a checkoff provision which fails to spell out the requirements of the proviso to Section 302(c) (4) of the Act, unless the checkoff provision is either unlawful on its face or has been otherwise determined to be illegal in an unfair labor practice proceeding or in a proceeding initiated by the Attorney General." See also *General Electric Co.*, 173 NLRB 511 (1969).

9-800 Racial Discrimination in Contracts

347-4040-3333-3367

Contracts which discriminate between groups of employees on racial lines do not constitute a bar to an election. *Pioneer Bus Co*., 140 NLRB 54 (1963).

Consistent with decisions by the courts in other contexts condemning governmental sanction of racially separate grouping as inherently discriminatory (see, for example, *Brown v. Board of Education*, 349 U.S. 294 (1955)), the Board does not permit its contract-bar rules to be utilized to shield such contracts from otherwise appropriate election petitions. Thus, when the bargaining representative of employees in an appropriate unit executes separate contracts, or for that matter a single contract which discriminates between groups of employees on the basis of race, such contracts do not operate as a bar.

In *Pioneer Bus*, the employer met separately with representatives of a group composed exclusively of white employees and another group consisting entirely of black employees—both groups covering the same classifications—and executed separate contracts with each. While the contracts were executed on the same dates and generally contained identical terms and conditions of employment, separate seniority lists were maintained within each unit. On these facts, since the two contracts divided the employees into two separate bargaining units solely on considerations of race, they were removed as a bar.

In *Safety Cabs, Inc.*, 173 NLRB 17 (1969), separate collective-bargaining agreements, entered into by a single employer on separate dates and with different terms for black drivers at one company and for white drivers at another, were found to constitute separate bargaining units essentially based on race. This was the type of bargaining history "established and continued on a racial basis, the validity of which the Board could not accept as a factor in determining the scope of an appropriate bargaining unit." For this reason, the Board in an earlier case involving the same companies (*New Deal Cab Co*., 159 NLRB 1838 (1966)) declined to accord any weight to the extensive bargaining history of separate units "essentially based on race" in unit determination. In *Safety Cabs* the Board concluded that contracts thereafter executed which separated employees on racial lines could not bar a petition for a combined unit of both companies.

Significantly, the Board rejected the contention, inter alia, that segregation was inherent in and a reflection of the history of the community in which the parties functioned as a justification for separate units and for upholding the separate contracts as a bar. "The fact that the parties may not have caused the racial segregation,'' observed the Board, "does not make its perpetuation less invidious.''

Although it did not deal with contract-bar issues, the Board's decision in *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 210 NLRB 943 (1974), would suggest the same result where there is gender discrimination.

9-900 Contracts Proscribed by Section 8(e)

347-4040-6775

Section 8(e) makes it an unfair labor practice for any labor organization and any "employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." The contract proscribed is commonly known as a hot cargo assessment.

A proviso to Section 8(e) specifically states that nothing in the above subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating "to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work."

In *Food Haulers*, 136 NLRB 394, 395–396 (1962), a contract asserted as a bar contained the following provision:

> It shall not be the duty of any employee nor shall any employee at any time be required to cross a picket line and refusal of any employee at any time to cross a picket line shall not constitute insubordination nor cause for discharge or disciplinary action.

It was contended that this contract clause was unlawful under Section 8(e) of the Act and that the contract was therefore no bar. The Board rejected this contention, holding that a hot cargo clause, although unlawful, "does not in any sense act as a restraint upon an employee's choice of a bargaining representative," and, accordingly, does not remove the contract as a bar. In arriving at this result the Board reasoned as follows:

> Thus, Section 8(e) provides that any contract or agreement containing an unlawful "hot cargo" provision "shall be to such extent unenforceable and void." In an unfair labor practice proceeding, if the Board found after litigation that a disputed clause violated Section 8(e), it would not and could not set aside the entire contract but only the unlawful clause. Yet . . . in a representation proceeding where the issue of legality of an alleged "hot cargo" clause is collateral at best, the entire contract would in effect be set aside [if found no bar] on a finding that the contract contained a "hot cargo" provision. We can perceive no rational basis for a sanction so much more drastic in a representation than in an unfair labor practice proceeding, even assuming that the Board has to power so to do. In fact, such a drastic remedy seems to be inconsistent . . . with the stated purport of Section 8(e).

The Board distinguished *C. Hager & Sons Mfg. Co*., 80 NLRB 163 (1949), in which it held that it would not find a contract a bar which contained an unlawful union-security clause because the "existence of such a provision acts as a restraint upon those desiring to refrain from union activities within the meaning of Section 7 of the Act." A "hot cargo" clause, it stated in *Food Haulers*, "although unlawful, does not in any sense act as a restraint upon an employee's choice of a bargaining representative." See also *Four Seasons Solar Products Corp.,* 332 NLRB 67 (2000).

9-1000 Special Statutory Provisions as to Prehire Agreements

347-4040-5080

90-7550 et seq.

Section 8(f)(1), added by the 1959 amendments to the Act, provides that it shall not be an unfair labor practice for an employer engaged primarily in the construction industry to make an agreement with a union covering construction employees, even though the union's majority status has not been established prior to the making of the agreement.

However, a proviso to Section 8(f) states that, when the majority status of the contracting union has not been established pursuant to Section 9, an agreement lawful under Section 8(f) will not serve as a bar to a petition filed pursuant to Section 9(c) or Section 9(e). Accordingly, a prehire contract made lawful by Section 8(f) does not constitute a bar to a petition. *John Deklewa & Sons*, 282 NLRB 1375 (1987), and *S. S. Burford, Inc*., 130 NLRB 1641, 1642 (1961).

Section 8(f)(1) does not mean that a union may acquire representative status only by certification; voluntary recognition is an equally suitable method for determining whether the proviso to Section 8(f) applies. Thus, a contract executed pursuant to voluntary recognition, when a union demonstrates its majority "in a manner recognized as valid under Section 9(a)," remains bar despite the proviso to Section 8(f). *Island Construction Co*., 135 NLRB 13 (1962). *John Deklewa & Sons*, supra at 1384. The Board explained that a union obtains exclusive representative status by establishing that a majority of the employees in an appropriate unit have selected it as their representative, either in a Board-conducted election pursuant to Section 9(c), or by other voluntary designation pursuant to Section 9(a). A union selected under either Section 9(c) or Section 9(a) is entitled to recognition. Accordingly, the Board, saw no justification to limit Section 8(f)(1) as meaning that the union's representative status may only be acquired by

certification, or that recognition accorded under Section 9(a) is not an equally suitable method for determining whether the proviso to Section 8(f) applies. And where the relationship does convert from 8(f) to 9(a), the contract will become a bar to a rival petition. *VFL Technology Corp*., 329 NLRB 458 (1999). For a discussion of these principles in an 8(a)(5) proceeding, see *Goodless Electric Co.*, 321 NLRB 64 (1996).

In *Central Illinois Construction*, 335 NLRB 717 (2001), the Board took the "occasion" to explain how an 8(f) representative can become a 9(a) representative through an agreement with the employer. Specifically the Board stated that written contract language must unequivocally show:

(1) that the union requested recognition as the majority representative of the unit employees.
(2) that the employer granted such recognition; and
(3) that the employee's recognition was based on the union showing, or offer to show, substantiation of its majority support.

See also *Donaldson Traditional Interiors,* 345 NLRB 1298 (2005), in which a panel majority found it unnecessary to rely on *Central Illinois* and *Nova Plumbing, Inc. v. NLRB,* 330 F.3d 531 (D.C. Cir. 2003), a decision in which the court criticized the Board's *Central Illinois* decision.

On the other hand, strict requirements for the showing of majority status apply. *J & R Tile*, 291 NLRB 1034 (1988); *American Thoro-Clean Ltd*., 283 NLRB 1107 (1987); and *Golden West Electric*, 307 NLRB 1494 (1992). And in *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000), a divided Board remanded an RD petition to the Regional Director to take evidence as to whether or not the union represented a majority when the employer extended 9(a) recognition. Compare *Oklahoma Installation Co*., 325 NLRB 741 (1998), where the Board found that a letter of assent that states that the union has submitted and the employer is satisfied that the union represents a majority of the unit employees.

The mere fact that a construction industry bargaining relationship was in existence prior to the enactment of Section 8(f) does not support an inference that the parties must have initiated their relationship under Section 9(a). *Brannan Sand & Gravel*, 289 NLRB 977 (1988). Compare *Casale Industries*, 311 NLRB 951 (1993), where the Board held that it would not permit a challenge to 9(a) status where that status is granted and more than 6 months passed without a charge or petition. At footnote 18 of *Casale*, the Board harmonized this decision with its decisions in *J & R Tile* and *Brannan Sand*, supra. Compare *H.Y. Floors,* supra, where the petition was filed less than 6 months after the purported 9(a) recognition. See also *Saylor's, Inc.,* 338 NLRB 330 (2002); *Reichenbach Ceiling & Partition Co.*, 337 NLRB 125 (2001); *Verkler, Inc.,* 337 NLRB 128 (2001); and *Pontiac Ceiling & Partition Co.,* 337 NLRB 120 (2001)**.**

The decision in *Island Construction* is distinguishable from the Board's holding in *S. S. Burford, Inc*., supra. In the latter, the contract was held not to be a bar since it had been entered into as a prehire contract; i.e., at a time when the contracting unions had not and could not have demonstrated their majority status under Section 9 of the Act.

In one case the Board has suggested that it would not permit a carryover of 9(a) status where the units were substantially altered and expanded by subsequent agreements. *James Julian, Inc.*, 310 NLRB 1247 fn. 1 (1993).

For discussions of other prehire-8(f) issues, see sections 5-210 (Showing of Interest), 9-211 (Contract Bar), 10-500 (Lawful Recognition), 10-600 (Expanding Unit), 14-350 (Multiemployer, Single Employer, and Joint Employer Units), and 15-130 (Construction Units).

10. PRIOR DETERMINATIONS AND OTHER BARS TO AN ELECTION

The granting of a petition for an election is subject to certain limitations which are designed, like contract bar, to implement the statutory objective of achieving a balance between industrial stability and freedom of choice.

We have already considered contract bar. Treated here are other bars, one based on a statutory provision, Section 9(c)(3) of the Act, and the others on policy considerations.

10-100 Effect of Prior Election

347-2083

10-110 Board Elections

Section 9(c)(3) prohibits the holding of an election in any bargaining unit or subdivision in which a valid election was held during the preceding 12-month period.

An election may be valid and bar a new election even if the certification resulting from that election is revoked during the 12-month period, depending on the circumstances. *Weston Biscuit Co*., 117 NLRB 1206 (1955). The 12-month period runs from the date of balloting, not from the date of the certification. *Mallinckrodt Chemical Works*, 84 NLRB 291 (1949); and *Retail Store Employees Local 692 (Irvins, Inc.)*, 134 NLRB 686 fn. 5 (1961). If the balloting takes more than 1 day, the election is not considered as held until it has been completed. *Alaska Salmon Industry,* 90 NLRB 168, 170 (1950).

Under Section 9(c)(3), the prior election must be a "valid" election. *Security Aluminum Co*., 149 NLRB 581 (1964). A considerable increase in the number of employees and the employer's inaccurate prediction at the prior hearing, concerning the number of employees it would shortly have at the plant, did not impair the validity of the prior election. *U. S. Steel Corp*., 156 NLRB 1216 (1966).

A withdrawal of a petition after an election during the consideration of determinative challenge ballots does not affect the 1-year election bar rule. *E Center, Yuba Sutter Head Start*, 337 NLRB 983 (2002).

The prohibition of Section 9(c)(3) does not preclude the processing of a petition filed within 60 days before the expiration of the statutory period so long as the election resulting from such petition is not held within the prohibited time. However, petitions filed more than 60 days before the end of the statutory period will be dismissed. *Vickers*, *Inc*., 124 NLRB 1051 (1959). Note the distinction between this rule and the 1-year certification rule, treated later, which precludes the processing of a petition filed before the end of the 1-year period. The *Vickers* rule does not apply to a situation when an untimely petition, dismissed by the Regional Director, is reinstated by the Board on appeal because of questions concerning the validity of the prior election. *Mason & Hanger-Silas Mason Co*., 142 NLRB 699 (1963).

Although a petition was filed more than 5 months before the end of the 12-month period described in Section 9(c)(3), an immediate election was directed where the petition had already been processed, a hearing was held, and 12 months had by this time actually elapsed, the Board noting that "To dismiss the petition at this time would subject the Board to an immediate repetition of the proceeding as a new petition could be timely filed as soon as a decision in this case issues." *Weston Biscuit Co.,* supra at 1208; see also *Mason & Hanger-Silas Mason Co*., supra. Compare *Randolph Metal Works*, 147 NLRB 973, 974 fn. 5 (1964).

A new election is barred only in a "unit or any subdivision" in which a previous election was held. Section 9(c)(3) applies to the unit, not the employer, so an election is barred in same unit in the case of a successor employer during the 12-month period. *Kraco Industries*, 39 LRRM 1236 (Feb. 20, 1957).

Section 9(c)(3) does not preclude for a 12-month period the holding of an election in a larger unit, such as a plantwide unit, where there has been a previous election in a smaller unit, such as a craft unit, because the subsequent election is not being conducted in a "unit or any subdivision" in which the earlier election was held. *Allegheny Pepsi-Cola Bottling Co.,* 222 NLRB 1298 (1976). *Thiokol Chemical Corp*., 123 NLRB 888 (1959); and *Allstate Insurance Co*., 176 NLRB 94 (1969). For a discussion of the converse of this situation, see *Vickers, Inc*., supra at 1052. Employees who voted in the first election may be included in the larger unit and vote in the new election. *Robertson Bros. Department Store*, 95 NLRB 271, 273 (1951). Similarly, an election is not barred for employees who are excluded from the unit in the prior election. *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994), and *Philadelphia Co*., 84 NLRB 115 (1949).

Section 9(c)(3) prohibits only the holding of more than one valid election within a 1-year period. It does not prevent the Board from imposing a bargaining obligation based on a card majority within 1 year of a valid election. *Comvac International*, 297 NLRB 853 (1991); and *Great Scott Supermarkets*, 156 NLRB 592 (1966).

There is also an election year bar rule for UD elections. See Section 9(e)(2). That bar, however, applies only to valid UD elections. It does not bar a UD election within 12 months of a valid representation election. *Monsanto Chemical Co*., 147 NLRB 49, 50 (1964). See also *Gilchrist Timber Co.*, 76 NLRB 1233, 1234 (1948), explaining the interplay of Section 9(c)(3) and (e)(2) [then Sec. 9(e)(3)].

10-120 Comity to State Elections

347-2033

347-2040

In applying the statutory limitations in Section 9(c)(3), representation elections conducted by State authorities are given the same effect as the Board's own election, provided that the election itself is valid under State law and not affected by any irregularities under the Board's standards. *We Transport, Inc*., 198 NLRB 949 (1972); *Olin Mathieson Chemical Corp*., 115 NLRB 1501 (1956); and *T-H Products Co.,* 113 NLRB 1246 (1955). In *Summer's Living Center*, 332 NLRB 275 (2000), the Board set out the standards for comity:

(1) the state-conducted elections reflect the true desires of the affected employees;
(2) there was no showing of election irregularities; and
(3) there was no substantial deviation from due process requirements.

Where in a State-conducted election supervisors within the meaning of the National Labor Relations Act were included in the unit found appropriate, the Board deemed such an election not a valid election and declined to accord to it the same effect as it would have given to one of its own elections. *Southern Minnesota Supply Co.,* 116 NLRB 968, 969 (1957). See also *Health Center of Boulder County*, 222 NLRB 901 (1976), in which the Board did not give effect to an election in a mixed unit of professionals and nonprofessionals.

The Board did give effect to an election held under the law of the Virgin Islands, although that Territory's challenge procedures did not conform to the Board's, since the parties voluntarily participated in the election and the election was conducted "without substantial deviation" from the due-process requirements. *West Indian Co.*, 129 NLRB 1203 (1961). The results of a second election held by a State agency within 1 year of the first election were honored where the State law did not prohibit such an election. *Western Meat Packers*, 148 NLRB 444, 449–450 (1964). In *Albertson's/Max Food Warehouse*, 329 NLRB 410 (1999), the Board reversed its prior holding in *City Markets, Inc*., 266 NLRB 1020 (1983), and ruled that the timeliness of a UD petition is to be determined under the NLRB, not State law.

A distinction is made between an election conducted by a Government agency and one privately conducted. *Interboro Chevrolet Co.*, 111 NLRB 783, 784 (1955).

10-200 The 1-Year Certification Rule

347-2017-2500

530-4020

It is the Board's policy to treat a certification under Section 9 of the Act as identifying the statutory bargaining representative with certainty and finality for a period of 1 year.

This rule was upheld by the U. S. Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), in which the Court stated that "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence." In *Americare-Lexington Health Care Center*, 316 NLRB 1226 (1995), the Board reaffirmed the certification year rule and a panel majority applied the rule to the year after employees voted for continued representation in a decertification election. Accord: *Beverly Manor Health Care Center*, 322 NLRB 881 (1997).

In *Virginia Mason Medical Center,* 350 NLRB 923 (2007), bargaining began 4 months after a court order affirming the Board's order in a test of certification case. The Board found that there was no unwarranted delay in the 4-month period and therefore set the certification year as beginning with the bargaining.

To effectuate the policy of affording the employer and the union full opportunity of arriving at an agreement within the certification year, the Board has developed the rule that petitions, whether these be representation, employer, or decertification, will be dismissed if filed before the end of the certification year. The Board explained that "the mere retention on file of such petitions, although unprocessed, cannot but detract from the full import of a Board certification, which should be permitted to run its complete 1-year course before any question of the representative status of the certified union is given formal cognizance by the Board." This rule was enunciated in *Centr-O-Cast Engineering Co.,* 100 NLRB 1507, 1508 (1951), and is applied strictly. *United Supermarkets*, 287 NLRB 119 (1987). And in *Chelsea Industries*, 331 NLRB 1648 (2000), an unfair labor practice case, the Board held that an employer cannot withdraw recognition after the certification year expires based on evidence of employee dissatisfaction that was obtained during the certification year. Compare *LTD Ceramics, Inc.,* 341 NLRB 86 (2004) (signatures obtained on last day of certification year permitted).

In *Kirkhill Rubber Co.*, 306 NLRB 559 (1992), the Board decided that the certification year rule did not bar the processing of a UC petition. Compare *Firestone Tire Co*., 185 NLRB 63 (1970), distinguished by the Board in *Kirkhill*.

Care should be taken to distinguish between the 1-year certification rule promulgated by the Board and the 1-year limitation on elections provided by Section 9(c)(3) of the Act. The first requires the dismissal of any representation petition filed within 1 year after *certification*. The second prohibits the holding of an election in the 12-month period following a valid *election*.

A petition filed before the expiration of the 12-month period following an incumbent union's certification will, with certain exceptions discussed below, be dismissed, even if it is filed only a few days before that date.

10-210 Application of the 1-Year Certification Rule

347-2017-7533-8300

The 1-year certification rule applies only to petitions involving the representation of employees *in the unit certified*. It was not applied to a petition seeking a small segment of the employees who were included in a unit certified less than 1 year prior to the new petition, when during that year those employees had been effectively separated for unit purposes from the other employees covered by the certification. *American Concrete Pipe of Hawaii*, 128 NLRB 720 (1960).

When a voting group in a self-determination election chooses to remain a part of the existing larger bargaining unit, the certification resulting from that election does not constitute the type which bars a petition for 1 year because it does not embrace a complete bargaining unit, but only amounts to a finding that the group of employees voting have indicated a desire to remain a part of the larger unit. *Westinghouse Electric Corp*., 115 NLRB 185, 186 (1956), and *Edward J. DeBartolo Corp.*, 315 NLRB 1170 (1994). See also chapter on "Self-Determination Elections," infra, section 21.

But an RM petition for a plantwide unit was dismissed when a union had been certified less than 1 year previously as bargaining representative for a unit which encompassed a part of the employees in the plant. *Casey-Metcalf Machinery Co.*, 114 NLRB 1520, 1525 (1956).

10-220 Exceptions to the Rule

347-2017-5000

347-2017-7567

625-6675

10-221 The *Mar-Jac* Exception

The certification year is extended in situations where the employer has failed to carry out his statutory duty to bargain in good faith. The extension equals the time of delay and commences on the resumption of negotiations. The aim is to insure "at least one year of actual bargaining." *Mar-Jac Poultry Co.,* 136 NLRB 785, 787 (1962), and *Lamar Hotel*, 137 NLRB 1271, 1273 (1962). See also *Bridgestone/Firestone, Inc.,* 337 NLRB 133 (2001); and *JASCO Industries,* 328 NLRB 201 (1999).

Thus, when the employer had bargained with the union for only 6 months and, largely through its refusal to bargain, took from the union a substantial part of the 1-year period, "when Unions are generally at their greatest strength," to permit an election on the employer's petition at that time in question "would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year." Id. See also *Midstate Telephone Co.*, 179 NLRB 85 (1969); *Burnett Construction Co.*, 149 NLRB 1419 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); and *Lower Bucks Cooling & Heating*, 316 NLRB 16 (1995).

When there was not "a single minute of bargaining uncompromised by . . . unlawful conduct," the Board extended for a full year. *Metta Electric,* 349 NLRB 1088 (2007). See also, *All Seasons Climate Control, Inc*., 357 NLRB No. 70 (2011). Compare *American Medical Response,* 346 NLRB 1004 (2007) (3-month extension).

In *Dominguez Valley Hospital*, 287 NLRB 149 (1987), the Board ruled that the *Mar-Jac* year began with the first bargaining session, not the date of court enforcement of the bargaining order and not the date in which the parties agreed to schedule a bargaining session. The Board has held that an employer offers to bargain conditional on litigation in the Supreme Court did not in any way afford the unions their *Mar-Jac* year. *Chicago Health Clubs*, 251 NLRB 140 (1980). See also *Van Dorn Plastic Machinery Co.,* 300 NLRB 278 (1990), and *JASCO Industries*, supra.

In *Paramount Metal & Finishing Co.,* 223 NLRB 1337 (1976), the Board rejected an employer defense to *Mar-Jac* application where the union did not request immediate bargaining after the election and where the employer had an appeal pending in a related bargaining case.

On the other hand, the "equities of the case" were found not to warrant the *Mar-Jac* exception where the lapse in negotiations was occasioned solely by the employer's cessation of operations for a period of 4 months; the settlement of unfair labor practices related to the employer's refusal to bargain as to such cessation; and the union had the benefit of more than a year under its certification (9 months prior to the plant shutdown and more than 5 months subsequent to the settlement agreement) in which to negotiate. *Southern Mfg. Co.,* 144 NLRB 784 (1963).

The *Mar-Jac* case involved a settlement agreement, as did *Southern Mfg*. The *Mar-Jac* rule was also applied to a situation when an employer belatedly furnished requested information resulting in the union's withdrawal of the charge. This was held "tantamount" to a settlement of the unfair labor practice proceeding, less formal but essentially not different from the written settlement agreement which the Board in *Mar-Jac* considered a sufficient foundation for extending the period following a certification during which no valid petition may be filed. *Gebhardt-Vogel Tanning Co.*, 154 NLRB 913, 915 (1965).

In this line of cases, violations occurred during the certification year and directly served to deprive the union of the fruits of the certification. When, however, all the employer's violations occurred before the beginning of the certification year and it did not appear that any further violations were committed between the date of the certification and that of the request to bargain, there was no warrant for concluding that meaningful bargaining could not have taken place during the certification year. *Dixie Gas, Inc*., 151 NLRB 1257, 1259–1260 (1965).

Similarly, the *Mar-Jac* rule is not necessarily applicable in any 8(a)(5) situation; there must be a showing of a general refusal to bargain. *Cortland Transit*, 324 NLRB 372 (1997).

The Board has specifically rejected the application of *Mar-Jac* to the voting group in a self-determination election. *Edward J. DeBartolo Corp*., supra, and *White Cap Inc*., 323 NLRB 477 (1997).

10-222 The *Ludlow* Exception

347-2017-7533-1700

When the parties execute a contract within 12 months of the contracting union's certification, the certification year merges with that of the contract and the latter controls the timeliness of the filing of a rival petition. In such circumstances, there is no need to protect the certification further. Thus, a petition which is filed timely in relation to such a contract will be processed even though it is filed before the end of the certification year. *Ludlow Typograph Co*., 108 NLRB 1463 (1954).

The *Ludlow* exception applies only when the union negotiates a new contract, and *not* when the union, after certification, assumes an existing contract pursuant to a preelection agreement. *Great Atlantic & Pacific Tea Co*., 123 NLRB 1005 (1959). In other words, it does not apply in a situation where an agreement to continue an existing contract in effect after certification is executed prior to the certification year. *John Vilicich*, 133 NLRB 238 (1961); and *Westinghouse Electric Corp*., 114 NLRB 1515 (1956). In the latter, an existing national agreement was applied to the plant.

10-300 Settlement Agreement as a Bar

347-6020-5067

Following a settlement agreement containing a provision requiring bargaining, a reasonable period of time must be afforded the parties in which to reach a contract. *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). *Poole* was recently reaffirmed in *Caterair International*, 322 NLRB 64 (1996).

Effectuation of the policies of the Act requires that the employer honor the bargaining obligation provided for in a settlement agreement for a reasonable period of time and no question concerning representation may be raised while the effects of the employer's unfair labor practices are being remedied by the employer's compliance with the terms of a settlement agreement. *Freedom WLNE-TV*, 295 NLRB 634 (1989). *Interstate Brick Co.,* 167 NLRB 831 (1967); *Frank Becker Towing Co.,* 151 NLRB 466, 467 (1965); and *Dick Bros., Inc.,* 110 NLRB 451 (1955).

In *Lexus of Concord, Inc*., 343 NLRB 851 (2004), the Board rejected an administrative law judge's holding that an employer's letter stating that it would resume negotiations met the standards for settlement bar such as to bar a question concerning representation raised by a majority of employees expressing disaffection from the union.

For a discussion of "reasonable period," see 10-1000.

In *Trusev Corp.,* 349 NLRB 227 (2007), the Board reversed a series of cases dealing with the processing of decertification petitions in the face of settlements of concurrent unfair labor practice charges. The Board summarized its decision as follows:

> Based on all of the above, we overrule *Douglas-Randall* and its progeny and return to the Board's prior holdings for handling decertification petitions when the parties have resolved concurrent unfair labor practice allegations by entering into either a settlement agreement or collective-bargaining agreement. Thus, an employer's agreement to resolve outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union, or by entering into a collective-bargaining agreement, will not be treated as an admission of wrongdoing unless it expressly so provides, and will not require dismissal of a decertification petition challenging the union's majority status filed after the alleged unlawful conduct but prior to settlement. When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, continue to serve as a bar to newly filed petitions under the Board's contract-bar rules, but it will not bar a petition filed prior to the agreement.

This decision reverses *Douglas Randall, Inc.,* 320 NLRB 431 (1995); *Liberty Fabrics,* 327 NLRB 38 (1998); and *Supershuttle of Orange County,* 330 NLRB 1016 (2000); and returned Board law to *Passavant Health Center,* 278 NLRB 483 (1986). It does not of course validate a decertification petition whose showing of interest is tainted by employer misconduct. In reinstating *Passavant*, the Board also reinstated *Jefferson Hotel,* 309 NLRB 705 (1992), which encourages participation of the RD petitioner in the settlement negotiations of the unfair labor practice case. See *Trusev,* supra at fn. 14.

For further discussion of related issues, see section 10-800.

In *BOC Group*, 323 NLRB 1100 (1997), the Board found that a settlement agreement did not require bargaining or involve the type of unfair labor practices that would preclude a question concerning representation. There were, however, other pending 8(a)(3) and (5) charges. In those circumstances, the Board dismissed the petition subject to reinstatement on request if it would be appropriate in light of the disposition of those charges.

10-400 Court Decree as a Bar

347-6040

817-5942-9000

When more than a year has elapsed since the entry by the court of a decree directing an employer to bargain with a union, and no contract has resulted, the court order will not act as a bar to a current determination of representatives. *Ellis-Klatcher & Co.,* 79 NLRB 183 (1948).

In *Ellis-Klatcher*, supra, more than 4 years had elapsed since the entry of the court decree. In *Mascot Stove Co.,* 75 NLRB 427 (1948), the union had been certified as the exclusive bargaining representative, negotiations between the employer and the union were commenced but no contract was executed, and the Sixth Circuit entered a bargaining decree pursuant to which negotiations were resumed but, again, no contract was executed. When more than a year elapsed from the date of the decree without the consummation of a collective-bargaining agreement, the Board held that the court's decree did not preclude a current determination of representatives.

10-500 Lawful Recognition as a Bar/Reasonable Period of Time

347-2067

Like situations involving certifications, Board orders, and settlement agreements, where the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from

such bargaining, lawful recognition of a union bars a petition for "a reasonable period of time." *Keller Plastics Eastern, Inc*., 157 NLRB 583 (1966).

In a pair of cases decided in 2011 (*Lamons Gasket Co.*, 357 NLRB No. 72 and *UGL-UNICCO Service*, 357 NLRB No. 76) the Board defined "reasonable time." The period will range from a minimum of 6 months to 1 year.

Previously the Board had tailored the length of the period to the circumstances of the case. See for example *Royal Coach Lines,* 282 NLRB 1037 (1987); *Tajon, Inc.*, 269 NLRB 327 (1984); and *Brennan's Cadillac*, 231 NLRB 225 (1977). See also *Ford Center for the Performing Arts*, 328 NLRB 1 (1998), where the Board noted the problems of first contract bargaining as a consideration in determining "reasonable time." See also *MGM Grand Hotel*, 329 NLRB 464 (1999) (11 months held reasonable in circumstances).

See also the discussion of "reasonable period"at 10-1000.

Lamons Gasket and *UGL-UNICCO* each involved a reversal of Board law that amounted to a reinstatement of prior Board policy. *Lamons* reversed *Dana Corp*., 351 NLRB 434 (2007), and reinstated the Board's prior *Keller Plastics Eastern,* supra policy of permitting the voluntary recognition of a majority supported union and the application of a recognition bar to an election petition that challenges that recognition.

In *Dana Corp*. the Board had modified *Keller Plastics Eastern* supra, *Smith's Food & Drug Centers, Inc.,* 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001), to require that the employer notify the unit employees of its action in voluntarily recognizing a union. The employees or a rival union could then seek an election from the Board. If no petition was filed during the required 45 day notice period, the recognition bar policy would preclude a petition for a reasonable period of time.

UGL-UNICCO involved the "successor bar." The *UGL-UNICCO* Board reversed *MV Transportation,* 337 NLRB 770 (2002), which had itself reversed *St. Elizabeth-Manor, Inc.*, 329 NLRB 341 (1999). Under *St. Elizabeth Manor, Inc.*, recognition of an incumbent union by a successor bars a petition for a reasonable period of time. Under *MV Transportation* and an earlier case *Southern Moldings, Inc.*, 219 NLRB 119 (1975), such recognition entitled a union to only a rebuttable presumption of continuing majority status.

When a rival union seeks an election, the petition will not be barred if it does "not affirmatively appear . . . that the Employer extended recognition to the Intervener in good faith on the basis of a previously demonstrated showing of a majority and at a time when only that union was actively engaged in organizing the unit employees." *Sound Contractors Association*, 162 NLRB 364 (1966), and *Josephine Furniture Co., Inc*., 172 NLRB 404 (1968).

In a number of cases when one or more of the criteria set forth in *Sound Contractors* and *Josephine Furniture* were not affirmatively met, the informal agreement was held not to constitute a bar. *S. Abraham & Sons,* 193 NLRB 523 (1971); *Akron Cablevision*, 191 NLRB 4 (1971); *Display Sign Service*, 180 NLRB 49 (1970); *Pineville Kraft Corp*., 173 NLRB 863 (1969); and *Allied Super Markets*, 167 NLRB 361 (1967).

Since the *John Deklewa & Sons* decision (282 NLRB 1375 (1987)), there have been no cases in which the Board has been presented with a recognition bar in the construction industry. However, the discussion of appropriate unit in *Casale Industries*, 311 NLRB 951 (1993), clearly indicates that the Board would apply the doctrine in this industry subject to a scrutiny of that recognition. (See also sec. 9-1000.)

10-600 Expanding Unit

316-6701-6700 et seq.

347-8020-2050 et seq.

Some of the factors commonly raised by employers contending that a petition should be dismissed as premature are that the plant is still under construction or not yet in full operation; an insufficient number of the contemplated job classifications are filled; and there is not a representative number of employees in a substantial number of the existing job classifications.

In *Endicott Johnson de Puerto Rico*, 172 NLRB 1676, 1677 fn. 3 (1968), the Board made it clear 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 in an unorganized plant. The test in noncontract-bar cases is, rather, whether the present complement is substantial and representative; and there is no flat rule for making such a determination. In this particular case, the employer, at the time of the hearing, had a complement of approximately 200 employees in 115 assigned job classifications engaged in the production of six types of shoes. The employer's expansion plans included more employees, more job classifications, and more types of shoes in the original plant as well as in a second plant to be constructed. As the Board found that the numerous new job titles planned would not necessarily involve new job classifications in terms of skills, it found the present complement representative and substantial for purposes of directing an immediate election. See also *General Cable Corp*., 173 NLRB 251 (1969); and *Yellowstone International Mailing,* 332 NLRB 386 (2000), and cases cited there. In general, the Board finds an existing complement of employees substantial and representative when at least 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Shares, Inc.,* 343 NLRB 455 fn. 2 (2004).

In making its determination, the Board generally considers one or more of the following four factors:

1. The size of the employee complement just prior to the date of issuance of the Board's decision. By such time the complement may be significantly more representative and substantial than it was at the time of the hearing. See *Celotex Corp*., 180 NLRB 62 (1970); *Bell Aerospace Co*., 190 NLRB 509 (1971); and *St. John of God Hospital,* 260 NLRB 905 (1982).

2. Whether the projected additional jobs merely involve distinct operations rather than separate and distinct job classifications in terms of types of skills required of the employees. If no significantly different functions are to be fulfilled or no significantly different skills are required, the Board will find the "substantial and representative complement" test satisfied. See *Frolic Footwear*, 180 NLRB 188 (1970); *Redman Industries*, 174 NLRB 1065 (1969); and *Revere Copper & Brass*, 172 NLRB 1126 (1968). Compare *Bekaert Steel Wire Corp.,* 189 NLRB 561 (1971), in which the Board directed an election although the employer contended that its plans to add a new facility and process made the petition premature. The Board found the existing facility (process) then in operation "representative and a separate appropriate unit." The Board stated that the continuing viability of any certification that may result from the election and the effect, if any, of such certification may be reviewed in a subsequent appropriate proceeding after the new operations have materialized. See also *Some Industries*, 204 NLRB 1142 (1973), wherein the Board, while agreeing that the employee complement was substantial, held that the addition of 10–15 new classifications to the 9 in existence rendered the present complement nonrepresentative. Compare *Witteman Steel Mills*, 253 NLRB 320 fn. 7 (1981).

3. The rate of expansion of the unit. The Board has found that an expansion anticipated for implementation almost 2 years after the current hearing was "too remote and speculative

to form a basis for denying present employees an opportunity to select a bargaining representative." An expansion contemplated within the forthcoming year, however, was considered "a more realistic date for measuring the substantiality of the present force." *Gerlach Meat Co.,* 192 NLRB 559 (1971). See also *Bekaert Steel Wire Corp*., supra; *Key Research & Development Co.,* 176 NLRB 134 (1969).

A case involving the construction industry highlights the rationality of the Board's flexible ad hoc approach in the area of expanding units. This decision notes the Board's effort to balance two potentially conflicting policy objectives: insuring maximum employee participation in the selection of a bargaining agent, and permitting employees who wish to be represented as immediate representation as is possible. Since the construction industry, however, is characterized by activities of "a fluctuating nature and unpredictable duration," delaying an election until the employee complement was full or almost full "might well result in bargaining for only a very short duration, with the project completed before any meaningful results could ensue." Thus, in the construction industry the Board favors an early election. *Clement-Blythe Cos.,* 182 NLRB 502 (1970). For further discussion see *John Deklewa & Sons*, 282 NLRB 1375, 1386 fn. 45 (1987).

4. The Board will look at the employer's projected plans and will not dismiss where the plans are mere speculation or conjecture. See, e.g., *General Engineering*, 123 NLRB 586 (1959); *Meramec Mining Co.,* 134 NLRB 1675 (1962); and *Pullman, Inc*., 221 NLRB 954 (1975).

In *Toto Industries (Atlanta),* 323 NLRB 645 (1997), the Board affirmed on a Regional Director's decision finding representative complement and describing seven factors to be considered.

For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-700, and 15-130.

10-700 Contracting Units and Cessation of Operations

347-8020-6000 et seq.

The Board has extended its expanding unit guidelines to cases where the unit is contracting. *M. B. Kahn Construction Co*., 210 NLRB 1050 (1974); and *Douglas Motors Corp*., 128 NLRB 307 (1960). See also *NLRB v. Engineer Constructors*, 756 F.2d 464 (6th Cir. 1985). In *Fraser-Brace Engineering Co.,* 38 NLRB 1263 (1942), the Board dismissed a petition without prejudice where the construction work on a project was nearing completion and all or most employees would soon be laid off.

In *MGM Studios*, 336 NLRB 1255 (2001), the Board described its policy:

> To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be substantial and representative of the ultimate complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications.

A mere reduction in the number of employees is not sufficient to warrant dismissal of the petition. Rather, the Board will examine whether the reduction is a result of a fundamental change in the nature of the employer operations. *Plymouth Shoe Co*., 185 NLRB 732 (1970); and *Douglas Motors Corp*., supra at 308. See also *Wm. L. Hoge & Co*., 103 NLRB 20 (1953). See *Canterberry of Puerto Rico, Inc.,* 225 NLRB 309 (1976), and *Gibson Electric*, 226 NLRB 1063 (1976), requiring that mere speculation as to the uncertainty of future operations is not sufficient warrant for dismissing the petition. In *Pathology Institute*, 320 NLRB 1050 (1996) (an unfair labor practice case), the Board noted that a reduction in operations did not "destroy the continued appropriateness of the historic unit." Compare *Tracinda Investment Corp*., 235 NLRB 1167 (1978), and *Larson Plywood Co*., 223 NLRB 1161 (1976). See also *Cooper International, Inc*., 205 NLRB 1057 (1973), as to unit contraction as a result of plant relocation.

In *Servicios Correccionales De Puerto Rico*, 338 NLRB 452 (2002), the Board, having been advised that the unit had ceased to exist because of cancellation of a management service contract, issued an order to Show Cause why the petition should not be dismissed.

For an analysis of Board policy in construction cases compare *Fish Engineering & Construction*, 308 NLRB 836 (1992); and *Davey McKee Corp.,* 308 NLRB 839 (1992).

For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-600, and 15-130.

10-800 Blocking Charges (CHM sec. 11730)

347-6020-5033

393-6061

578-8075-6028 et seq.

The Board has a longstanding policy of refusing to process representation petitions when there is a pending unfair labor practice case. *U. S. Coal Co*., 3 NLRB 398 (1937); and *Big Three Industries*, 201 NLRB 197 (1973). This policy is known as the blocking charge policy and it is set forth in detail in CHM section 11730. In practice the policy has two different applications.

(1) Election petitions will not be processed when the alleged unfair labor practice conduct would have a tendency to interfere with employees' free choice. *Mark Burnett Productions,* 349 NLRB 706 (2007). This aspect of the policy requires that the charges be filed by a party to the representation case. The processing of the petition is deferred until the unfair labor practice case is resolved, absent a request to proceed (CHM sec. 11731.1). See also *Overnite Transportation Co.,* 337 NLRB 131 (2001) (national posting blocked petition at facility where no unfair labor practices had occurred). In *Bally's Atlantic City,* 338 NLRB 443 (2002), a divided panel declined a suggestion by one Board member that impounded ballots be counted where the petitioner had filed unfair labor practice charges instead of objections.

(2) If the charges allege incidents that challenge the circumstances surrounding the petition or the showing of interest or violations of Section 8(a)(2), (5), (b)(3), or (b)(7), the petition will be dismissed if the charge is deemed to have merit because the remedies for such cases may preclude a question concerning representation (CHM sec. 11730.3). *American Medical Response,* 346 NLRB 1004 (2006). This second application of the policy does not require that the charge be filed by a party to the representation case. The petitioner may upon final disposition of the unfair labor practice case seek reinstatement of the petition and is, for this purpose, kept informed of the status of that case by being granted party in interest status in the unfair labor practice case (CHM sec. 11733.2(b)). See, e.g., *Brannon Sand & Gravel*, 308 NLRB 922 (1992).

The blocking charge policy is not a per se rule. Thus, there are four major exceptions to the policy:

(1) *Where a request to proceed is filed by the party filing the charge*. (CHM sec. 11731.1) Such a request must be in writing and will usually be honored except in cases where the charges would, if proven, preclude the existence of a question concerning representation (Sec. 8(a)(2), (5), (b)(7), or (3)). A request to proceed in an 8(a)(2) case may be honored if the parties execute a *Carlson* waiver. *Carlson Furniture Industries*, 157 NLB 581 (1966), and CHM section 11731.1(c)(1). See also *Mistletoe Express Service*, 268 NLRB 1245 (1984), where the Board rejected such a waiver in the absence of an 8(a)(2) order and *Town & Country*, 194 NLRB 1135 (1972). Cf. *Pullman Industries*, 159 NLRB 580 (1966), where a waiver was approved in the absence of a Board order because the alleged assisted union was not a party to the representation case.

(2) *Where a fair election can be conducted notwithstanding meritorious charges*. This exception is available where the nature of the unfair labor practices would not interfere with

employee free choice. CHM section 11731.2 describes the considerations which go into the application of this exception.

(3) *Where significant common issues will be resolved by processing the representation case*. See CHM section 11731.3 for further information. See also discussion of *A. J. Schneider & Associates*, 227 NLRB 1305 (1977), in Chapter 11 under "Clarification of Certification (UC)."

(4) *Where the charge is filed too late to permit investigation before the hearing or the election*. (CHM secs. 11731.4 and 11731.5.) In this situation the Regional Director has the discretion to postpone the hearing or election; conduct the hearing or election and impound the ballots; or conduct the election, issue a tally and determine the validity of the election if objections are filed.

(5) A fifth less known exception involves strikers. The Board will waive the blocking charge rule in order to hold an election within 12 months of the beginning of an economic strike so as not to exclude strikers. *American Metal Products*, 139 NLRB 601 (1962). See also section 23-120, infra.

In one unusual case, the two Member Board ordered the processing of a petition notwithstanding the pendency of an 8(a)(2) charge. In doing so, the Board stated that the "unfair labor practice charge was filed by a union other than the petitioner against an employer other than the Employer" party to the representation case. The Board noted that the issue presented in the unfair labor practice case was a "novel theory" and that there was no guidance in how to process a matter like the one before it. Accordingly, the Board ordered the processing of the petition leaving resolution of the bar issue to a "later date" when the unfair labor practice case had been resolved. *Sequoias Portola Valley*, 354 NLRB 528 (2009).

In the case of decertification petitions it may be alleged that unfair labor practices tainted the petition thus mandating dismissal thereof. In order to warrant dismissal, there must be a causal connection between the unfair labor practices and the employee disaffection. *Lee Lumber & Building Material Corp*., 322 NLRB 175, 177 (1996); and *Overnite Transportation Co.*, 333 NLRB 1392 (2001). The Board has a four-factor test for determining causal connection:

(1) the length of time between the unfair labor practices and the filing of the petition;
(2) the nature of the alleged acts;
(3) any possible tendency to cause employee disaffection; and
(4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp*., 271 NLRB 78, 84 (1984). Compare *AT Systems West, Inc.,* 341 NLRB 7 (2004) (conduct tainted the petitions); and *LTD Ceramics, Inc.,* 341 NLRB 86 (2004) (conduct did not taint); *Overnight Transportation Co.*, supra, and *Penn Tank Lines, Inc*., 336 NLRB 1066 (2001).

In *Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004), the Board directed the Regional Director to conduct a preelection hearing on an RD petition to determine whether there "was a causal relationship between [alleged unfair labor practice] conduct and the disaffection." In so doing the Board noted that the standards set out in *Master Slack*, 271 NLRB 78 (1984), should be applied and that "the *Master Slack* test is an objective one." Id. at fn. 2.

This hearing does not have to be separate from the unfair labor practice hearing. Rather, a Regional Director may use the record in the unfair labor practice hearing in making a *Saint Gobain* determination. See e.g. *NTN-Bower Corp*.—unpublished Board Order of May 20, 2011, in Case 10–RD–1504.

A petition that is not dismissed may be held in abeyance. Upon final disposition of the unfair labor practice charges, the petition that was held in *abeyance* will be activated and be processed in the normal manner. Where the unfair labor practices were found meritorious, no election will be conducted until the posting period has expired absent a written waiver. Preliminary processing

of the petition is permitted (CHM sec. 11734). See also *Matson Terminals*, 321 NLRB 879 fn. 7 (1996).

As noted above, a petitioner may request that a *dismissed* petition be reinstated on final disposition of the unfair labor practice case. In *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), the Board ordered the employer to bargain for a reasonable period of time after entry of an 8(a)(5) order and would not permit a question concerning representation to be raised during that period. A previously dismissed petition will not be reinstated during this period and if, bargaining during that period results in a contract, that contract will bar processing of the petition. In *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001), the Board set a 6-month to 1-year period for bargaining before the union's status can be challenged.

For Board policy with respect to concurrent decertification pettions and unfair labor practice cases, see section 10-300, supra.

Petitions filed during the posting period of a settlement agreement will be dismissed. *Freedom WLNE-TV*, 295 NLRB 634 (1989); *Hertz Equipment Rental Corp.,* 328 NLRB 28 (1999).

For additional discussion, see sections 10-300 and 24-150.

10-900 Special Situations

There are times when special situations occur. In *Aerojet-General Corp*., 144 NLRB 368, 371 (1963), the Board stated:

> In the particular circumstances of this case, we do not believe it would be in the national interest to direct an election based on the present petition. Administration of the National Labor Relations Act, it must be remembered, is an important, but not the sole, instrument of our national labor policy. Although exclusive jurisdiction over representation matters has been committed to the Board, we do not regard this as a license to carry out our responsibilities with myopic disregard for other important considerations affecting the national interest and well-being.

In *Aerojet-General*, supra, the Board held that an election would be inappropriate, although it would normally have directed one, in view of the intervention of the President of the United States and the Secretary of Labor in the national interest and their setting up special procedures to resolve a contract dispute in order to avert serious damage to the Nation's vital defense program that a strike would have caused.

Along similar lines, in *Mine Workers*, 205 NLRB 509 (1973), a case in which a union was involved in its capacity as an employer, the Board found a special situation "in which extraordinary considerations compel a different result." Factually, a reorganization resulted from proceedings began by the Secretary of Labor and actions initiated by private parties enforcing rights granted under the Labor-Management Reporting and Disclosure Act, Section 2(a). To hold an election at the time in question, observed the Board, would be at cross-purposes with, and possibly impede, the Government-initiated procedures set in motion by those suits and might also interfere with possible voluntary resolutions of existing issues concerning some of the districts of the union acting as employer. In these circumstances, the representation petition was dismissed, without prejudice to refiling after stabilization of the situation.

10-1000 Reasonable Period of Time

A Board bargaining order pursuant to an order of the Board will bar any challenge to the union's status for "a reasonable period of time." In *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001), a case involving a withdrawal of recognition after an adjudicated violation of Section 8(a)(5), the Board set out the parameters of what constitutes a reasonable period, id.:

> [W]e have decided that when an employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable time for bargaining before the union's majority status

> can be challenged will be no less than 6 months, but no more than 1 year. Whether a "reasonable period of time" is only 6 months, or some longer period up to 1 year, will depend on a multifactor analysis. Under that analysis, we shall consider whether the parties are bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties are to agreement, and the presence or absence of a bargaining impasse.

In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), and *UGL-UNICCO Service Co.,* 357 NLRB No. 76 (2011), the Board altered the *Keller Plastics* rule "in one respect." It now holds that the reasonable period for the application of recognition and successorship bars is no less than 6 months no more than 1 year. In assessing whether such a period has elapsed in a given case, the Board will continue to use the multifactor analysis of *Lee Lumber*.

In *Columbus Transit*, 357 NLRB No. 146 (2011), the Board applied the reasonable time period finding that a 4 month delay in requesting bargaining was reasonable "under the uncommon circumstances" including a rival union filing a representation petition shortly after voluntary recognition.

See also sections 10-300 and 10-500.

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

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

11-100 Amendment of Certification (AC)

355-8800

385-2500

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

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

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

For a number of years thereafter, the Board debated the due process issue. Finally, in *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143 (2007), it "decided to abandon the due process requirement for union affiliation." Thus, there is no longer anything left of the first part of the Board's test. For a history of that test see the *Kravis* decision. The Board has decided to apply the *Kravis* principle retroactively. *Allied Mechanical Services,* 352 NLRB 662 (2008).

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

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

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

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

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

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

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

11-200 Clarification of Certification (UC)

Generally

316-3301-5000

355-7700

385-7501 et seq.

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

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

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

The statement was repeated in *CHS, Inc.,* 355 NLRB 928 (2010). See also *E. I. Du Pont, Inc*., 341 NLRB 607 (2004); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001); and *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999), quoting from *United Parcel Service*, 303 NLRB 326, 327 (1991).

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

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

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

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

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

The board has a "relitigation rule" that precludes a party from stipulating to the inclusion of a classification in the representation case and shortly thereafter seeking to exclude the position

from the unit. *Premier Living Center,* 331 NLRB 123 (2000), and *I.O.O.F. Home of Ohio, Inc.,* 322 NLRB 921 (1997). There is an exception to this rule when the issue involves the inclusion of positions "that would violate basic principles of the Act." *Washington Post Co.,* 254 NLRB 168 (1981), and *Goddard Riverside Community Center,* 351 NLRB 1234 (2007). Where there is such an issue, the Board will process the petition if it is filed at an appropriate time. (See sec. 11-210, infra.)

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

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

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

11-210 Timing of UC Petition

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

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

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

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

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

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

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

11-220 Accretion v. Question Concerning Representation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11-300 Deauthorization Petition (UD)

324-4060-5000

347-4040-3301-7500

362-3385

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

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

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

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

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

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

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

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

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

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

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

355-9500

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

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

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

11-600 Revocation of Certification

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

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

12. APPROPRIATE UNIT: GENERAL PRINCIPLES

12-100 Introduction

401-2500 et seq.

420-0150

440-1720

Section 9(a) of the Act implements the general provisions contained in Section 7 of the Act, which grant employees the right to self-organization and to representation through agents of their own choosing. Section 9(a) goes further by providing that representatives selected for the purposes of collective bargaining shall be the "exclusive" representatives.

There are specific requirements in the statutory provision. The representative must be chosen by a majority of the employees. These employees must be in a unit appropriate for collective-bargaining purposes. Under Section 9(b) the Board is empowered to "decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." "The selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, if not final, is rarely to be disturbed." *So. Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976).

The distinction between issues involving the scope of the unit and those involving its composition should be kept in mind. The scope of the unit pertains to such questions as to whether it should be limited to one plant rather than employerwide or to one employer as distinguished from multiemployer. (Chs. 12–14.) Composition of a unit relates to such questions as the inclusion or exclusion of disputed employee categories or unit placement in general. (Chs. 16–20.) In *Boeing Co*., 337 NLRB 152, 153 (2001), the Board described its policy with respect to determining appropriate units:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. 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. See, e.g., *Overnite Transportation Co*., 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

It will be observed that there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co*., 334 NLRB 484 (2001); *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp*., 157 NLRB 1130 (1966); *Parsons Investment Co.,* 152 NLRB 192 fn. 1 (1965); *Capital Bakers*, 168 NLRB 904, 905 (1968); *National Cash Register Co*., 166 NLRB 173 (1967); *NLRB v. Carson Cable TV,* 795 F.2d 879 (9th Cir. 1986); and *Dezcon, Inc*., 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co*., supra.

Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example,

General Instrument Corp. v. NLRB, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); and *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). The Board will pass only on the appropriateness of units that have been argued for. *Acme Markets, Inc*., 328 NLRB 1208 (1999).

The presumption is that a single location unit is appropriate. *Hegins Corp*., 255 NLRB 1236 (1981); and *Penn Color, Inc.,* 249 NLRB 1117, 1119 (1980). *Marks Oxygen Co.,* 147 NLRB 228, 230 (1964); see also *Huckleberry Youth Programs*, 326 NLRB 1272 (1998).

A petitioner's desire as to unit is always a relevant consideration but cannot be dispositive. *International Bedding Co*., 356 NLRB No. 168 (2011). *Marks Oxygen Co.,* supra; *Airco, Inc.,* 273 NLRB 348 (1984), and sections 12-140, 12-300, and 13-1000 infra. Obviously, a proposed bargaining unit based on an arbitrary, heterogeneous, or artificial grouping of employees is inappropriate. *Moore Business Forms, Inc*., 204 NLRB 552 (1973); and *Glosser Bros., Inc.,* 93 NLRB 1343 (1951). Thus, when all maintenance and technical employees have similar working conditions, are under common supervision, and interchange jobs frequently, a unit including only part of them is inappropriate. *U.S. Steel Corp.,* 192 NLRB 58 (1971).

The discretion granted to the Board in Section 9(b) to determine the appropriate bargaining unit is reasonably broad, although it does require that there be record evidence on which a finding of appropriateness can be granted. *Allen Health Care Services*, 332 NLRB 1308 (2000). The only statutory limitations are those pertaining to professional employees (Sec. 9(b)(1)); craft representation (Sec. 9(b)(2)); plant guards (Sec. 9(b)(3)); and extent of organization (Sec. 9(c)(5)). These provisions are treated in summary manner here and at greater length under more specific headings in later chapters. By way of an introductory note to these statutory limitations, we summarize them here.

12-110 Professional Employees

355-2260

401-2575-1400

440-1760-4300

Section 9(b)(1) prohibits the Board from deciding that a unit including both professional and nonprofessional employees is appropriate, unless a majority of the professional employees vote for inclusion in such a mixed unit. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Vickers, Inc*., 124 NLRB 1051 (1959); *Pay Less Drug Stores*, 127 NLRB 160 (1960); *Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7 (2d Cir. 1971), cert. denied 404 U.S. 853 (1971); *A. O. Smith Corp.*, 166 NLRB 845 (1967); and *Lockheed Aircraft Corp*., 202 NLRB 1140 (1973). In *Russelton Medical Group*, 302 NLRB 718 (1991), an unfair labor practice case, the Board declined to order bargaining in a combined unit where there had never been a vote under Section 9(b)(1). See also *Utah Power & Light Co.,* 258 NLRB 1059 (1981), and section 18-100, infra.

12-120 Craft Units

440-1760-9100

Section 9(b)(2) prohibits the Board from deciding that a proposed craft unit is inappropriate because of the prior establishment by the Board of a broader unit unless a majority of the employees in the proposed craft unit vote against separate representation. For a full discussion of this provision and its interpretation, see chapter 16 on Craft and Traditional Departmental Units in general and *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967), in particular.

12-130 Plant Guards

339-7575-7500 et seq.

401-2575-2800

Section 9(b)(3) prohibits the Board from establishing units including both plant guards and other employees and from certifying a labor organization as representative of a guard unit, if the labor organization admits to membership, or is affiliated, directly or indirectly, with an organization which admits nonguard employees. *American Building Maintenance Co.,* 126 NLRB 185 (1960); *Bonded Armored Carrier*, 195 NLRB 346 (1972); and *Wackenhut Corp*., 196 NLRB 278 (1972). See also *Elite Protective & Security Services*, 300 NLRB 832 (1990).

The Board has also held that the 9(b)(3) restriction precludes it from finding unlawful the withdrawal of recognition for a mixed guard union that had been voluntarily recognized for a guard unit. *Temple Security, Inc.,* 328 NLRB 663 (1999), and *Wells Fargo Corp.,* 270 NLRB 787 (1984)

See also section 18-200, infra.

12-140 Extent of Organization

401-2562

Section 9(c)(5) prohibits the Board from establishing a bargaining unit solely on the basis of extent of organization. *NLRB v. Morganton Hosiery Co.,* 241 F.2d 913 (4th Cir. 1957); *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965); and *Motts Shop Rite of Springfield*, 182 NLRB 172 (1970). See also *Overnite Transportation Co.,* 322 NLRB 723 (1996), and 325 NLRB 612 (1998), where the Board held that a finding of different units in the same factual setting does not mean that the decision is based on extent organization.

For a fuller discussion of this statutory limitation, see sections 12-300 and 13-1000.

12-200 General Principles

The Board has given full recognition to the significance of its discretionary determination of an appropriate bargaining unit. In *Kalamazoo Paper Box Corp.,* 136 NLRB 134, 137 (1962), it stated:

> Because the scope or the unit is basic to and permeates the whole of the collective-bargaining relationship, each determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. Accord: *Gustave Fischer, Inc.,* 256 NLRB 1069 (1981).

To obtain a better understanding of the factors which go into a unit finding, we shall first consider those which are relatively simple and therefore require little elaboration, and then, in more detail, those which need further explication.

12-210 Community of Interest

401-7500

420-2900

420-4000 et seq.

A major determinant in an appropriate unit finding is the community of duties and interests of the employees involved. When the interests of one group of employees are dissimilar from those of another group, a single unit is inappropriate. *Swift & Co.,* 129 NLRB 1391 (1961). See also *U.S. Steel Corp*, supra. But the fact that two or more groups of employees engage in different processes does not by itself render a combined unit inappropriate if there is a sufficient

community of interest among all these employees. *Berea Publishing Co.*, 140 NLRB 516, 518 (1963).

Many considerations enter into a finding of community of interest. See, e.g., *NLRB v. Paper Mfrs. Co.*, 786 F.2d 163 (3d Cir. 1986). The factors affecting the ultimate unit determination may be found in the following sampling:

a. Degree of functional integration. *Casino Aztar,* 349 NLRB 603 (2007); *Publix Super Markets, Inc*., 343 NLRB 1023 (2004); *United Rentals, Inc.,* 341 NLRB 540 (2004); *United Operations, Inc*., 338 NLRB 123 (2002); *Seaboard Marine Ltd.,* 327 NLRB 556 (1999); *Atlanta Hilton & Towers*, 273 NLRB 87 (1984); *NCR Corp*., 236 NLRB 215 (1978); *Michigan Wisconsin Pipe Line Co.,* 194 NLRB 469 (1972); *Threads-Inc.,* 191 NLRB 667 (1971); *H. P. Hood & Sons*, 187 NLRB 404 (1971); *Monsanto Research Corp*., 185 NLRB 137 (1970); and *Transerv Systems*, 311 NLRB 766 (1993).

b. Common supervision. *United Rentals, Inc*., supra; *Bradley Steel, Inc*., 342 NLRB 215 (2004); *United Operations, Inc*., supra; *Associated Milk Producers*, 250 NLRB 1407 (1970); *Sears, Roebuck & Co*., 191 NLRB 398 (1971); *Donald Carroll Metals*, 185 NLRB 409 (1970); *Dean Witter & Co.*, 189 NLRB 785 (1971); *Harron Communications*, 308 NLRB 62 (1992); *Transerv Systems*, supra; and *Sears, Roebuck & Co*., 319 NLRB 607 (1995).

c. The nature of employee skills and functions. *United Operations, Inc*., supra; *Overnite Transportation Co*., 331 NLRB 662 (2000) (all unskilled employees at particular location); *Seaboard Marine Ltd*., supra; *J. C. Penney Co.,* 328 NLRB 766 (1999); *Harron Communications*, supra; *Hamilton Test Systems*, 265 NLRB 595 (1982); *R-N Market*, 190 NLRB 292 (1971); *Downingtown Paper Co*., 192 NLRB 310 (1971); and *Phoenician,* 308 NLRB 826 (1992).

d. Interchangeability and contact among employees. *Casino Aztar,* supra; *United Rentals*, supra*; J. C. Penney*, supra; *Associated Milk Producers*, supra; *Purity Supreme, Inc*., 197 NLRB 915 (1972); *Gray Drug Stores*, 197 NLRB 924 (1972); and *Michigan Bell Telephone Co*., 192 NLRB 1212 (1971).

e. Work situs. *R-N Market*, supra; *Bank of America*, 196 NLRB 591 (1972); and *Kendall Co.,* 184 NLRB 847 (1970).

f. General working conditions. *United Rentals,* supra*; Allied Gear & Machine Co.,* 250 NLRB 679 (1980); *Sears, Roebuck & Co*., supra; and *Yale University*, 184 NLRB 860 (1970). See also *K.G. Knitting Mills*, 320 NLRB 374 (1995), where the Board held that the fact that employees receive a salary, do not punch timeclocks, receive different health insurance benefits from other unit employees, and are able to adjust their own hours was not an adequate basis for exclusion from the unit.

g. Fringe benefits. *Allied Gear & Machine Co*., supra; *Donald Carroll Metals*, supra; *Cheney Bigelow Wire Works*, 197 NLRB 1279 (1972). In *Publix Super Markets,* supra; *Bradley Steel, Inc*., supra; and *Los Angeles Water & Power Employees' Assn*., 340 NLRB 1232 (2003), the Board found community of interest where the only factor militating against inclusion was the higher rate of pay enjoyed by the contested employee.

"[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co*., 96 NLRB 295, 298 fn. 7 (1951). Accord: *Gustave Fischer, Inc*., supra at fn. 5.

This enumeration of factors relevant to a community-of-interest finding is intended to alert the reader to the ingredients to look for in arriving at a determination. It should be noted, however, that, in the normal situation, the unit question is resolved by weighing *all* the relevant factors against the major determinant of community of interest. See, e.g., *Publix Super Markets,*

supra; *Bradley Steel, Inc*., supra; *Trumbull Memorial Hospital,* 338 NLRB 900 (2003); *United Operations, Inc*., supra; and *Hotel Services Group,* 328 NLRB 116 (1999).

A difference in the situs of employment does not in itself require establishment of separate bargaining units, especially when there is evidence of a community of interest in their employment joining both groups. *NLRB v. Carson Cable TV*, supra. *McCann Steel Co*., 179 NLRB 635, 636 (1969); and *Peerless Products Co*., 114 NLRB 1586 (1956). Conversely, employees stationed away from the plant are excluded from a production and maintenance unit where they do not have sufficient interests in common with the in-plant employees. *Sealite, Inc*., 125 NLRB 619 (1959); and *Sheffield Corp.*, 123 NLRB 1454 (1959). As a consequence, homeworkers are generally excluded from a unit of in-plant employees. *Valley Forge Flag Co*., 152 NLRB 1550 (1965); and *Terri Lee, Inc*., 103 NLRB 995 (1953). However, employees who spend most of their time away from the plant may be included in a plantwide unit if the petitioner is willing to represent such a unit and no other union seeks to represent them separately. *Marks Oxygen Co*., supra and *International Bedding Co*., 356 NLRB No. 168 (2011).

Difference in supervision is not a per se basis for excluding employees from an appropriate unit. *Texas Empire Pipe Line Co*., 88 NLRB 631 (1950). The important consideration is still the overall community of interest among the several employees.

For a typical analysis of the operative factors leading to or away from a community-of-interest finding, see *International Bedding Co*., supra; *U.S. Steel Corp*., supra, and *Brand Precision Services*, 313 NLRB 657 (1994). See also *Aerospace Corp*., 331 NLRB 561 (2000) (community-of-interest test used in research and development industry).

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), a non acute healthcare facility case, the Board overruled *Park Manor Care Center*, 305 NLRB 872 (1991). In *Park Manor* the Board had applied both traditional community of interest factors and "(1) what was learned about nursing homes . . . in the rulemaking proceeding that led to the Board's Rule governing units in acute care hospitals and (2) Board cases . . . issued prior to rulemaking." Characterizing this approach as "idiosyncratic," the Board majority in *Specialty* announced that it would apply traditional community of interest principles in deciding units for non acute (long term) facilities.

More significantly, the majority took the "opportunity" of this case to make clear that when employees or a union seek a particular bargaining unit that the Board considers appropriate, an employer who challenges the unit because of an excluded classification will be required to demonstrate "that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit".

In doing so, the Board noted that its decision was consistent with Section 9(c)(5) of the Act in that it was taking into consideration the employees' wishes but that those wishes would not be controlling in deciding the appropriateness of the unit.

After its *Specialty* decision, the Board decided three other cases in 2011 in which it relied on *Specialty*:

1. In *Odwalla, Inc*., 357 NLRB No. 132 (2011), the Board applied *Specialty Healthcare* finding an overwhelming community of interest between a unit of route sales drivers and merchandisers. The merchandisers had voted by challenge and the Board thereafter agreed with the employer's position that they should be included in the unit.
2. In *DTG Operations, Inc*., 357 NLRB No. 175 (2011), a Board majority overruled a Regional Director's finding that the smallest appropriate unit was a wall to wall unit. The union had petitioned for a unit of rental service and local rental service agents and the employer sought a broader unit. The Board found that the employees, who the employer would have added, do not share an overwhelming community of interest with the employees petitioned for and that those employees sought by the union are an appropriate unit.

3. In *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011). A Board majority affirmed the Regional Director's finding that a departmental unit of radiological control technicians (RCTs), calibration technicians, laboratory technicians, and RCT trainees was appropriate for bargaining. Applying *Specialty Healthcare,* the Board concluded that the employees were "readily identifiable as a group." The Board further found that the employer failed to establish that the other technical employees it sought to include in the unit shared an overwhelming community of interest with the radiological employees. Additionally, the Board found, in agreement with the Regional Director, that even under the traditional community of interest test, a departmental unit of radiological employees constituted "a functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining."

In *Winsett-Simmonds Engineers, Inc.*, 164 NLRB 611 (1967), the Board found sufficient community of interest to include work release prisoners in a bargaining unit in the circumstances there. Compare *Speedrack Products Group, Ltd.*, 321 NLRB No. 143 (1996) (not reported in Board volumes), enf. denied 114 F.3d 1276 (D.C. Cir. 1997). On remand the Board included the work release prisoners. *Speedrack Products Group Limited*, 325 NLRB 609 (1998).

12-220 History of Collective Bargaining

420-1200 et seq.

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. *ADT Security Services Inc*., 355 NLRB 1388 (2010). 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. *Canal Carting, Inc.,* 339 NLRB 969 (2003); *Ready Mix USA*, *Inc.,* 340 NLRB 946 (2003); *Red Coats, Inc.,* 328 NLRB 205 (1999); and *Washington Post Co*., 254 NLRB 168 (1981). *Fraser & Johnston Co*., 189 NLRB 142, 151 fn. 50 (1971); *Lone Star Gas Co*., 194 NLRB 761 (1972); *West Virginia Pulp & Paper Co*., 120 NLRB 1281, 1284 (1958); and *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965). The rationale for this policy is based on the statutory objective of stability in industrial relations. See also *Hi-Way Billboards*, 191 NLRB 244 (1971).

Bargaining history under 8(f) agreements is relevant to a unit determination under Section 9 but not conclusive. *Barron Heating & Air Conditioning, Inc.,* 343 NLRB 450 (2004).

A party challenging a historical unit as no longer inappropriate has a heavy evidentiary burden. *Trident Seafoods, Inc.*, 318 NLRB 738 (1995); *Canal Carting,* supra*;* and *Ready Mix USA*, supra.

As in many areas of substantive law, exceptions are made to the general rule. These are:

12-221 Consent-Election Stipulation

393-6054-6750

401-5000

420-7312

The Board does not consider itself bound by a collective-bargaining history resulting from a consent election conducted pursuant to a unit stipulated by the parties rather than one determined by the Board. *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004); *Mid-West Abrasive Co.,* 145 NLRB 1665 (1964); and *Macy's San Francisco*, 120 NLRB 69, 71 (1958). Likewise, the Board does not consider itself bound by a history of bargaining resulting from a Board certification or stipulation of the parties at the hearing. *Coca-Cola Bottling Co. of*

Baltimore, 156 NLRB 450, 452 (1966); and *Westinghouse Electric Corp.,* 118 NLRB 1043 (1957). This policy is not applicable to instances in which the Board is making unit placement determinations in a stipulated unit. In such cases, the intent of the parties is paramount. *Tribune Co*., 190 NLRB 398 (1971); and *Lear Siegler, Inc*., 287 NLRB 372 (1987). Where that intent is unclear, a community-of-interest test is applied. *Space Mark, Inc.,* 325 NLRB 1140 fn. 1 (1998).

For additional discussion of stipulations in representation cases, see sections 23-500, -520, and -530 and *Pacific Lincoln-Mercury*, 312 NLRB 901 (1993).

12-222 Bargaining History Contrary to Board Policy

420-1787

Bargaining history, conducted on a basis contrary to established Board representation policy, carries little or no weight in a determination of appropriate unit. *Mfg. Woodworkers Assn*., 194 NLRB 1122 (1972) (bargaining history on a "members only" basis); *Land Title Guarantee & Trust Co.,* 194 NLRB 148 (1972) (bargaining history based solely on the sex of the employees); *Crown Zellerbach Corp*., 246 NLRB 202 (1980), and *A. L. Mechling Barge Lines*, 192 NLRB 1118, 1120 (1971) (inclusion of employees by agreement despite lack of community of interest); *Liggett & Meyers Tobacco Co.,* 91 NLRB 1145, 1146 fn. 3 (1950) (bargaining history on a "members only" basis); and *New Deal Cab Co.*, 159 NLRB 1838, 1841 (1966) (bargaining history based solely on race). But simply because the historical unit would not be appropriate under Board standards if being organized for the first time, does not make it inappropriate. *Ready Mix USA*, *Inc.,* supra.

12-223 Ineffective Bargaining History

420-1708

420-1775

A brief or ineffective history of collective bargaining is not accorded determinative weight. Generally, a bargaining history of less than a year in duration is regarded as too brief to be deemed a significant factor. See *Jos. Schlitz Brewing Co*., 206 NLRB 928 (1973); *Duke Power Co*., 191 NLRB 308 (1971); *Heublein, Inc.,* 119 NLRB 1337, 1339 (1958); and *Chrysler Corp*., 119 NLRB 1312, 1314 (1958).

12-224 Oral Contract

420-1725

A bargaining history which is based on an oral contract is not controlling. *Inyo Lumber Co*., 92 NLRB 1267 fn. 3 (1951).

12-225 Bargaining History of Other Employees

420-1254

420-1263

420-1281

The bargaining history of a group of organized employees in a plant does not control the unit determination for every other group of unorganized employees in that plant. *North American Rockwell Corp.,* 193 NLRB 985 (1971); *Piggly Wiggly California Co.*, 144 NLRB 708 (1963); *Arcata Plywood Corp*., 120 NLRB 1648, 1651 (1958); and *Joseph E. Seagram & Sons, Inc*., 101 NLRB 101 (1953). Compare *Transcontinental Bus System*, 178 NLRB 712 (1969).

For similar reasons, the bargaining pattern at other plants of the same employer or in the particular industry will not be considered controlling in relation to the bargaining unit of a particular plant, *Big Y Foods*, 238 NLRB 855 (1978); *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1953), although it may be a factor in unit determination; and *Spartan Department Stores*, 140 NLRB 608 (1963).

12-226 Significant Changes

420-2300

Notwithstanding a long history of bargaining on a multiplant basis, where significant changes occur after the prior certification, the bargaining history on the former basis no longer has a controlling effect. *Plymouth Shoe Co.*, 185 NLRB 732 (1970); *General Electric Co.,* 185 NLRB 13 (1970); and *General Electric Co.,* 100 NLRB 1489 (1951). Thus, the bargaining history lost its impact where, as a result of a reorganization, integrated plants became decentralized. See also *General Electric Co.*, 123 NLRB 1193 (1959); and *Westinghouse Electric Corp*., 144 NLRB 455 (1963). Compare *Crown Zellerbach Corp*., supra, where the Board found the changes insubstantial but nonetheless directed an election in a single-plant unit which had historically been part of a multiplant unit. In *Rinker Materials Corp.*, 294 NLRB 738 (1989), the Board found that the changes were not sufficient "to destroy the historical separation of two groups of employees." See also *Ready Mix USA*, *Inc.,* 340 NLRB 946 (2003), changes made by successor found insubstantial.

12-227 Checkered Bargaining History

420-1209

Where there is a varied bargaining history, sometimes described as a "checkered bargaining history" (*Western Electric Co*., 98 NLRB 1018, 1036 (1951)), the most recent bargaining history normally controls. *Weston Paper & Mfg. Co*., 100 NLRB 276 (1951). A "checkered bargaining history" is one in which no fixed pattern of bargaining has been established either among all employees or among groupings of employees in a plant. See *Western Electric Co*., supra, for an illustration of such a bargaining history.

12-228 Deviation From Prior Unit Determination

420-1766

420-9000

Bargaining on a basis which deviates substantially from a prior unit determination is not controlling in a subsequent proceeding in which a redetermination of the unit is sought. Thus, for example, where all the parties have abandoned joint bargaining, as where a multiemployer association released its members and the members in turn resigned, revoked the association's authority, and entered into separate agreements with the former common employee representatives, the former bargaining history has no controlling effect on current unit determination. *Pennsylvania Garment Mfrs. Assn.*, 125 NLRB 185 (1959). But the dissolution of an historical multiemployer bargaining did not render irrelevant the previous history in which a separate unit was appropriate. *Matros Automated Electrical Construction Corp*., 353 NLRB 569 (2008) (two Member decision).

12-229 Other Exceptions

339-7550

420-1227

420-1758

420-1787

An employer's dealings with a shop committee established by it, which did not conduct any bargaining with the employer or handle any grievance, is not regarded as evidence of a bargaining history. *Mid-West Abrasive Co*., 145 NLRB 1665 (1964). Although in the determination of the scope of the appropriate unit weight is given to bargaining history and to the prior agreement of the parties, such factors are not determinative of the status of disputed employee categories whose exclusion may be required because of the statute or for policy reasons. *Firemen & Oilers*, 145

NLRB 1521, 1525 fn. 10 (1964). Where a multiplant bargaining history began prior to the expiration of a single-plant contract, and resulted in the execution of a multiplant contract found to be a premature extension of the single-plant contract, the bargaining history was not given controlling weight in determining the appropriate unit. *Continental Can Co.,* 145 NLRB 1427, 1429 (1964)). See also *Firestone Synthetic Fibers Co*., 171 NLRB 1121 (1968), wherein the employees involved were found to be accretions to an existing unit.

12-230 Specific Unit Rules

A number of rules have been formulated affecting a variety of unit contentions urging the determination of an appropriate unit on one or more of the grounds listed here. These include considerations such as size of unit, mode of payment, age, sex, race, union membership, territorial or work jurisdiction, and the desires of the employees involved.

12-231 Size of Unit

347-8040

As noted above 12-100, the Board generally selects the smallest appropriate unit that includes the petitioned-for employees. *Bartlett Collins Co.*, 334 NLRB 484 (2001).

It is**,** however**,** contrary to Board policy to certify a representative for bargaining purposes in a unit consisting of only one employee. *Roman Catholic Orphan Asylum*, 229 NLRB 251 (1977); *Sonoma-Marin Publishing Co*., 172 NLRB 625 (1968); and *Griffin Wheel Co*., 80 NLRB 1471 (1949); cf. discussion in *Louis Rosenberg, Inc*., 122 NLRB 1450, 1453 (1959); also *Foreign Car Center*, 129 NLRB 319 (1961)); and *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966). In the latter case, the Board held that, because it is not empowered to require bargaining or to certify a bargaining representative in a unit comprising only one employee, it does not direct elections in such units either under Section 9(c) or under Section 8(b)(7)(c). Consequently, a union claiming recognition is disabled through no fault of its own from invoking the Board's election processes for purposes of resolving the question concerning representation raised by picketing, and it would be inequitable and not within the congressional intent to condition the lawfulness of the recognitional picketing in the one-man unit on the union's filing of a petition. See also *Operating Engineers Local 181 (Steel Fab)*, 292 NLRB 354 (1989); and *Laborers Local 133 (Whitaker & Sons)*, 283 NLRB 918 (1987).

It should be noted that the appropriateness of a unit is not affected by the speculative possibility that the employee complement may be reduced to one employee. *National Licorice Co.*, 85 NLRB 140 (1949). It is the permanent size of the unit, not the number of actual incumbents employed at any given time that is controlling. *Copier Care Plus*, 324 NLRB 785 fn. 3 (1997).

12-232 Mode and/or Rate of Payment

420-2903 et seq.

The mode of payment itself is not determinative of the scope of an appropriate bargaining unit. *Palmer Mfg. Corp.,* 105 NLRB 812 (1953). Nor does a distinction in the rate of pay affect the unit determination. *Four Winds Services,* 325 NLRB 632 (1998) (some paid under Davis-Bacon and some not), and *Donald Carroll Metals*, 185 NLRB 409, 410 (1970). A mere difference in the method of payment does not warrant exclusion from an appropriate unit. *Armour & Co*., 119 NLRB 122 (1958); and *Century Electric Co*., 146 NLRB 232 (1964). Where a different method of payment arises out of historical or administrative reasons, rather than a functional distinction, no valid basis exists for distinguishing, for representation purposes, hourly paid workers from those paid by the week. *Swift & Co*., 101 NLRB 33 (1951). It is to the general interests, duties, nature of work, and working conditions of the employees that significance is given in the resolution of unit questions. *Kansas City Power & Light Co*., 75 NLRB 609 (1948). Mode of payment, if viable at all as a factor, is generally only one of a number of factors, all of

which when considered together determine the unit finding. *Hotel Services Group,* 328 NLRB 116 (1999); *Liquid Transporters, Inc.*, 250 NLRB 1421, 1424 (1980); *Firestone Tire Co.*, 156 NLRB 454, 456 (1966); "*M" System*, 115 NLRB 1316 (1956); *Curcie Bros., Inc.*, 146 NLRB 380 (1964); and *Carter Camera Shops*, 130 NLRB 276 (1961).

12-233 Age

420-3460

Age is not a valid consideration for exclusion from a unit. Thus, a contention for exclusion from a unit on the ground that the employees were elderly was rejected. *Metal Textile Corp*., 88 NLRB 1326, 1329 (1950). Similarly, social security annuitants who limit their earnings so as not to decrease their annuity but who otherwise share community of interests with unit employees are included. *Holiday Inns of America*, 176 NLRB 939 (1969).

12-234 Sex

420-3440

In the absence of evidence of a substantial difference in skills between male and female employees, a petition for a unit based on sex is inappropriate. *Cuneo Eastern Press*, 106 NLRB 343 (1953); and *Land Title Guarantee & Trust Co*., 194 NLRB 148 (1972). For related reasons, severance of all female employees, although they performed similar duties and had interests in common with the other employees, was denied. No justification for severance had been advanced, leaving only the differentiation in sex, and that, Board policy makes clear, is by itself no basis for a separate unit. *Rexall Drug Co.,* 89 NLRB 683 (1950). Where the evidence established, and the parties admitted, that the sole basis for separate units and separate contracts was that one included all female production employees and the other included all male production employees, the Board directed an election in a unit of *all* production employees, rejecting a proposed unit based solely on sex. *U.S. Baking Co.,* 165 NLRB 951 (1967).

In the latter case, the Board admonished the parties that if the labor organization which had represented the separate units of male employees and female employees wins the election, and it should later be shown, in an appropriate proceeding, that equal representation had been denied to any employee in the unit, the Board would consider revoking its certification. See *U.S. Baking Co*., supra at fn. 6. See also *Glass Bottle Blowers Local 106 (Owens-Illinois),* 210 NLRB 943 (1974), separate locals and units based on sex held violative of Section 8(b)(1)(A) and (2).

12-235 Race

420-3420

The race of employees is not a valid determinant of the appropriateness of a unit. *Norfolk Southern Bus Corp.,* 76 NLRB 488 fn. 8 (1948); and *New Deal Cab Co.,* 159 NLRB 1838 (1966). See also *Andrews Industries*, 105 NLRB 946 (1953); *Pioneer Bus Co.,* 140 NLRB 54 (1963); and *Lindsay Newspapers*, 192 NLRB 478 (1971).

In *New Deal*, supra, the Board found that *New Deal Cab Co.,* and *Safety Cabs, Inc.,* 173 NLRB 17 (1969), constituted a single employer but had engaged in a bargaining pattern predicated on racial factors "which cannot be accepted as appropriate." The separation of bargaining units was rooted originally in representation by separate segregated locals, a situation fostered by the local government's issuance of separate permits to the separate enterprises based essentially on lines of racial segregation. That racial pattern continued to exist as of the time of the Board decision. "Throughout its entire history," said the Board, it "has refused to recognize race as a valid factor in determining the appropriateness of any unit for collective bargaining." See, for example, *American Tobacco Co*., 9 NLRB 579 (1938); *Union Envelope Co*., 10 NLRB 1147 (1939); *Aetna Iron & Steel Co*., 35 NLRB 136 (1941); *U.S. Bedding Co.,* 52 NLRB 382 (1943); *Norfolk Southern Bus Corp*.,);supra; *Andrews Industries*, supra; and *Pioneer Bus Co*., supra.

For a discussion of Board policy with respect to contention that a union should not be certified because it discriminates on racial grounds see *Handy Andy, Inc.*, 228 NLRB 447 (1977), discussed of section 6-130. See also *Memphis Furniture Mfg. Co.*, 259 NLRB 401 (1981).

12-236 Union Membership

420-7336 et seq.

The fact that a union does not admit certain employee categories to membership is not a valid ground for excluding such employees from a bargaining unit. *Rockwell Mfg. Co*., 89 NLRB 1434, 1436 fn. 8 (1950). Thus, the jurisdictional inability of a union to represent certain employees or job classifications in no way restricts the Board in the determination of the appropriate unit. *Davis Cafeteria*, 160 NLRB 1141 (1966); *Associated Grocers*, 142 NLRB 576 (1963); and *Central Coat, Apron & Linen Service*, 126 NLRB 958 (1960). Nor are the union's jurisdictional limitations, standing alone, a proper determinant of bargaining unit. *Pennsylvania Garment Mfrs. Assn*., supra. Moreover, a jurisdictional agreement between two or more unions does not relieve the Board of its statutory duty to determine the appropriate bargaining unit. *J. A. Jones Construction Co*., 84 NLRB 88 (1949). This is true even where there has been a prior bargaining history along the lines of the jurisdictional agreement. *Utility Appliance Corp.*, 106 NLRB 398 (1953).

When, however, exclusion from membership is based on invidious or discriminatory reasons, see *Handy Andy, Inc.,* supra.

12-237 Territorial Jurisdiction

420-7342

420-8473

The union's territorial jurisdiction and limitations do not generally affect the determination of an appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968). See also *Building Construction Employers Assn.*, 147 NLRB 222 (1964); *John Sundwall & Co.*, 149 NLRB 1022 (1964); and *Paxton Wholesale Grocery Co*., 123 NLRB 316 (1959). But see *Dundee's Seafood, Inc*., 221 NLRB 1183 (1976), in which the Board considers the union's jurisdictional limitations as one factor in its unit determination. In doing so, the Board noted that its limitation was a factor in past bargaining. See also *P. J. Dick Contracting*, 290 NLRB 150 fn. 8 (1988).

12-238 Work Jurisdiction

420-7342

420-8400

560-7580-4000

Early in its history the Board stated that its function in a representation proceeding "is to ascertain and certify to the parties the name of the bargaining representative, if any, that has been designated by the employees in the appropriate unit; it is not our function to direct, instruct, or limit that representative as to the manner in which it is to exercise its bargaining agency." *Wilson Packing & Rubber Co*., 51 NLRB 910, 913 (1943). Thus, in describing a unit the Board does not make an award to employees in the unit found appropriate to perform exclusively all the duties required by their job classifications. *General Aniline Corp*., 89 NLRB 467 (1950). See also *Plumbing Contractors Assn*., 93 NLRB 1081, 1087 fn. 21 (1951); and *Gas Service Co*., 140 NLRB 445 (1963). As the Board has explained, certifications are not granted to unions on the basis of specific work tasks or types of machines operated, on union jurisdictional claim but in terms of employee classifications performing related work functions, under a community of interest analysis. *Ross-Meehan Foundries*, 147 NLRB 207 (1964). *Scrantonian Publishing Co*., 215 NLRB 296, 298 fn. 9 (1974).

12-239 Employees' Desires

420-7306

"While the desires of employees with respect to their inclusion in a bargaining unit [are] not controlling, it is a factor which the Board should take into consideration in reaching its ultimate decision. . . . Indeed, it may be the single factor that would 'tip the scales.'" *NLRB v. Ideal Laundry & Dry Cleaning Co*., 330 F.2d 712, 717 (10th Cir. 1964).

While in *Ideal Laundry*, the Board accepted the court's theory with respect to the employees' unit desires as the law of the case, it disagreed with the court's opinion to the extent that the court indicated that subjective testimony by employees as to their desires for inclusion in or exclusion from an appropriate unit is generally relevant in Board unit determinations. *Ideal Laundry & Dry Cleaning Co.*, 152 NLRB 1130, 1131 fn. 6 (1955). See also *Marriott In-Flite Services v. NLRB*, 652 F.2d 202 (1981).

See also Extent of Organization, section 12-300, infra.

12-300 Extent of Organization

401-2562

420-8400

We mentioned at the beginning of this chapter, in referring to statutory limitations, that one of these is the provision in Section 9(c)(5) against making "extent of organization" a controlling factor in bargaining unit determination. Amplification of this provision appears to be appropriate at this point. Although this requirement is essentially one of statutory origin, its application is nonetheless couched in terms of Board policy and therefore does not seem out of place in a synopsis of general unit principles.

The Board has effectuated the 9(c)(5) provision denying unit requests where the only apparent basis was the extent of the petitioner's organization of the employees. However, it has held that extent of organization may be taken into consideration as one of the factors in unit determination, together with other factors, provided, of course, that it is not the governing factor. *NLRB v. Quaker City Life Insurance Co.*, 319 F.2d 690 (4th Cir. 1963); *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965).

Stated differently, the fact that the union is seeking a particular unit is a relevant factor but it cannot be a controlling factor. *International Bedding Co.*, 356 NLRB No. 168 (2011); *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), slip. op. pp 8-9. For further discussion of *Specialty Healthcare* see Sec. 12-210.

In conformity with this statutory limitation, it has been held that a unit based solely or essentially on extent of organization is inappropriate. *New England Power Co*., 120 NLRB 666 (1958); and *John Sundwall & Co*., supra. However, the fact that under Section 9(c)(5) the extent that employees have been organized may not be the controlling determinant of the appropriateness of a proposed bargaining unit does not, as we have said, preclude reliance on that factor in conjunction with other factors. *Metropolitan Life Insurance Co.*, 156 NLRB 1408 (1966); *Central Power & Light Co.,* 195 NLRB 743 (1972); *Mosler Safe Co*., 188 NLRB 650, 651 fn. 6 (1971); and *Overnite Transportation Co*., 141 NLRB 384 fn. 2 (1963).

In *Central Power & Light Co*., supra at 746, which involved the public utility industry, it was pointed out that "Before bargaining can occur on the basis of a systemwide unit, there must be systemwide organization of employees"; there is nothing in the Act or in Board policy which requires a petitioner to seek the optimum unit; and it "need only seek to represent an appropriate unit of employees." Consequently, the decision aimed at in that case comported with the statutory direction and did not preclude the eventual establishment of bargaining in the systemwide unit.

Even if a petitioning union's proposal is, in part, based on the extent of its organizational efforts, it does not follow that such a unit is necessarily defective or that in designating that unit as appropriate the Board is thereby giving any, much less controlling, weight to the union's extent

of organization. *Dundee's Seafood*, *Inc*., supra; *Consolidated Papers*, 220 NLRB 1281 (1975); and *Bell Industries*, 139 NLRB 629, 631 fn. 7 (1962). Similarly, the fact that the petitioner's motive in seeking separate units is guided by the extent to which the union had organized is immaterial so long as the Board, in its choice of appropriate unit, does not give controlling weight to that fact. *Stern's Paramus*, 150 NLRB 799, 807 (1965).

See earlier reference to this subject at sections 12-140 and 12-239, supra. See also section 13-1000, infra.

12-400 Residual Units

420-8400

440-1780-6000

Groups of employees omitted from established bargaining units constitute appropriate "residual" units, provided they include all the unrepresented employees of the type covered by the petition. *G.L. Milliken Plastering*, 340 NLRB 1169 (2003); *Carl Buddig & Co.,* 328 NLRB 929 (1999); and *Fleming Foods*, 313 NLRB 948 (1994). See also *Premier Plastering, Inc.,* 342 NLRB 1072 (2004).

For example, where a group of laboratory employees had been excluded from the production and maintenance unit and were therefore unrepresented, representation in a separate unit on a residual basis was held appropriate. *S. D. Warren Co*., 114 NLRB 410, 411 (1956). When, however, a petitioner sought a unit of employees in the employer's shipping and warehouse office, and it appeared that the employer had many unrepresented clerical employees other than those petitioned for, the unit sought was found to be comprised of only a segment of all the unrepresented employees, and therefore did not meet the test of "residual unit," and was inappropriate as a bargaining unit. *American Radiator Corp*., 114 NLRB 1151, 1154–1155 (1956). Where, however, the union is willing to proceed to an election in a larger unit, an election will be directed. *Carl Buddig*, supra, and *Folger Coffee Co*., 250 NLRB 1 (1980).

In fashioning overall or larger units, the Board is reluctant to leave a residual unit where the employees could be included in the larger group. *Huckleberry Youth Programs*, 326 NLRB 1272 (1998). *International Bedding Co.,* 356 NLRB No. 168 (2011). See also *United Rentals, Inc.,* 341 NLRB 540 fn. 11 (2004) (only unrepresented employees at facility included in unit despite sparse record of community of interest) and section 19-440, infra.

Where the record was insufficient to establish whether the requested residual unit includes all unrepresented employees, the Board has remanded the matter to the Regional Director. *G.L. Milliken,* supra.

For other illustrations of groups found *appropriate* as "residual," see *Cities Service Oil Co*., 200 NLRB 470 (1972) (in a multiplant situation); *Walter Kidde & Co.*, 191 NLRB 10 (1971) (plant clerical employees); *Water Tower Inn*, 139 NLRB 842, 848 (1962) (food service and kitchen employees); *Hot Shoppes, Inc*., 143 NLRB 578 (1963) (food preparation employees and related categories); and *Rostone Corp*., 196 NLRB 467 (1972) (so-called hot mold employees).

For illustrations of groups found inappropriate for a bargaining unit on a residual basis, see *Republican Co.,* 169 NLRB 1146, 1147 (1968) (part-time employees in mailing room alone); *Budd Co*., 154 NLRB 421, 428 (1965) (separate residual units of engineers and accountants inappropriate in view of established units of technical and office clerical employees represented by the petitioner); *Armstrong Rubber Co*., 144 NLRB 1115, 1119 fn. 11 (1963) (unit sought as "residual'' did not contain all of the unrepresented employees); and *Richmond Dry Goods Co*., 93 NLRB 663, 666–667 (1951) (inappropriate because the larger unit as to which it was allegedly "residual" was inappropriate).

When the employer's only employees not presently represented by a labor organization are those classified in the category sought by the petitioning union, the petition is treated as a request for a residual unit of all unrepresented employees and an election is directed in that unit. *Building*

Construction Employers Assn., 147 NLRB 222 (1964); *Eastern Container Corp.,* 275 NLRB 1537 (1985).

The issue of appropriateness of a residual unit sometimes arises in a more complex context. For example, when, in the face of an existing multiemployer unit, separate residual units of all unrepresented employees of two hotels were sought, these units were found inappropriate for the reason that the employees sought comprised miscellaneous groupings lacking internal homogeneity or cohesiveness and could not alone constitute an appropriate unit. To be "residual," the group must be coextensive in scope with the existing multiemployer unit, and not merely coextensive with the particular employer's operations and thus only a segment of the residual group. *Los Angeles Statler Hilton Hotel*, 129 NLRB 1349 (1961). But where employees could have expressed their choice in a smaller clerical unit if included in a prior election (held on the basis of a stipulation which failed to include them), they were accorded the opportunity to vote on a residual basis "under the same condition afforded represented clericals." *Chrysler Corp*., 173 NLRB 1046, 1047 (1969).

12-410 Residual Units in the Health Care Industry

When it fashioned its rules for bargaining units in acute care hospitals, the Board specifically deferred resolving whether or not it would process a petition for a residual unit filed by a nonincumbent union in cases involving nonconforming units. See *Health Care Unit Rules,* 284 NLRB 1580, 1580–1597 (1989); and Rules 103.30. Later in *St. John's Hospital*, 307 NLRB 767 (1992), the Board held that it would process a petition for an incumbent union but that the unit would have to include all skilled maintenance employees residual to the existing unit and that the employees must be added to the existing unit by means of a self-determination election.

In *St. Mary's Duluth Clinic Health System*, 332 NLRB 1419 (2000), the Board held that a nonincumbent union may represent a separate residual unit of employees in an acute care hospital that is residual to an existing nonconforming unit. In doing so, the Board overruled its pre-Rule decision in *Levine Hospital of Hayward*, 219 NLRB 327 (1975). Thereafter, in *Kaiser Foundation Health Plan of Colorado,* 333 NLRB 557 (2001), the Board applied its new *St. Mary's* policy to a nonacute care health facility. See also section 15-170, infra.

In *St. Vincent Charity Medical Center*, 357 NLRB No. 79 (2011), a group of phlebotomists was found to be an appropriate voting group that could be added to an existing unit of technical, nonprofessional, skilled maintenance, and business office clerical employee at the employers acute care hospital. The Board majority held that the Healthcare Rule left these issues to adjudication and ordered an *Armour-Globe* election (40 NLRB 1333 (1942), and 3 NLRB 294 (1937)).

For a more extensive discussion of the type of elections accorded residual groups, see chapter 21, infra.

12-500 Accretions to Existing Units

316-3301-5000

347-4050-1733

385-7533-4080

440-6701

In outlining general unit principles, and before turning to the broad specific areas each of which is treated in the separate chapters that follow, we turn our attention to "accretion." For additional discussion of "accretion" see chapter 21 and section 11-220. "The Board has defined an accretion as 'the addition of a relatively small group of employees to an existing unit where these additional employees share a community of interest with the unit employees and have no separate identity.'" *Safety Carrier, Inc.,* 306 NLRB 960, 969 (1992). See also *Progressive Service Die Co.*, 323 NLRB 1182 (1997).

In *Safeway Stores,* 256 NLRB 918 (1981), the Board described its test as requiring that the group to be accreted have "little or no separate group identity" and "have an overwhelming community of interest with the unit." The Fourth Circuit agreed with this rule but disagreed with how the Board applied it. *Baltimore Sun Co. v. NLRB*, 257 F.3d 419 (4th Cir. 2001). Accord: *E. I. Du Pont, Inc.,* 341 NLRB 607 (2004).

In *Milwaukee City Center, LLC*, 354 NLRB 551 (2009) (two Member decision) the Board used the "well-established accretion rules" described in *Safeway Stores,* 356 NLRB 918 (1981), and found no accretion of baristas or head baristas in a hotel bar and restaurant unit.

Accretions to an established bargaining unit are regarded as additions to the unit and therefore as part of it. *United Parcel Service*, 325 NLRB 37 (1997). An accretion issue may arise in three different contexts: contract bar, a petition for certification, or a petition for unit clarification. "The Board has followed a restrictive policy in finding accretion because it foreclosed the employee's basic right to select their bargaining representative." *Towne Ford Sales*, 270 NLRB 311 (1984); and *Melbet Jewelry Co*., 180 NLRB 107 (1970). See also *Giant Eagle Markets*, 308 NLRB 206 (1992). Thus, the accretion doctrine is not applicable to situations in which the group sought to be accreted would constitute a separate appropriate bargaining unit. *Passavant Health Center*, 313 NLRB 1216 (1994), and *Beverly Manor-San Francisco*, 322 NLRB 968, 972 (1997). The issue may also arise in an unfair labor practice case where the General Counsel alleges that an employer unlawfully added employees to a unit where there is no accretion and the union did not represent a majority of those added. *Ryder Integrated Logistics, Inc*., 329 NLRB 1493 (1999).

Where employees are found to be an accretion to an existing unit, a current contract covering that unit bars the petition. *Firestone Synthetic Fibers Co*., 171 NLRB 1121 (1968); and *Public Service Co*., 190 NLRB 350 (1971).

Employees accreted to an existing unit are not accorded a self-determination election. *Borg-Warner Corp.,* 113 NLRB 152, 154 (1955); and *Goodyear Tire Co*., 147 NLRB 1233 fn. 6. (1964). Compare *Massachusetts Electric Co.*, 248 NLRB 155 (1980), where a self-determination election was directed where the meter readers could have been in either of two units. See also *Carr-Gottstein Foods Co*., 307 NLRB 1318 (1992), and *Photype, Inc*., 145 NLRB 1268 (1964), for discussion of self-determination elections. For a complete discussion of self-determination elections see chapter 21, infra.

Finally, a new classification that is performing the same work the unit classification had historically performed is viewed as part of the unit, not as an accretion. *Premcor, Inc.,* 333 NLRB 1365 (2001); and *Developmental Disabilities Institute,* 334 NLRB 1166 (2001).

A petition for certification of a group found to be an accretion is, of course, dismissed. *Granite City Steel Co.,* 137 NLRB 209 (1962); and *Radio Corp. of America*, 141 NLRB 1134 (1963). However, a petition for clarification is granted if the disputed employees are an accretion to the unit. *Printing Industry of Seattle*, 202 NLRB 558 (1973).

Accretion issue resolution can depend on a number of factors and as in the case of most areas depending on a resolution of factors, it is a combination of factors rather than one single factor which affects the determination whether the employees in question constitute an accretion to an existing bargaining unit. The touchstone is community of interest. See *Boeing Co.,* 349 NLRB 957 (2007). For example, the production and maintenance electrical workers and steamfitters at employer's newly established can manufacturing plant were held not an accretion to the employer's brewery plant in view of the absence of employee interchange, separate management and administrative control, and differences in working conditions. *Jos. Schlitz Brewing Co*., 192 NLRB 553 (1971). Similarly, shared factors such as geographic proximity, working conditions and wages were outweighed by other factors. *E. I. Du Pont, Inc.,* supra. By way of contrast, accretion was found where the employer's second plant provided the same service as the original unit; the employer was the sole owner of both companies; and the companies had interlocking officers and directors and similar operating functions, job classifications, and working conditions.

Baton Rouge Water Works Co., 170 NLRB 1183 (1968). See also *Earthgrains Co.,* 334 NLRB 1131 (2001).

The factors commonly used to determine whether the group of employees in question constitutes an accretion include the following:

12-510 Interchange

Absence or infrequency of interchange among the new employees and those in the existing unit. *Dedicated Services, Inc.,* 352 NLRB 753, 764 (2008)*; Plumbing Distributors*, 248 NLRB 413 (1980); and *Combustion Engineering*, 195 NLRB 909, 912 (1972).

As pointed out by the administrative law judge in the last case, "The absence, or infrequency, of interchange of employees is probably the one factor most commonly relied upon by the Board in finding no accretion." More recently, the Administrative Law Judge in *Dedicated Services,* supra made this same point adding that common supervision was another "critical" factor. 352 NLRB at 764. Accord: *Milwaukee City Center, LLC*, 354 NLRB 551 (2009) (two Member Decision) slip op. p.4. The Board has not deemed it material that interchange was feasible. Thus, in finding no accretion, the Board noted that, although the jobs at the two operations involved were virtually interchangeable, there was in fact no interchange. *Essex Wire Corp*., 130 NLRB 450 (1961). See also *Towne Ford Sales*, 270 NLRB 311 (1984); *Super Value Stores*, 283 NLRB 134 (1987); and *Judge & Dolph, Ltd*., 333 NLRB 175 (2001).

12-520 Supervision and Conditions of Employment

420-2900

Common supervision and similar terms and conditions of employment. *Dedicated Services, Inc.,* 352 NLRB 753, 764 (2008); *Western Cartridge Co.*, 134 NLRB 67 (1962); and *Western Wirebound Box Co*., 191 NLRB 748 (1971).

In *Western Cartridge Co*., supra, the Board issued a decision in which it clarified an existing certification, including in the description of the appropriate unit a grouping of employees. It relied in part on the fact that these employees had "the same supervisors, duties, and conditions of employment." Compare *Town Ford Sales*, supra; and *Plumbing Distributors*, supra. See also *Safety Carrier, Inc.,* 306 NLRB 960, 969 (1992), and *Judge & Dolph, Ltd.,* supra.

12-530 Job Classification

385-7533-2000

Substantially similar job classifications. *Gillette Motor Transport*, 137 NLRB 471 (1962); and *Printing Industry of Seattle*, supra; *Plough, Inc*., 203 NLRB 818 (1973).

In *Printing Industry of Seattle*, supra, a certification was clarified to include personnel as an accretion because of the identical work being performed by them. But where a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as "remaining in the unit rather than being added to the unit by accretion." *Premcor, Inc.,* 333 NLRB 1365 (2001). See also *Developmental Disabilities Institute,* 334 NLRB 1166, 1168 (2001).

12-540 Integration of Units

420-4600

The physical, functional, and administrative integration of units. *Granite City Steel Co.*, supra; *Combustion Engineering*, supra.

"Although both groups may occasionally utilize similar work measurement techniques, this fact alone is insufficient to warrant the accretion of the new group to the existing unit, where, as here, the functions performed by the two groups are in no way integrated or related and there is no common supervision." *General Electric Co*., 204 NLRB 576 (1973).

The Board will find an accretion of a separate unit of employees into an existing unit where the reasons for the exclusion have been eliminated. *U.S. West Communications*, 310 NLRB 854 (1993).

An employer cannot have employees clarified out of a unit merely by transferring them to a new location, when they are doing the same work under the same supervision. *Montgomery Ward & Co*., 195 NLRB 1031 (1972). Similarly, in the case of an intracorporation reorganization, employees who continue to perform the same type of functions under the same supervision should remain in the unit. *Swedish Medical Center*, 325 NLRB 683 (1998); *McDonnell Douglas Astronautics Co*., 194 NLRB 689 (1972); and *S. D. Warren Co*., 164 NLRB 489 (1967). However, when a merger eliminates the "rational basis" for a separate unit, such unit will be found inappropriate and its members will be clarified into the larger, more comprehensive unit. *Joseph Cory Warehouse*, 184 NLRB 627 (1970). And when a change in the method of operation eliminates the historical justification for including certain employees in a unit, they may be clarified out of the unit. *Cal-Central Press*, 179 NLRB 162 (1969); and *Libby, McNeill & Libby*, 159 NLRB 677, 681 (1966).

12-550 Geographic Proximity

420-6700

Rollins-Purle, Inc., 194 NLRB 709, 711 (1972), in which the administrative law judge quoted from *Melbet Jewelry Co*., 180 NLRB 107 (1970): "We will not . . . under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." Geographic remoteness was among the factors militating against an accretion finding in *Rollins-Purle, Inc*.,)supra. See also *Granite City Steel Co*., supra. See also *Super Value Stores*, supra. In that case the Board found a 10–12-mile distance as not weighing in favor of accretion. See *Bryant Infant Wear*, 235 NLRB 1305 (1978), and *Judge & Dolph*, *Ltd.,* 333 NLRB 175 (2001) (70 miles). Compare *Arizona Public Service Co.*, 256 NLRB 400 (1981); and *White Front Stores*, 192 NLRB 240 (1971).

The Board does not automatically accrete employees at a new facility solely because the unit description covers all facilities in a geographical area. *Superior Protection Inc*., 341 NLRB 267 (2004).

12-560 Role of New Employees

The role of the new employees in the operations of the existing unit is a factor in accretion analysis. *Granite City Steel Co.,* supra. In that case, the Board commented, inter alia, on the "vital role in the operation" of new employees held to be an accretion. Compare *Premcor, Inc.,* supra; *Developmental Disabilities Institute,* supra, section 12-530.

12-570 Community of Interest

401-7550

As we have seen in other substantive areas, the element of community of interest is consistently a vital element in determining accretion. *Boeing Co.,* 349 NLRB 957 (2007); and *Dennison Mfg. Co*., supra. In *Firestone Synthetic Fibers Co*., supra at 1123, accretion was found where maintenance employees, recently acquired, shared a community of interest with the employer's other maintenance employees and with the production and maintenance employees generally. *Earthgrains Co*., 334 NLRB 1131 (2001). See also *U.S. Steel Corp*., 187 NLRB 522 (1971); and *CF&I Steel Corp*., 196 NLRB 470 (1972). Compare *Giant Eagle Markets*, 308 NLRB 206 (1992).

A UC petition was dismissed where petitioner did not seek to include other employees who performed similar functions and had a close community of interest with the employees sought.

Armstrong Rubber Co., 180 NLRB 410 (1970). Compare *KMBZ/KMBR Radio*, 290 NLRB 459 (1988).

12-580 Bargaining History

420-1200

A long history of exclusion from the unit was relied on by the Board in rejecting an accretion contention. *Teamsters Local 89 (United Parcel Service),* 346 NLRB 484 (2006). *Aerojet-General Corp*., 185 NLRB 794, 798 (1970). See also *Manitowoc Shipbuilding*, 191 NLRB 786 (1971), noting a long history of inclusion of related employees in the unit which warranted finding of accretion. Compare *Safeway Stores*, 256 NLRB 918 (1981), where jurisdictional clause in a contract with another union precluded accretion. In *Massachusetts Electric Co*. , supra, the Board declined to accrete transferred employees who had been separately represented by another union. See also *United Parcel Service*, 303 NLRB 326 (1991); *Staten Island University Hospital*, 308 NLRB 58 (1992); and *ATS Acquisition Corp*., 321 NLRB 712 (1996).

As a general rule, the Board will not clarify a bargaining unit to interfere with or change a long-term collective-bargaining history. However, in *Rock-Tenn Co.*, 274 NLRB 772 (1985), the Board clarified a two-plant unit into separate units in which the two plants had been sold to separately incorporated operating divisions of *Rock-Tenn*. The Board found that the sale had resulted in significant organizational changes which offset what community of interest had existed among the employees of the two plants. The Board's *Rock-Tenn* decision emphasized the particular facts of the case finding that they constituted "compelling circumstances" for disregarding the two-plant bargaining history. Later, in *Batesville Casket Co.*, 283 NLRB 795 (1987), the Board declined to clarify an existing two-company single unit into separate units where the single unit had been in existence without substantial changes for many years. In distinguishing *Rock-Tenn*), the Board emphasized that the changes there which had prompted clarification were "*recent* substantial changes." As there were not "recent substantial changes" in *Batesville*, the UC petition was dismissed. See also *Ameron, Inc.,* 288 NLRB 747 (1988), where the Board clarified a single unit into two units under *Rock-Tenn* principles and *Delta Mills*, 287 NLRB 366 (1987), where the Board in an RD proceeding rejected a contention that changed circumstances warranted splitting an existing unit into two units. Accord: *Lennox Industries*, 308 NLRB 1237 (1992), in which the Board clarified a single unit into two units rejecting the employer's request for six units. In *Mayfield Holiday Inn*, 335 NLRB 38 (2001), the Board allowed a historically single unit covering two locations to be divided into two separate units when the two facilities were sold to different employers.

As a "members only" contract does not afford the kind of representation nor establish the type of bargaining unit which the Act contemplates, the Board will not make its procedures available to clarify a unit covered by an agreement which has been applied, in effect, on a "members only" basis. *Ron Wiscombe Painting Co.,* 194 NLRB 907 (1972).

In *United Parcel Service*, 325 NLRB 37 (1997), the Board declined to clarify a nationwide bargaining unit to include a group of employees in one geographic area while continuing to exclude employees performing similar duties in the rest of the unit.

For an analysis of the effect of hiatus on accretion, compare *F & A Food Sales*, 325 NLRB 513 (1998) (position included in unit after 3-year hiatus); with *Coca-Cola Bottling Co. of Wisconsin*, 310 NLRB 844 (1993) (no accretion due to 12-year hiatus).

12-590 Skills and Education

420-2963

Despite an apparent similarity of function, employees found to be basically "computer programmers," who had to meet special educational requirements, were held, for this reason among others, not to have accreted to the unit. *Dennison Mfg. Co.*, supra; and *Aerojet-General Corp*., supra at 797. Accord: *E. I. Du Pont, Inc*., 341 NLRB 607 (2004).

12-600 Relocations, Spinoffs, and Accretions

530-8018-2500

530-8090-4000 et seq.

The Board has been confronted with the problem presented by the transfers of bargaining unit work members. In *Coca-Cola Bottling Co. of Buffalo*, 299 NLRB 989 (1990), the Board termed a transfer of what has been traditionally unit work to a new facility using unit members as a "spinoff." In *Gitano Distribution Center*, 308 NLRB 1172 (1992), the Board overruled *Coca-Cola* and announced a new test for determining the bargaining obligation in such situations. Under this test, the Board will presume that the new operation is a separate appropriate unit. If this presumption is not rebutted, the Board then applies "a simple fact-based majority test'' to determine the bargaining obligation. See also *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000); *Mercy Health Services North*, 311 NLRB 367 (1993); and *ATS Acquisition Corp*., supra. The Board remanded *Coca-Cola* for further consideration in light of *Gitano* and later found that the presumption of a separate unit had been rebutted. *Coca-Cola Bottling Co. of Buffalo*, 325 NLRB 312 (1998). See also *Rock Bottom Stores,* 312 NLRB 400 (1993), an unfair labor practice case involving when it is appropriate to require application of an existing contract at the new facility.

In *Armco Steel Co*., 312 NLRB 257 (1993), the Board held that UC proceedings could be utilized to resolve the full panoply of issues presented in a *Gitano* analysis. Thus, the Board found the UC proceeding is a more expeditious method of resolving the unit scope and the majority status issues that are part of a *Gitano* consideration.

13. MULTILOCATION EMPLOYERS

420-4000

420-7390

440-3300

737-4267-8700

The determination of the proper scope of a bargaining unit when the employer operates more than one plant or establishment often presents special problems. As we have seen, Section 9(b) empowers the Board to decide in each case whether the unit appropriate for bargaining purposes shall be the employer unit, the craft unit, the plant unit, or a subdivision thereof.

The scope of the unit sought by the petitioner is relevant but cannot be determinative of the unit (see sec. 13-1000, infra). So when a union seeks a presumptively appropriate unit, e.g., a single facility or an employerwide unit, it is the burden of the party seeking a multifacility unit to rebut the presumption. See, e.g., *Hilander Foods,* 348 NLRB 1200 (2006); and *Greenhorne & O'Mara*, *Inc*., 326 NLRB 514 (1998) (employerwide unit presumptively appropriate). However, where the union seeks a multifacility unit, the single-facility presumption is inapplicable, *Capital Coors Co.,* 309 NLRB 322 (1992), citing *NLRB v. Carson Cable TV,* 795 F.2d 879, 886–887 (9th Cir. 1986).

A number of factors bear on the unit determination in a multilocation situation; indeed, they bear striking resemblance to the factors discussed in the preceding chapter. Assuming the union is seeking a single-location unit, these include past bargaining history; the extent of interchange of employees; the work contacts existing among the several groups of employees; the extent of functional integration of operations; the differences, if any, in the products or in the skills or types of work required; the centralization or lack of centralization of management and supervision, particularly in regard to labor relations, the power to hire, discharge, or affect the terms and conditions of employment; and the physical and geographical location in relation to each other. These factors must necessarily be weighed in resolving the unit contentions of the parties. See, for example, *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *Novato Disposal Services*, 328 NLRB 820 (1999); and *R & D Trucking,* 327 NLRB 531 (1999), both finding that the single-facility presumption was rebutted; *RB Associates*, 324 NLRB 874 (1997), single-facility presumption not rebutted; *J&L Plate*, 310 NLRB 429 (1993).

The general rule is that a single-plant unit is presumptively appropriate, unless the employees at the plant have been merged into a more comprehensive unit by bargaining history, or the plant has been so integrated with the employees in another plant as to cause their single-plant unit to lose its separate identity. *Trane*, 339 NLRB 866 (2003); *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *Dattco, Inc.,* 338 NLRB 49 (2002); *New Britain Transportation Co*., 330 NLRB 397 (1999); *Centurion Auto Transport*, 329 NLRB 34 (1999); *Kendall Co.,* 184 NLRB 847 (1970); *Kent Plastics Corp*., 183 NLRB 612 (1970); *National Cash Register Co*., 166 NLRB 173 (1967); *O'Brien Memorial*, 308 NLRB 553 (1992); and *Passavant Health Center*, 313 NLRB 1216 (1994) (health care institution). For recent cases in which this presumption was rebutted, see *We Care Transportation, LLC*, 353 NLRB 65 (2008) (two Member decision); *Sleepy's, Inc*., 355 NLRB 132 (2010) (two Member decision) *Dattco,* supra*;* and *Budget Rent A Car Systems*, supra. See also *Waste Management Northwest,* 331 NLRB 309 (2000); and *Oklahoma Installation Co.*, 305 NLRB 812 (1991), for a discussion of multisite units in the construction industry. See *Acme Markets, Inc.,* 328 NLRB 1208 (1999).

In *North Hills Office Services,* 342 NLRB 437 (2004), the Board found a single-facility unit appropriate and distinguished *Trane*, supra, and *Waste Management Northwest,* supra.

Even though employees may share a community of interest with others in a petitioned-for multifacility unit, that interest must be separate and distinct from that which they share with other

employees at other facilities of the same employer, if the petitioned-for unit is to be appropriate. *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004).

An employerwide unit is also presumptively appropriate.

In considering whether the single-facility presumption has been rebutted, the Board examines a number of factors including:

(1) central control over labor relations
(2) local autonomy
(3) interchange of employees
(4) similarity of skills
(5) conditions of employment
(6) supervision
(7) geographic separation
(8) plant and product integration
(9) bargaining history

Budget Rent A Car Systems, supra; *Trane*, supra; and *Bashas', Inc.,* 337 NLRB 710 (2002). For other cases dealing with these issues see *Bowie Hall Trucking*, 290 NLRB 41 (1988); *Esco Corp*., 298 NLRB 837 (1990); and *Executive Resources Associates*, 301 NLRB 400 (1991).

In 2006, the Board decided two cases that dealt with most of these factors. In *Hilander Foods,* 348 NLRB 1200, the Board found that the employer had not rebutted the single-store presumption. But, in *Prince Telecom,* 347 NLRB 789 (2006), the Board found that the employer had.

The same general rule is applicable also to retail chain store operations. At one time the Board's policy generally was to determine the appropriate unit in retail chain store industry on the basis of being coextensive with the employer's administrative division or the geographic area in question. This was changed in *Sav-On Drugs*, 138 NLRB 1032 (1962), which modified the preexisting policy to apply the rule that a proposed unit, which is confined to one of two or more retail establishments making up an employer's retail chain, is either appropriate or not in the light "of all the circumstances in the case." Id. at 1033. This does not make the extent of organization the "decisive factor," but, as in manufacturing and any other multiplant enterprises, means that "a single location or a grouping other than an administrative division of geographical area may be appropriate." See, e.g., *Verizon Wireless*, 341 NLRB 483 (2004) (unit of Bakersfield stores appropriate, even though distinct wide unit might also be appropriate).

This means that the question of appropriateness of a unit is not decided "by any rigid yardstick" but by examining all the relevant circumstances. *Frisch's Big Boy Ill-Mar, Inc*., 147 NLRB 551, 552 (1964). By way of clarification of the rule announced in *Sav-On Drugs*, it was pointed out in *Frisch's* that the rule in multiplant situations was applicable to multistore situations; i.e., a single-plant unit is presumptively appropriate unless it is established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity. See also *Walgreen Co*., 198 NLRB 1138 (1972); *Gray Drug Stores*, 197 NLRB 924 (1972); *Haag Drug Co.,* 169 NLRB 877 (1968); and *V.I.M. Jeans*, 271 NLRB 1408 (1984). In *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965), applying the *Sav-On Drugs* rule, a multistore unit was found solely appropriate on the basis of an established bargaining relationship and other factors pertinent to a unit determination. Compare *Twenty-First Century Restaurant*, 192 NLRB 881 (1971), and *McDonalds*, 192 NLRB 878 (1971). In *Bashas', Inc.,* supra, , the Board rejected a multistore unit petition that was based solely on the fact that all stores were in the same county.

It was pointed out in *Haag Drug*, supra, that a group of retail outlets could also constitute an appropriate bargaining unit if there were a sufficient degree of geographic coherence and common interests of the employees in the outlets. And see *NLRB v. Carson Cable TV*, 795 F.2d

879 (9th Cir. 1986), which illustrates the principle that the single-facility presumption is inapplicable when a union petitions for a multifacility unit.

Even if there are some factors supporting a multiplant or multistore unit, the appropriateness of such a unit does not establish the inappropriateness of a smaller unit. *McCoy Co*., 151 NLRB 383, 384 (1965). It also follows that the appropriateness of a storewide unit does not establish a smaller unit as appropriate. *Montgomery Ward & Co*., 150 NLRB 598 (1965). Thus, although the optimum unit for collective bargaining may well be citywide in scope, a union is not precluded from seeking a smaller unit when the unit sought is in and of itself also appropriate for collective bargaining in light of all the circumstances. *Frisch's Big Boy Ill-Mar, Inc*., supra.

On September 28, 1995, the Board published a proposed rule on the appropriateness of single-location bargaining units. Specifically, the proposal stated that an unrepresented single-location unit shall, absent extraordinary circumstances, be found appropriate provided that there are 15 or more employees, that no other location is located within 1 mile, and that a supervisor is present at the location for a regular and substantial period. The Board later decided to withdraw the proposed rule.

We now direct our specific attention to the individual factors previously cited in multiplant and multistore situations:

13-100 Central Control of Labor Relations

420-4025

440-3300

The fact that several plants or stores are subject to identical personnel and labor relations policies, which are determined at the employer's principal office, have been cited to support multilocation determination. *Budget Rent A Car Systems*, supra; *Dattco, Inc*., supra *Purity Supreme, Inc*., 197 NLRB 915 (1972); *Dan's Star Market*, 172 NLRB 1393 (1968); *McCulloch Corp.,* 149 NLRB 1020 (1964); *Mid-West Abrasive Co*., 145 NLRB 1665, 1667–1668 (1964); and *Barber-Colman Co*., 130 NLRB 478, 479 (1961). Similarly, administrative integration of the employer's operations under unified control and centralized control of labor relations are factors given significant weight in favor of a multilocation unit. *Prince Telecom,* supra; *Novato Disposal Services*, 328 NLRB 820 (1999); *R & D Trucking,*, 327 NLRB 531 (1999); *Twenty-First Century Restaurant*, 199 NLRB 881 (1971); *Mary Carter Paint Co*., 148 NLRB 46 (1964); and *Universal Metal Products Corp.,* 128 NLRB 442 (1960). Compare *Cargill, Inc*., 336 NLRB 1114 (2001), where the Board majority found "significant local autonomy over labor relations sufficient for a single unit." In *Twenty-First Century Restaurant*, supra at 882, the Board commented:

> In our opinion it is significant that all of the franchised food outlets of the Employer conduct business under standardized policies and procedures subject to close centralized controls. It is clear that the location manager is vested only with minimal discretion with respect to labor relations matters and the method of operation, and the exercise of his discretion is carefully monitored by the field supervisor who visits each location daily and the general manager who also makes frequent visitations. In sum, any meaningful decision governing labor relations matters emanates from established corporatewide policy, as implemented by the general managers and field supervisors. [See also *Waste Management Northwest*, 331 NLRB 309 (2000).]

Compare *Red Lobster*, 300 NLRB 908 (1990).

13-200 Local Autonomy

420-4033

440-3300

Local autonomy of operations will militate toward a separate unit. *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB,* 297 F.3d 41 (1st Cir. 2002); *Hilander Foods,* supra*; Angelus Furniture Mfg. Co*., 192 NLRB 992 (1971); *Bank of America*, 196 NLRB 591 (1972); *Parsons Investment Co*., 152 NLRB 192 (1965); *J. W. Mays, Inc*., 147 NLRB 968 (1964); *Thompson Ramo Wooldridge, Inc*., 128 NLRB 236 (1960), and *D&L Transportation*, 324 NLRB 160 (1997). In *Angelus Furniture*, supra, the individual store manager could he said to represent "the highest level of supervisory authority present in the store for a substantial majority of time." See also *Grand Union Co.,* 176 NLRB 230 (1969); *Red Lobster*) supra. Compare *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *V.I.M. Jeans*, supra; *R & D Trucking*, supra.

In *New Britain Transportation Co*., 330 NLRB 397 (1999), the Board found that the existence of centralized administration and control was not inconsistent with finding sufficient local autonomy to warrant a single location.

13-300 Interchange of Employees

420-5027 et seq.

440-3300

Interchange among employees is a frequent consideration. Like the other factors, it is considered in the total context. *Gray Drug Stores*, supra; and *Carter Camera Shops,* 130 NLRB 276, 278 (1961). Thus, for example, where, except for the rare instance of a new store opening, employees were not transferred from the store in question to another store, a unit confined to the one store was found appropriate. *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB,* supra; *Hilander Foods,* supra; and *J. W. Mays, Inc*., supra at 970. See *Cargill, Inc*., 336 NLRB 1114 (2001); *Van Lear Equipment, Inc*., 336 NLRB 1059 (2001); *Bowie Hall Trucking*, 290 NLRB 41 (1988); and cf. *Globe Furniture Rentals*, 298 NLRB 288 (1990). See also *Courier Dispatch Group*, 311 NLRB 728 (1993). Compare *Budget Rent A Car Systems*, 337 NLRB 884 (2002); and *Trane,* 339 NLRB 866 (2003).

For discussion of interchange in a health care setting see *O'Brien Memorial*, 308 NLRB 553 (1992).

In *J&L Plate*, 310 NLRB 429 (1993), the Board found that minimal employee interchange and lack of meaningful contact between employees at the two facilities diminishes the significance of the functional integration and distance between the facilities. See also *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *RB Associates*, supra. Compare *First Security Services Corp*., 329 NLRB 235 (1999). *R & D Trucking*, supra; *Novato Disposal Services*, 328 NLRB 820 (1999); and *Macy's West, Inc*., 327 NLRB 1222 (1999).

In *New Britain Transportation Co*., 330 NLRB 397 (1999), the Board found that the single-facility presumption was not rebutted by evidence of interchange that was presented in aggregate form rather than as a percentage of total employees.

In *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004), the Board found the multifacility unit sought was too narrow as it left out employees with whom the unit employees interchanged regularly.

13-400 Similarity of Skills

420-8417

440-3300

The similarity or dissimilarity of work skills has some bearing, along with the nature of any work performed, in deciding on whether a multiplant alone is appropriate. Thus, where similar

classifications existed and similar work was being performed at two separately located plants, these, in addition to the consideration of multiplant bargaining history, weighed the balance in favor of finding only a two-plant unit appropriate. *Cheney Bigelow Wire Works*, 197 NLRB 1279 (1972). See also *Dattco, Inc.,* 338 NLRB 49 (2002); *R & D Trucking*, supra; *Greenhorne & O'Mara,*supra; and *Waste Management Northwest*, 331 NLRB 309 (2000).

13-500 Conditions of Employment

420-2900

440-3300

Working hours, pay rates, the nature of the employer's operations, and indeed all terms and conditions of employment are factors in this area of unit determination. *Prince Telecom,* 347 NLRB 789 (2006). A difference in working hours in each store was one among a number of factors considered. *V. J. Elmore 5 Stores*, 99 NLRB 1505 (1951). A difference in rates of pay was a factor, among others, in reaching the ultimate conclusion. *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1953). The fact that airport operations were "functionally distinct" from the employer's other operations in the area was taken into account. The airport operations involved the preparation and supplying of cooked meals for various airline companies which were prepared, brought to thc airport, and loaded on airplanes by employees. The employer's other operations were restaurants in the same general area. In this context, a unit confined to the airport employees was found appropriate. *Hot Shoppes, Inc*., 130 NLRB 138, 141 (1961). But see *Dattco, Inc.,* supra; *Stormont-Vail Healthcare, Inc.,* 340 NLRB 1205 (2003); and *Globe Furniture Rentals*, supra, finding a multilocation unit appropriate. See also *Greenhorne & O'Mara*, supra; and *Novato Disposal Services,* 328 NLRB 820 (1999).

13-600 Supervision

440-3300

Whether the employees at different plants or stores share common supervision is a consideration where more than one plant, facility, or store is involved. Thus, where a store supervisor and the store manager of a store had direct control over the hiring and discharging of employees in one store, assigned work, approved work schedules and time off, and settled customer complaints, a unit limited in scope to that store was an appropriate unit within Board policy. *Purity Food Stores*, 150 NLRB 1523, 1527 (1965). See also *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *Penn Color, Inc*., 249 NLRB 1117 (1980); and *Renzettis Market*, 238 NLRB 174 (1978). See also *First Security Services Corp.*, supra, and *Courier Dispatch Group,* supra. Compare *Dattco, Inc.,* supra; *Trane*, supra; *Novato Disposal Services*, supra; and *Macy's West*, supra.

13-700 Geographical Separation

420-6280

440-3300

Geography is frequently a matter of significance in resolving these issues. Thus, plants which are in close proximity to each other are distinguished from those which are separated by meaningful geographical distances. This was among the factors enumerated in deciding the appropriateness of a single-plant unit where 20 miles separated it from another plant. Although not a large distance, this geographical separation added to lack of substantial interchange; the absence of a bargaining history and the fact that no labor organization sought to represent a multiplant unit were held to warrant a single-plant unit. *Dixie Belle Mills*, 139 NLRB 629, 632 (1962). See also *Van Lear Equipment, Inc.,* 336 NLRB 1059 (2001). Compare *Barber-Colman Co*., supra, in which a plant 43 miles distant was included in what would otherwise have been a three-plant unit because of the functional integration of operations and centralized management of

labor matters. See also *Stormont-Vail Healthcare, Inc.,* 340 NLRB 1205 (2003); *Trane,* supra; *Novato Disposal Services,* supra, and *Macy's West, Inc*., supra. But see *Esco Corp*., 298 NLRB 837 (1990).

In *Capital Coors Co*., 309 NLRB 322 (1992), the Board denied an employer's request for review of a decision in which the Regional Director found two plants to be a single unit even though they were 90 miles apart. Here, the union had sought a single unit of the two plants.

In *D&L Transportation,* 324 NLRB 160 (1997), the Board found a single-bus terminal unit appropriate where inter alia, the other terminals were between 3 and 21 miles apart. See also *New Britain Transportation*, 330 NLRB 397 (1999) (separations of 6 and 12 miles).

13-800 Plant Integration and Product Integration

420-2969 et seq.

420-4600

440-3300

A distinction exists between plant integration and product integration. While operations may be integrated among several plants with respect to executive, managerial, and engineering activities, countervailing factors may nonetheless favor the appropriateness of a single-plant unit. "[P]roduct integration is becoming a less significant factor in determining an appropriate unit because modern manufacturing techniques combined with the increased speed and ease of transport make it possible for plants located in different States to have a high degree of product integration and still maintain a separate identity for bargaining purposes." *Black & Decker Mfg. Co*., 147 NLRB 825, 828 (1964). In that case, the employer engaged in the manufacture of power tools at plants located 24 miles apart. The Board was mindful of the existence of product integration and that the interchange of employees between the two plants was "more than minimal." However, these circumstances were counteracted by a "relatively wide geographical separation," substantial autonomy reflected by the control exercised by departmental managers and foremen in day-to-day operations, the absence of any bargaining history, and the fact that no labor organization was seeking a larger unit. It should be noted parenthetically that the latter two factors reflect a constant refrain in unit determinations. But compare *Eastman West*, 273 NLRB 610 (1984). See also *Lawson Mardon U.S.A.,* 332 NLRB 1282 (2000).

Although the integration of two or more plants in substantial respects may weigh heavily in favor of the more comprehensive unit, it is not a conclusive factor, particularly when potent considerations support a single-plant unit. In this connection, see also *Dixie Belle Mills*, supra, and *J&L Plate*, 310 NLRB 429 (1993).

The highly integrated nature of particular industries has caused the Board to find that a broader unit is optional. See *New England Telephone Co*., 280 NLRB 162 (1986) (systemwide unit for each department in public utility); and *Inter-Ocean Steamship Co*., 107 NLRB 330 (1954) (fleetwide unit in the maritime industry). With respect to maritime, see also *Moore-McCormack Lines*, 139 NLRB 796 (1962), in which special circumstances supported a finding that a fleetwide unit was not appropriate. Accord: *Keystone Shipping Co*., 327 NLRB 892 (1999). For a discussion of functional integration in automobile rental industry, see *Alamo Rent-A-Car*, 330 NLRB 897 (2000)**.**

See also section 15-280.

13-900 Bargaining History

420-1200

440-3300

The pattern of bargaining, as any study of bargaining unit principles will readily indicate, plays a significant role in all phases of unit determination, including, of course, the resolution of

questions pertaining to single-unit or multilocation unit scope. By way of illustration, we mention three of the many cases involving this factor:

> Where a retail chain bargained in citywide units in other cities, this fact was accorded considerable weight in arriving at the unit determination. *Spartan Department Stores*, 140 NLRB 608, 610 (1963).
>
> A bargaining history on a chainwide basis militated in favor of the more comprehensive bargaining unit. *Meijer Supermarkets*, 142 NLRB 513 (1963).
>
> A "fairly sketchy history of bargaining in two units" was insufficient to rebut other evidence supporting the sole appropriateness of a three-plant unit. *Coplay Cement Co.*, 288 NLRB 66 (1988).
>
> The history of bargaining on a three power plant basis was compelling enough to rebut the single facility presumption together with the fact that the employer also grouped the three with five other plants. *Southern Power Co.*, 353 NLRB 1085 (2009) (two Member decision).

In *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB,* 297 F.3d 41 (1st. Cir. 2002), the First Circuit, while commenting that the absence of history of bargaining does not favor or disfavor a single-facility finding, nonetheless found that the Regional Director did not abuse her discretion in relying on it for a single-facility finding.

13-1000 Extent of Organization

420-4600

420-6280 et seq.

440-3300

This area of substantive law has received the specific attention of the courts, including the United States Supreme Court. Generally, the courts have enforced Board orders based on findings in given circumstances of single-location units in multilocation enterprises, despite contentions that the Board acted in derogation of the ban in Section 9(c)(5) on giving controlling weight to extent of organization. Thus, the Fourth Circuit, in discussing this type of unit determination and considering the factual elements, had occasion to state: "[T]he office operates in an isolated manner, with little or no contact with other branch offices. . . . We cannot say that a single office is an arbitrary choice. . . . At most, the extent of organization was only one of the factors leading to the Board's decision, not the controlling one." *NLRB v. Quaker City Life Insurance Co*., 319 F.2d 690, 693–694 (4th Cir. 1963).

In its analysis of the facts, the Third Circuit observed that "[t]he grouping of two district offices was founded on cogent geographical considerations." *Metropolitan Life Insurance Co. v. NLRB*, 328 F.2d 820 (3d Cir. 1964).

The Sixth Circuit pointed out that "Geographical considerations were not 'simulated grounds' but the actual basis for the Board's decision." *Metropolitan Life Insurance Co. v. NLRB*, 330 F.2d 62 (6th Cir. 1964). See also the Ninth Circuit opinion in *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986).

Finally, this issue reached the highest court, in *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965), the Supreme Court reversed an unfavorable decision of the First Circuit, 327 F.2d 906 (1964). The circumstances attending this expression by the Supreme Court were as follows.

The First Circuit, disagreeing with the Board's finding, had held, in the light of the unarticulated basis of decision and what appeared to it to be inconsistent determinations approving units requested by the union, that the only conclusion that it could reach was that the Board had made extent of organization the controlling factor in violation of the congressional mandate. The Supreme Court, declining to accept the First Circuit's holding that the only possible conclusion was that the Board had acted contrary to the ban on "extent of organization" in Section 9(c)(5), remanded the case to the Board for the purpose of disclosing the basis of its order

and to "give clear indications that it has exercised the discretion with which Congress has empowered it." The Court added that the Board may, of course, articulate the basis of its order "by reference to other decisions or its general policies laid down in its rules and its annual reports, reflecting its 'cumulative experience.'"

Restating its policy in *Metropolitan Life Insurance Co*., 156 NLRB 1408, 1418 (1966), the Board stated:

> In making its determination the Board applied the usual tests to measure the community of interest of the employers involved: common working conditions a clearly defined geographical area sufficiently inclusive and compact to make collective bargaining in a single unit feasible and the absence of any substantial interchange with employees or offices outside the stated areas. As the units are thus appropriate under traditional criteria, the fact that we give effect to the Union's request certainly does not mean that our decision is controlled by the extent of the Union's organization, which would be contrary to the mandate of Section 9(c)(5).

It should be pointed out that, when a union requested a single unit in which only two of the three divisions would be represented, the Board characterized the request as one which asked "for neither fish nor fowl," and found instead a unit which would represent "some geographic or administrative coherence." See discussion in *State Farm Mutual Automobile Insurance Co*., 158 NLRB 925 (1966).

For additional discussion see sections 12-140, -239, and -300.

13-1100 Health Care

401-7575

470-8500

The statutory admonition against proliferation of bargaining units in health care prompted the Board to apply a somewhat different standard on multilocation v. single-location unit questions. In *Manor Healthcare Corp*., 285 NLRB 224 (1987), and *California Pacific Medical Center*, 357 NLRB No. 21 (2011), the Board applied the single-facility presumption in health care. See also *Visiting Nurses Assn. of Central Illinois*, 324 NLRB 55 (1997); and *Mercy Health Services North*, 311 NLRB 367 (1993). That presumption can however, "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 in the health care industry." *Mercywood Health Building*, 287 NLRB 1114 (1988). In that case, the Board found a single facility appropriate. 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 (1989). See also *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB,* 297 F.3d 41 (1st Cir. 2002).

In *St. Luke's Health System, Inc.,* 340 NLRB 1171 (2003), a divided Board found that the single-facility presumption had been rebutted in a health care situation based on a review of the traditional factors for deciding multilocation unit issues. See also *Stormont-Vail Healthcare, Inc.,* 340 NLRB 1205 (2003)

See other health care issues discussed and cross-referenced in section 15-170.

14. MULTIEMPLOYER, SINGLE EMPLOYER, AND JOINT EMPLOYER UNITS

177-1642 et seq.

420-9000

As we have seen, Section 9(b) of the Act confers on the Board the duty to determine in each instance whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit craft unit, plant unit, or subdivision thereof." From an early date, the Board has construed "employer unit" to include multiemployer units, and joint-employer units. In some respects the tests for determining multiemployer and joint-employer status overlap although there are distinctions. Generally, a multiemployer situation is said to exist when two or more employers band together for purposes of bargaining with the union for what would otherwise be separate units of the employees of each of the Employers. A "single employer" question presents different considerations and is posed when "two nominally-separated entities are actually part of a single integrated enterprise." *Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). In contrast, the term "joint employer" is usually applied to a situation where two or more employers share labor relations control over a group of what would otherwise be one of the employer's employees. This sharing is not necessarily for bargaining purposes. In fact, joint-employer issues arise often in unfair labor practice cases.

This chapter deals primarily with multiemployer bargaining units. The subjects of single- and joint-employer relationships and applicable unit principles are covered briefly.

14-100 Multiemployer Units

420-9000

440-5000

530-8023

The practice of multiemployer bargaining was known to Congress when it enacted the Taft-Hartley amendments. The construction was given formal approval by the Supreme Court in *NLRB v. Teamsters Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957), when it stated that Congress "intended to leave to the Board's specialized judgment the inevitable questions concerning multiemployer bargaining bound to arise in the future.''

The question of the appropriateness of a bargaining unit comprising employees of more than one employer generally arises where employers in an industry have conducted collective-bargaining negotiations jointly as members of an association or are asserted to have delegated the power to bind themselves in collective bargaining to a joint agent. Consideration is given to the history of collective bargaining, intent of the parties, the nature and character of the joint bargaining, the contract executed by the parties, whether effective withdrawal from multiemployer bargaining had occurred, and other factors relevant to this determination. See *Maramount Corp.*, 310 NLRB 508 (1993), where the long history of collective bargaining was balanced against the employees' Section 7 rights as evidenced by a series of petitions for single units.

Basically, in addressing itself to this standard to be applied in assessing the existence of a multiemployer bargaining, the Board looks for a sufficient indication from the history of the bargaining relationship between the employers and the union of "intent to be governed by joint action." *Rock Springs Retail Merchants Assn*., 188 NLRB 261 (1971).

Determinations normally are made within the framework of a unit functioning either via an association or under an informal understanding between otherwise unrelated employers. See *Weyerhaeuser Co*., 166 NLRB 299, 300 (1967); and *Van Eerden Co*., 154 NLRB 496 (1965).

In *Weyerhaeuser*, the Board adverted to the fact that it had in the past found a multiemployer unit even though the employers had never formalized themselves into an employer association, "a requirement the Board has never demanded," and added that "substance rather than legalistic form is all the Board has ever required in multiemployer bargaining." Thus, the emphasis is on intent to be bound by joint action as evidenced by objective, as distinguished from subjective, facts. Compare *Accetta Millwork*, 274 NLRB 141 (1985), where the Board found no intent to be bound by group action.

14-200 The General Rule

420-9000

440-1729-0133

440-5033

530-5700

530-8023-9500

The general rule is that a single-employer unit is presumptively appropriate. Thus, to establish a contested claim for a broader unit, a controlling history of collective bargaining on a multiemployer basis must be shown. *Central Transport, Inc*., 328 NLRB 407 (1999); *Chicago Metropolitan Home Builders Assn*., 119 NLRB 1184 (1958); *Cab Operating Corp*., 153 NLRB 878, 879–880 (1965); and *Bennett Stone Co*., 139 NLRB 1422, 1424 (1962). See also *Sands Point Nursing Home*, 319 NLRB 390 (1995), and *St. Luke's Hospital*, 234 NLRB 130 (1978), where the Board found that the history of multiemployer bargaining governed the scope of the unit.

For examples of cases in which the Board found a bargaining history on a multiemployer basis, see *Milwaukee Meat Packers Assn*., 223 NLRB 922, 924 (1976); *John Corbett Press Corp*., 172 NLRB 1124 (1968); *B. Brody Seating Co*., 167 NLRB 830 (1967); *United Metal Trades Assn*., 172 NLRB 410 (1968); and *Tom's Monarch Laundry & Cleaning Co*., 168 NLRB 217 (1968). Compare with *Santa Barbara Distributing Co*., 172 NLRB 1665 (1968), in which the Board found a manifest failure of intention to participate in a multiemployer unit. Similarly, in *Walt's Broiler*, 270 NLRB 556 (1984), the employers timely withdrew from multiemployer bargaining. The fact that they later used the same representative was not inconsistent with that withdrawal.

As multiemployer bargaining is a voluntary agreement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes, the "ultimate question . . . is the actual intent of the parties.'' *Van Eerden Co*., supra. Intent to be bound by joint bargaining is found where employers participate in meaningful multiemployer bargaining for a substantial period of time and there is a uniform adoption of the agreement resulting therefrom. *Architectural Contractors Trade Assn.*, 343 NLRB 259 (2004); *Arbor Construction Personnel, Inc.*, 343 NLRB 259 (2004); *Krist Gradis*, 121 NLRB 601 (1958); and *Hi-Way Billboards*, 191 NLRB 244 (1971).

The intention of the parties to be bound in their collective bargaining by group rather than individual action must be unequivocal. *Donaldson Traditional Interiors,* 345 NLRB 1298 (2005); *Hunts Point Recycling Corp*., 301 NLRB 751 (1991); *Kroger Co*., 148 NLRB 569 (1964); *Morgan Linen Service*, 131 NLRB 420 (1961); and *Artcraft Displays*, 262 NLRB 1233 (1982). "The mere adoption of an areawide contract, which includes a 'one unit' clause" is not sufficient. See *Architectural Contractors,* supra, and *Arbor Construction,* supra.

Intent to become part of a multiemployer unit cannot be based solely on the adoption by an employer of a contract negotiated by a multiemployer association of which the employer was not a member. There must also be evidence that the employer had authorized the association to negotiate on its behalf. *Etna Equipment & Supply Co*., 236 NLRB 1578 (1978). *Moveable*

Partitions, 175 NLRB 915 (1969); and *Photographers of the Motion Picture Industries*, 197 NLRB 1187 (1972). In the latter, the evidence indicated that the so-called independent employers did not in fact comprise a part of a single unit for bargaining. It was admitted that these employers had the option to negotiate separately if they so desired; they could refuse to be bound by any agreement negotiated by any multiemployer group simply by not signing the resulting contract; it was not until they received the proposed agreement and discussed it that each individually decided whether to become a party to the agreement; and the association had not been authorized to negotiate on behalf of any of these. On this evidence, they were found *not* to be part of a multiemployer unit. Compare *Custom Color Contractors*, 226 NLRB 851 (1976).

Intent is inferred from the conduct of the parties, not subjectively. Thus, when employers have banded together informally to bargain, without expressly documenting their relationship to each other or to the unions, the presence of the requisite intention is inferred from the facts. In these cases, a steady refrain runs through Board rationales: meaningful joint bargaining, a substantial period of time, and adoption of uniform contracts resulting from the joint bargaining. *American Publishing Corp.*, 121 NLRB 115 (1958). In the language of the Board, in *Van Eerden Co*., supra at 499:

> The ultimate question in these cases, however, is the *actual* intent of the parties, since multiemployer bargaining is a voluntary arrangement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes. And where there is specific evidence, beyond the mere circumstances of joint negotiations and uniformity of contracts, indicating that the parties did not intend to accept the obligations and benefits of multiemployer bargaining, that evidence must be equally considered in determining the basic issue.

Thus, in *American Publishing Corp*., supra, the presentation of a joint position in bargaining and the signing of the resulting contract as a single document by all participating employers was regarded as a manifestation of the intent to be bound. But in *Texas Cartage Co*., 122 NLRB 999 (1959), mere adoption of an areawide agreement by an employer who never participated in group negotiations and never authorized any agent to negotiate on his behalf did not make the employer part of the multiemployer unit. See also *Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543 (1959), and *Ruan Transport Corp*., 234 NLRB 241 (1978).

An effective bargaining history or pattern, even though based on an informal organization of employers, may be sufficient to establish an appropriate multiemployer unit (*Detroit News*, 119 NLRB 345, 347–348 (1958)), but the fact that the union voluntarily entered into initial negotiations with a new employer association, with no prior bargaining history and no existing multiemployer unit, and continued negotiations over a period of some months without reaching agreement was insufficient to establish a multiemployer unit binding upon the union. *Operating Engineers Local 701 (Cascade Employer)*, 132 NLRB 648 (1961).

An employer group may be found to have engaged in joint bargaining even though the members of that group had no formal organization and even in the absence of an advance agreement to be bound by the negotiations. *Belleville Employing Printers*, 122 NLRB 350 (1959). Similarly, the retention by participating employers of the right to approve or disapprove the agreement reached does not necessarily preclude a finding that a multiemployer unit is appropriate. *Quality Limestone Products*, 143 NLRB 589 (1963). Compare *Rock Springs Retail Merchants Assn*., supra.

A multiemployer unit may be appropriate even though the employer has not specifically delegated to an employer group the authority to represent it in collective bargaining or given the group the power to execute final and binding agreements on its behalf. What is essential is that the employer member has indicated from the outset an intention to be bound in collective bargaining by group rather than by individual action. *Kroger Co*., supra. See also *Bennett Stone Co*., supra.

Fluctuating membership in a multiemployer group does not necessarily render the multiemployer unit inappropriate. *Quality Limestone Products*, supra at 591.

The fact that an employer group includes employers who are members of an existing formal association, as well as employers who are not, is not relevant to the determination. *American Publishing Corp*., supra. Similarly, a multiemployer unit may be appropriate even though some of the contracts have not been signed by all members of the employer group. *Kroger Co*., supra.

A finding that an effective multiemployer bargaining history exists is not precluded by the fact that joint negotiations are followed by the signing of individual uniform contracts, rather than by the execution of a single document. *Krist Gradis*, supra; see also *Belleville Employing Printers*, supra. It is immaterial that the members of the employer group sign a joint agreement separately rather than delegate authority to sign to a joint representative. *American Publishing Corp*., supra. Nor is it decisive that, in addition to the joint agreement, there are local agreements in strictly local matters or that each employer in the group handles his own grievances. *Evans Pipe Co*., 121 NLRB 15 (1958).

The exercise of a mutually recognized privilege to bargain individually on limited matters is not necessarily inconsistent with the concept of collective bargaining in a multiemployer unit. *Kroger Co*., supra. "Multiemployer bargaining does not altogether preclude demand for specialized treatment of special problems; what is required, if an employer or a union is unwilling to be bound by a general settlement, is that the particularized demand be made early, unequivocally and persistently." *Genesco Inc. v. Clothing & Textile Workers*, 341 F.2d 482, 489 (2d Cir. 1966).

Where the employer had bargained collectively with the union on a multiemployer basis for 17 years, but, during and after the latest negotiations, had insisted that it would not agree to a contract which included a pension plan, such a reservation was found to be "nothing more than an exercise of the Employer's privilege, acquiesced in by the Union, to insist upon limited separate negotiation, which privilege . . . is consistent with the concept of multiemployer bargaining." Nor did the fact that in past bargaining limited individual adjustments arose from apparently dozens of agreements, all of which were jointly negotiated, establish a future unequivocal intent not to be bound by group action generally. *Kroger Co*., supra at 574.

The existence of a multiemployer agreement which establishes an administrative organization to speak for the employers, in such matters as the management of trusts and health and welfare funds, should not be construed as committing an employer to a multiemployer bargaining relationship, absent a clear intention to be so bound. *Averill Plumbing Corp*., 153 NLRB 1595 (1965).

There is a distinction between an employer who is a member of a multiemployer bargaining unit and an employer who, while not a member of that unit, nonetheless agrees to sign the multiemployer agreement with the union. *HCL, Inc.,* 343 NLRB 981 (2004).

14-300 Exceptions to the General Rule

There are exceptions to the rule that controlling weight is accorded past bargaining history in determining the appropriateness of multiemployer units. These are:

14-310 Agreement of the Parties

420-7384

Where an employer association and a union agree to proposed multiemployer bargaining, and no party seeks a single-employer unit, bargaining history is not a prerequisite to a finding that a multiemployer unit is appropriate. *Broward County Launderers Assn*., 125 NLRB 256 (1960); and *Television Film Producers*, 126 NLRB 54 (1960). Compare *Maramount Corp*., 310 NLRB 508 (1993), where some employers had left the unit and the union filed petitions for separate units.

14-320 Tainted Bargaining History

420-1758

420-9630

A collective-bargaining history with a labor organization which has received illegal employer assistance is not given any weight. *Cavendish Record Mfg. Co*., 124 NLRB 1161, 1169 (1959).

14-330 Inconclusive Bargaining History

420-1209

420-1708 et seq.

Where there is a dispute as to the appropriateness of a multiemployer unit, the following circumstances will militate against a finding that such unit is appropriate, even though there has been some bargaining with respect to it: The bargaining was preceded by a long history of single-employer bargaining; it was of relatively brief duration; it did not result in a written contract of any substantial duration; and it was not based on a Board unit finding. *Chicago Home Builders Assn*., 119 NLRB 1184, 1186 (1958).

14-340 Employees in Different Category

420-1766

420-2966

A history of multiemployer bargaining for some employees does not preclude the establishment of a single unit of unrepresented employees in a different category. *Macy's San Francisco*, 120 NLRB 69 (1958). Compare *St. Luke's Hospital*, 234 NLRB 130 (1978).

14-350 The 8(f) Relationships-Construction Industry

In *Comtel Systems Technology*, 305 NLRB 287 (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 Section 9 relationship.

14-360 Nonbeneficial Bargaining History

Even a lengthy history of multiemployer bargaining may not be determinative if the Board concludes that the benefits and stability that have resulted from multiemployer bargaining have not been beneficial to the unit employees. *Maramount Corp*., 310 NLRB 508, 511 (1993), and *Burns Security Services*, 257 NLRB 387, 388 (1981).

14-370 Brief Duration of Multiemployer Bargaining

A brief history of multiemployer bargaining may be insufficient to rebut the presumption in favor of single employer units. *West Lawrence Care Center*, 305 NLRB 212, 217 (1991). See also section 9-560.

14-400 Employer Withdrawal From Multiemployer Bargaining

420-9016

440-5033-6080

530-5770

In the context of multiemployer units, a subject that regularly comes up for consideration is the question of withdrawals from multiemployer bargaining and its impact on unit policy.

The general rule, axiomatic by its very nature, is that employees are not included in a multiemployer bargaining unit if it is shown that their employer has effectively withdrawn from multiemployer bargaining.

The "specific ground rules" governing withdrawal are set out in *Retail Associates*, 120 NLRB 388, 394 (1958). The Board observed that:

> The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made.

See also *CTS, Inc.,* 340 NLRB 904 (2003).

To implement these principles, the Board, beginning with *Retail Associates*, has promulgated criteria. These follow under several headings below.

14-410 Adequate Timely Written Notice

420-9016 et seq.

530-5770

530-8023

Neither an employer nor a union may effectively withdraw from a duly established multiemployer bargaining unit except upon adequate written notice given prior to the date set by the contract for modification, or the agreed-upon date to begin the multiemployer negotiations. *Retail Associates*, supra at 395; *Milwaukee Meat Packers Assn*., 223 NLRB 922, 924 (1976).

14-420 Intent

420-9016 et seq.

440-5033-6020

530-5784

530-8023-3700

The withdrawal from a multiemployer unit "must be shown as manifesting an unequivocal and timely intention of withdrawing therefrom on a permanent basis." *B. Brody Seating Co*., 167 NLRB 830 (1967). See also *Walt's Broiler*, 270 NLRB 556, 557 (1984). For an instance of union effective withdrawal from a multiemployer bargaining unit, see *Belleville News Democrat*, 185 NLRB 1000 (1970).

14-430 Where Actual Bargaining had Begun

530-5770-2550 et seq.

530-8023

Where actual bargaining negotiations based on the existing multiemployer unit have begun, the Board will not permit, except on mutual consent, an abandonment of the unit upon which each party has committed himself to the other, absent unusual circumstances. *Retail Associates*, supra at 395; *Kroger Co*., supra; *Sheridan Creations, Inc*., 148 NLRB 1503 (1964), enfd. 357 F.2d 245 (2d Cir. 1966); *Union Fish Co*., 156 NLRB 187 (1966); and *Los Angeles-Yuma Freight*, 172 NLRB 328 (1968); *Hi-Way Billboards*, 191 NLRB 244 (1971).

An example of "unusual circumstances" may be found in *U.S. Lingerie Corp*., 170 NLRB 750 (1968). In that case, the following evidence was presented: (a) the employer withdrew from the association in order to relocate away from the particular area; (b) it unsuccessfully sought help from the union in its effort to overcome the difficult economic straits it was in; (c) its status was that of "debtor in possession" under the bankruptcy laws; and (d) its intention to relocate the plant outside the area it was in raised issues "more inherently amenable to resolution through collective bargaining confined to the parties immediately involved in the dispute rather than

through collective bargaining on an associationwide basis." The withdrawal in this case came at a time after the commencement of the latest round of bargaining.

In *Chel LaCort*, 315 NLRB 1036 (1994), a Board majority rejected as an "unusual circumstances" exception situations where the multiemployers association fails, either deliberately or otherwise, to inform its employer-members of the start of negotiations. Accord: *D. A. Nolt, Inc.,* 340 NLRB 1279 (2004), finding no secrecy or collusion concerning bargaining that was directed at respondent or employer members. Compare *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347 (1995), where a Board majority found that furnishing a list of employers represented by the association was adequate notice of the withdrawal of other employers from the association. The *Chel LaCort* principle was approved by the D.C. Court of Appeals in *Resort Nursing Home v. NLRB,* 389 F.3d 1262 (D.C. Cir. 2004).

A fragmented bargaining association that undermined the integrity of the multiemployer unit has been found to be an unusual circumstance. *Universal Enterprises*, 291 NLRB 670 (1988).

The Board has consistently rejected impasse as an "unusual circumstance" which would prompt withdrawal from multiemployer bargaining. *Hi-Way Billboards*, 206 NLRB 22 (1973); and *Charles D. Bonnano Linen Service v. NLRB*, 454 U.S. 404 (1982). See also *El Cerrito Mill & Lumber Co*., 316 NLRB 1005 (1995).

Compare *Ice Cream Council,* 145 NLRB 865, 870 (1964), where the Board approved withdrawal where there had been a "breakdown in negotiations leading to an impasse and a resultant strike."

In *Atlas Transit Mix Corp.*, 323 NLRB 1144 (1997), the Board rejected as unsupported, the contention that unusual circumstances existed because the association did not represent the interests of the employer. The employer relied on criminal proceedings against certain union officials.

14-440 After Filing of Petition by Rival Union

530-5770-2500

530-8023-5000

An attempted withdrawal from a multiemployer unit will be regarded as untimely and ineffective where it takes place after the filing of a petition by a rival union. "What we are doing," the Board pointed out, "is fulfilling our statutory duty of determining what is an *appropriate* time for such withdrawal." *Dittler Bros., Inc*., 132 NLRB 444, 446 (1961).

In the *Dittler* case, the attempted withdrawal took place while the multiemployer association was negotiating a new multiemployer contract with the incumbent union. The *Dittler* rule does not apply where a multiemployer contract is still in effect and a substantial part of its duration still has to run. *Ward Baking Co*., 139 NLRB 1344 (1962).

14-450 Consent of the Union

530-5770-3733

530-8023-7500

Withdrawal is permitted at an otherwise inappropriate time when the action has the consent, express or implied, of the union. *Atlas Sheet Metal Works*, 148 NLRB 27 (1964).

In the *Atlas* case, the union not only concluded that the employer had withdrawn from multiemployer bargaining, but also acquiesced in the withdrawal. Its acquiescence was reflected both by its consent to bargain with the employer on a single-employer basis even after the association and the union had reached an agreement and by conduct such as its willingness to bargain with other individual employers during an impasse and its failure to present the association contract to the employer for signature. *Atlas Sheet Metal Works*, supra at 29. See also *C & M Construction Co.*, 147 NLRB 843 (1964).

Separate negotiations while reflecting union acquiescence and "unusual circumstances" may nonetheless present an unfair labor practice issue if those negotiations amount to an untimely withdrawal from group bargaining over the objections of the group. *Olympia Auto Dealers Assn*., 243 NLRB 1086 (1979). The Board will, however, permit interim agreements provided those agreements contemplate that the parties will execute the final agreement between the group and the union. *Charles D. Bonnano Linen Service*, 243 NLRB 1093, 1096 (1979), affd. 454 U.S. 404, 414 (1982).

Whether the union has acquiesced in the withdrawal is a question of fact to be determined from an examination of its conduct in the light of all the circumstances. As the Board stated in *CTS, Inc.,* 340 NLRB 904, 907 (2003):

> Thus**,** a union may be found implicitly to have consented to or acquiesced in the attempted withdrawal, where the totality of the union's conduct toward that employer consists of a course of affirmative action that is clearly antithetical to any claim that the employer has *not* withdrawn from multiemployer bargaining. *I. C. Refrigeration Service,* 200 NLRB 687, 689 (1972). In determining whether the union has consented or acquiesced to the employer's withdrawal, a prime indicator is the union's willingness to engage in individual bargaining with the employer that is seeking to abandon multiemployer bargaining.

In *Pepsi-Cola Bottling Co*., 154 NLRB 490, 493 (1965), the union apparently recognized "a break from any possible past multiemployer association" when it met with a representative of one individual employer on the day following group bargaining and with another some time thereafter. Therefore, even if these individual employers had been members of a multiemployer association, the employers' "timely requests for separate bargaining and the Union's compliance with these requests clearly establish that neither operation [employer] was a member of any multiemployer bargaining unit at the time the present petitions were filed."

14-460 Appropriate Unit After Withdrawal

440-3325

440-5033-6080

530-8020-6000

In one case, the Board found that, after withdrawal, the determination of the appropriate unit for the withdrawn employer's employees is made on the basis of traditional unit considerations and not in relation to the history of bargaining on multiemployer basis. *Albertson's Inc*., 270 NLRB 132 (1984). But this principle is applicable only when the grouping in the multiemployer unit would not otherwise be an appropriate multifacility unit. *Arrow Uniform Rental*, 300 NLRB 246 (1990).

In the construction industry an 8(f) relationship does not convert into a Section 9 relationship by virtue of merger into a matter employer unit. Accordingly, careful consideration must be given to the nature of the recognition in this industry. See *Comtel Systems Technology*, 305 NLRB 287 (1991).

14-500 Single Employer

177-1642

401-7550

420-2900

The term "single employer" applies to situations where apparently separate entities operate as an integrated enterprise in such a way that "for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d. Cir. 1982). Single-employer issues are not limited to representation questions. They may, for example, have primary/secondary implications in 8(b)(4) cases.

The principal factors which the Board considers in determining whether the integration is sufficient for single-employer status are the extent of:

(1) Interrelation of operations
(2) Centralized control of labor relations
(3) Common management
(4) Common ownership or financial control

See *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 (1976); *Spurlino Materials*, 357 NLRB No. 126 (2011); *Mercy Hospital of Buffalo,* 336 NLRB 1282 (2001); *Grass Valley Grocery Outlet*, 332 NLRB 1449 (2000); *Mercy General Health Partners*, 331 NLRB 783 (2000); *Centurion Auto Transport*, 329 NLRB 394 (1999); *Denart Coal Co.*, 315 NLRB 850 (1994); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979); *Hydrolines*, *Inc.*, 305 NLRB 416 (1991); and *Alexander Bistrikzky*, 323 NLRB 524 (1997).

The most critical of these factors is centralized control over labor relations. Common ownership, while normally necessary, is not determinative in a single-employer status in the absence of such a centralized policy. *Cimato Brothers Inc.,* 352 NLB 797 (2008) (two member decision); *AG Communication Systems Corp.,* 350 NLRB 168 (2007); *Grass Valley Grocery Outlet*, supra; *Mercy General Health Partners*, supra; *Western Union Corp*., 224 NLRB 274, 276 (1976); and *Alabama Metal Products*, 280 NLRB 1090, 1095 (1986). Compare *Dow Chemical Co*., 326 NLRB 288 (1998), rejecting single-employer status based on common ownership alone.

However, in *Bolivar-Tees, Inc.,* 349 NLRB 720 (2007), the Board found single-employer status for four commonly-owned corporations—two American and two Mexican—notwithstanding the absence of evidence of centralized contral of labor relations. Noting that it usually "accords centralized control of labor relations substantial importance in the single-employer analysis," the Board found it "inappropriate" to do so in this case.

For other cases presenting single-employer issues, see *Soule Glass & Glazing Co*., 246 NLRB 792 (1980), enfd. 652 F.2d 1055 (1st. Cir. 1981); and *George V. Hamilton, Inc*., 289 NLRB 1335 (1988). See also *RBE Electronics of S.D.*, 320 NLRB 80 (1995); and *Francis Building Corp*., 327 NLRB 485 (1998).

A determination of single-employer status does not determine the appropriate bargaining unit. Thus, a single-employer analysis focuses on ownership, structure, and employer integrated control of separate corporations. Consideration of the scope of the unit examines employee community of interest. *Peter Kiewit Sons' Co*., 231 NLRB 76 (1977); and *Edenwal Construction Co*., 294 NLRB 297 (1989). See also *Lawson Mardon U.S.A.,* 332 NLRB 1282 (2000) (Board applies traditional presumption involving separate locations even in single-employer cases).

14-600 Joint Employer

177-1650

420-7330

530-4825-5000

The distinction between single and joint employer is often blurred. In an excellent opinion, the Third Circuit described the distinction between these two concepts. *NLRB v. Browning-Ferris Industries*, supra at 1122. Thus, the court stated:

> In contrast, the "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, 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 "historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'' *Checker Cab Co. v. NLRB*, 367 F.2d 692, 698 (6th Cir. 1966).

The existence of a joint-employer relationship is essentially a factual issue that depends on the control that one employer exercises over the labor relations of another employer. *M. B. Sturgis, Inc*., 331 NLRB 1298 (2000); *M. K. Parker Transport*, 332 NLRB 547 (2000); *Boire v. Greyhound Corp*., 376 U.S. 473 (1964); *Frostco Super Save Stores*, 138 NLRB 125 (1962); *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984); *TLI*, *Inc*., 271 NLRB 798 (1984); *O'Sullivan*, *Muckle, Kron Mortuary*, 246 NLRB 164 (1980); and *Lee Hospital*, 300 NLRB 947 (1990). *Rawson Contractors*, 302 NLRB 782 (1991). See also *G. Wes Ltd. Co.*, 309 NLRB 225 (1992); *Capitol EMI Music*, 311 NLRB 997 (1993); *Flatbush Manor Care Center*, 313 NLRB 591 (1993); *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993); and *Executive Cleaning Services*, 315 NLRB 227 (1994).

In *AM Property Holding Corp.,* 350 NLRB 998 (2007), the Board found no joint-employer relationship. The case is interesting because while agreeing with the decision, one Member criticized the test for joint employer and suggested that more emphasis be given to the provision of capital made by one corporation to another rather than the extent of supervisory control of one over the other.

As noted earlier, joint-employer issues are usually presented in unfair labor practice cases. Where they do arise in a representation matter, i.e., who is the employer of the bargaining unit employees, the Board previously held that there must be a showing of employer consent, implied or actual, to the inclusion of employees other than its own in the unit. See *Lee Hospital*, supra, and *Greenhoot*, *Inc*., 205 NLRB 250 (1973); Compare *Quantum Resources Corp*., 305 NLRB 759 (1991), in which the Board found joint employers in a representation case without a discussion of consent and *Alexander Bistrikzky*, supra, where the Board found the *Lee/Greenhoot* consent requirement inapposite because all the employees in the petitioned-for unit are employed by a single employer.

In *M. B. Sturgis, Inc*., supra, the Board overruled *Lee Hospital* and clarified its *Greenhoot* holding. Specifically, the Board held that joint-employer consent is not required for a unit combining solely employed user employees and jointly employed user/supplier employees. In *Oakwood Care Center,* 343 NLRB 659 (2004), the Board overruled *Sturgis* finding that such units are multiemployer units and require consent of the employer involved.

There is a series of cases decided under *M. B. Sturgis, Inc*., supra, whose viability will have to be decided by the Board in future decisions. See *Holiday Inn City,* 332 NLRB 1246 (2000)*; Professional Facilities Management,* 332 NLRB 345 (2000); and *Engineered Storage*, 334 NLRB 1063 (2001).

In *Airborne Express*, 338 NLRB 597 (2002), a Board majority rejected the suggestion of the dissenting Member when she advocated that the Board revisit its joint-employer test because "business trends driven by accelerating competition . . . may no longer fit economic realities."

14-700 Alter Ego

Alter ego is primarily an unfair labor practice concept that applies to situations in which the Board finds that what purports to be two separate employers are in fact and law one employer and that the employer is not honoring its bargaining obligation. 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); and *Advance Electric*, 268 NLRB 1001, 1002 (1984). As the Board noted in each of these cases, it is also relevant to consider whether the alleged alter ego was created for the purpose of evading bargaining responsibilities. See also *Crawford Door Sales Co*., 226 NLRB 1144 (1976). *Fallon-Williams*, *Inc*., 336 NLRB 602 (2001) (motive relevant but not required for finding of alter ego); *APF Carting, Inc*., 336 NLRB 73 (2001); *Dupont Dow Elastomers LLC,* 332 NLRB 1071 (2001); and *NYP Acquisition Corp*., 332 NLRB 1041 (2001). The test for determining alter ego is whether the business of the alleged disguised continuance differed from

that of the employer at the time the alleged disguised continuance was created. *Rome Electrical Systems, Inc*., 356 NLRB No. 38 (2010).

The Board will also consider alter ego allegations in representation proceedings. *Elec-Comm*, *Inc*., 298 NLRB 705 (1990). Accord: *All County Electric Co*., 332 NLRB 863 (2000) (also noting that 10(b) statute of limitations is not applicable to representation cases). Note also that the Board divided on the issue of whether alter ego can appropriately be decided in an "R" case.

In *D & B Contracting Co*., 305 NLRB 765 (1991), the Board declined to apply an alter ego bargaining order to a unit that had been the subject of a Board election. Noting that the "employees freely decided in a fair election that they did not want to be represented by the Union," the Board concluded that it would give "controlling weight to their rejection of representation" and dismissed the unfair labor practice complaint.

In one interesting case, the Board, as a consequence of court action, withdrew an earlier comment in *Gartner-Harf Co*., 308 NLRB 531 (1992), that alter ego is a subset of single employer. In doing so, the Board noted that the two concepts are related, but separate. *Johnstown Corp*., 322 NLRB 818 (1997).

In 2007, the Board decided two cases in which it rejected an alter ego contention because of the absence of common ownership. In *Summit Express, Inc.,* 350 NLRB 592 (2007), there was no common ownership although one Member found evidence of substantial control. In the second case, *US Reinforcing, Inc.,* 350 NLRB 404 (2007), the Board rejected a contention that the two corporations satisfied the common ownership test because of a close familial relationship. The Board majority accepted the general rule that close familial relationship where the owner exercises control over the alter ego business can amount to common ownership, but refused to find alter ego in this case notwithstanding that the owners cohabited and were a "committed couple."

A finding of alter ego does not, standing alone, permit a "piercing of the corporate veil." "Piercing" is appropriate when the shareholder has disregarded the separate identity of the corporation in such a way as to make a respondent's personal assets available to remedy the unfair labor practice. *Copper Craft Plumbing, Inc.*, 354 NLRB 958 (2009) (two Member decision).

15. SPECIFIC UNITS AND INDUSTRIES

Treatment on a complete industry-by-industry or specific type-of-unit basis would necessarily enlarge this volume beyond manageable proportions. Moreover, the major principles and relevant factors under more general headings do tend, for the most part, to govern unit determinations in any event, regardless of the particular industry affected. We shall therefore use a selective basis, making certain, however, to include for consideration units which had been affected by policy changes or have been the subject of more-than-casual litigation, those which have constituted problem areas, and, of course, units in industries which in recent years have become the subject of Board jurisdiction. For convenience, we have arranged the units and industries in alphabetical order.

15-100 Architectural Employees

440-1760-4340

177-9300

The Board has found appropriate units of professional architectural employees. *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049 (1971); *Skidmore, Owings & Merrill*, 192 NLRB 920 (1971); *Hertzka & Knowles*, 192 NLRB 923 (1971); *Fisher-Friedman Associates*, 192 NLRB 925 (1971); and *Frederick Confer & Associates*, 193 NLRB 910 (1971).

In *Wurster*, supra, virtually all the employees were graduates of recognized architectural schools, although some had not yet become "licensed" architects. Both classes of employees were found to be professionals within the meaning of the Act. Included in the unit was a graduate interior designer, also found to be a professional. The architectural employees were divided into two main groups, associates and nonassociates, the main distinction being that the associates receive higher pay, are on an annual salary as opposed to an hourly wage, share in a special fund set aside from the profits, and attend quarterly meetings with the firm's principals. However, as the nonassociates generally perform similar functions and share identical fringe benefits, creating a sufficient community of interest, they were included in the same unit. A job inspector and a modelmaker were excluded as nonprofessionals.

In *Skidmore*, supra, employees in an "interior design and graphics department" were excluded from the unit of architectural employees because they were not engaged in work which qualified them as professional employees within the statutory definition.

See the other cases cited above for peripheral issues.

15-120 Banking

440-1720

440-3375

In determining the scope of a unit in the banking industry, the Board follows the single-location unit presumption. Thus, absent compelling evidence otherwise, a unit of branch bank employees is appropriate. *Wyandotte Savings Bank*, 245 NLRB 943 (1979); *Hawaii National Bank*, 212 NLRB 576 (1974); *Bank of America*, 196 NLRB 591 (1972); *Banco Credito y Ahorro Ponceno*, 160 NLRB 1504 (1966); *Central Valley National Bank*, 154 NLRB 995 (1965); and *Banco Credito y Ahorro Ponceno v. NLRB*, 390 F.2d 110 (1st Cir. 1968). But see *Wayne Oakland Bank v. NLRB*, 462 F.2d 666 (6th Cir. 1972).

Where, however, the evidence indicates significant employee interchange between branches, a unit encompassing several offices in a metropolitan area may also be appropriate. *Banco Credito y Ahorro Ponceno*, supra.

A branch unit will ordinarily be a "wall to wall" unit particularly if a proposed exclusion would leave that group the only unrepresented employees. Wyandotte Savings Bank, supra at

945. For an example of inclusion of various classifications in a branch unit, see Banco Credito y Ahorro Ponceno, supra at 1513–1514.

15-130 Construction Industry

440-1760-9167 et seq.

440-5033

590-7500

Prior to 1951, although the Board had asserted jurisdiction over the building and construction industry in both unfair labor practice and representation cases, at least since the enactment of the Taft-Hartley Act, the representation cases involved either multicraft units of construction employees on large projects of substantial duration or shop employees.

In *Plumbing Contractors Assn*., 93 NLRB 1081 (1951), for the first time, the Board was confronted with the question of whether it should direct an election in a proposed single-craft unit of employees in actual construction operations. It was recognized in that case that the construction industry involved a series of successive operations by each craft in a specified order, but the Board nonetheless found that the degree of integration in the industry was not comparable, for example, to assembly line operations, and, in light of the history of separate representation of the employees involved in that case (a unit of plumbers, plumbers' apprentices, and gasfitters), found the separate craft grouping to be an appropriate unit. The Board also found that employment in the unit had been sufficiently stable to permit the election to be held.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board set down new policies with respect to the application of Section 8(f) of the Act. Although it is an unfair labor practice case, *Deklewa* does provide guidance on certain representation case matters. *Deklewa* involved an employer who withdrew from a multiemployer 8(f) bargaining relationship. The Board noted that in such cases, notwithstanding the history of 8(f) bargaining on a broader basis, "single employer units will normally be appropriate." *Deklewa,* supra at 1385. Nothing in *Deklewa* would, however, preclude a finding of a multiemployer unit where the parties agree or where there is a history of bargaining on that basis under Section 9 of the Act. The history of collective bargaining under 8(f) agreements is relevant, but not conclusive, to a unit determination under Section 9. *Turner Industries Group, LLC,* 349 NLRB 428 (2007), and *Barron Heating & Air Conditioning, Inc.,* 343 NLRB 450 (2004).

In circumstances where the expired 8(f) agreement covered only one employer, the unit will normally be that covered by the expired contract. But, see *Dezcon, Inc*., 295 NLRB 109 (1989), in which the Board found the history of bargaining as well as the trend toward project-by-project agreements insufficient to overcome employee community of interest in making the unit determination. In *Wilson & Dean Construction Co*., 295 NLRB 484 (1989), the Board used the *Daniel Construction Co*. formula (133 NLRB 264 (1961)) to determine eligibility to vote. In doing so, it rejected the employer's contention that it did not intend to use the hiring hall under the expired agreement as a source of employees. Thus, eligibility and unit scope were in that case governed by the coverage of the expired agreement. See also *P. J. Dick Contracting*, 290 NLRB 150 (1988), in which the Board found the bargaining history under the expired 8(f) agreement to be determinative in view of "the limited evidence presented." Note, however, that in this case, the parties did stipulate to common conditions of employment and centralized labor relations among multicounty worksites. Compare *Longcrier Co*., 277 NLRB 570 (1985), cited in *Dezcon,* supra at fn. 12, in which the evidence supported separate project units.

As to geographic scope of unit in construction cases, the proper unit description is one without geographic limitation where the employer uses a core group of employees at its various jobsites regardless of location. *Premier Plastering, Inc.,* 342 NLRB 1072 (2004). Compare *Oklahoma Installation Co*., 305 NLRB 812 (1991), where the Board found a multisite unit appropriate. In doing so, it reaffirmed the use of traditional community-of-interest standards for

deciding single versus multisite unit issues. The Board, in *Oklahoma*, also rejected a contention that the unit should include work in a county in which the employer had never conducted business.

The Board has found appropriate separate units of plumbers and gasfitters, pipefitters, and drain layers (*Denver & Contractors Assn*., 99 NLRB 251 (1951)); plumbers, steamfitters, pipefitters, refrigeration men, and their apprentices (*Automatic Heating Co*., 100 NLRB 571 (1951)); plumbers and pipefitters (*Air Conditioning Contractors*, 110 NLRB 261 (1955)); riggers (*Michigan Cartagemen's Assn*., 117 NLRB 1778 (1957)); lathers (*Employing Plasterers Assn*., 118 NLRB 17 (1957)); plumbers and pipefitters (*Daniel Construction Co*., supra); truckdrivers (*Graver Construction Co*., 118 NLRB 1050 (1957)); laborers (*R. B. Butler, Inc*., 160 NLRB 1595 (1966)); and carpenters (*Dezcon, Inc*., supra).

The laborers involved in *Butler* performed a type of work different from that of the other employees and had traditionally been represented by the petitioner or other locals of the petitioner's international in the same type of unit. They therefore constituted "a readily identifiable and homogeneous group with a community of interests separate and apart from the other employees." The fact that employees may perform duties not strictly within their classification does not render the unit inappropriate when these duties are secondary in nature. *Dick Kelchner Excavating Co*., 236 NLRB 1414 (1978). See also *Burns & Roe Services Corp*., 313 NLRB 1307 (1994).

In *Del-Mont Construction Co*., 150 NLRB 85 (1965), relied on by the Board in *Butler*, the holding, in effect, was that an appropriate unit in the construction industry did not have to be either a craft or departmental unit so long as the requested employees were a readily identifiable and distinct group with common interests distinguishable from those of other employees. See also *S. J. Graves & Sons Co*., 267 NLRB 175 (1983); and *Brown & Root, Inc*., 258 NLRB 1002 (1981). But in *Brown & Root Braun*, 310 NLRB 632 (1993), the Board denied review of a Regional Director's determination that an ironworkers and helpers' unit was neither a craft unit nor a departmental unit.

The Board also stated in *Butler*, supra at 1599, that "in the construction industry, collective bargaining for groups of employees identified by function . . . has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged." For this reason, in *Hydro Constructors*, 168 NLRB 105 (1968), the Board concluded that a unit of laborers alone was appropriate, rather than a unit of laborers combined with dump truckdrivers. The laborers were engaged, a substantial majority of their time, in laborers' duties (while the drivers were not), they were traditionally represented in this type of laborers' unit, and a pay differential existed between the laborers and the other employees. Thus, while two or more groups may each be separately appropriate, they cannot be arbitrarily grouped to the exclusion of others. *S. J. Graves & Sons Co*., supra. Similarly, an overall unit may be the only appropriate unit where there is no basis for separate grouping *A. C. Pavement Striping Co*., 296 NLRB 206 (1989).

In *New Enterprise Stone Co*., 172 NLRB 2157 (1968), a unit of heavy equipment operators, together with the mechanics and oilers who maintain and service their equipment, was found appropriate as a distinct functional grouping of construction employees with a community of interest separate and apart from other employees.

In *Del-Mont Construction Co*., supra, a separate unit consisting of operators of power-driven equipment, including crane, backhoe, shovel, bulldozer, compressor and pump operators, and mechanics, was found appropriate. In that case, another separate unit of laborers and truckdrivers was found appropriate. It should be noted that, unlike the situation in *Hydro*, supra, the laborers and drivers had related interests.

In *Johnson Controls, Inc*., 322 NLRB 669 (1996), the Board found a unit of fitters, system representatives, and service specialists appropriate. The employer sold, installed, and services building environmental control systems and fire and security systems.

For a discussion of other construction industry issues, see sections 5-210, 9-211 and -1000, and 10-600 and -700.

15-140 Drivers

15-141 The *Koester* Rule

440-1760-6200

Prior to 1961, Board policy was to require the inclusion of drivers or driver-salesmen in production and maintenance units unless the parties agreed to exclude them or another labor organization sought to represent them (see, for example, *Cooperative Milk Producers Assn*., 127 NLRB 785 (1960)).

But in *Plaza Provision Co*., 134 NLRB 910 (1962), a case involving driver-salesmen, the Board reconsidered the then existing policy, and in early 1962, in *E. H. Koester Bakery Co*., 136 NLRB 1006 (1962), which involved truckdrivers as well as driver-salesmen, it followed through with a full explication of the treatment it believed warranted for unit determinations involving drivers.

The Board recognized that the complexity of modern industry generally precludes the application of fixed rules for the unit placement of truckdrivers, that case experience demonstrates wide variation in employment conditions with respect to local and over-the-road drivers, between the various industries, and from plant to plant in a given industry. For these reasons, substantial weight is accorded to an established course of dealings as well as to the agreement of the parties. But when the parties disagree, and there is no bargaining history, and no union is seeking to represent them separately, the pertinent facts must be considered "to determine wherein the predominant interests of truckdrivers are vested."

A reexamination of the policy convinced the Board that the automatic rule amounted to a refusal to consider on its merits an issue, the resolution of which the parties have been unable to reach on the basis of their collective experience. The Board stated (136 NLRB at 1011):

> We have therefore decided to abandon the blanket policy of including truckdrivers in more comprehensive units and to return to the approach of predicating their unit placement in each case upon a determination of their community of interest.

From then on, unit determinations were to depend on the following factors:

> (a) Whether the truckdrivers and the plant employees have related or diverse duties, the mode of compensation, hours, supervision, and other conditions of employment; and
> (b) 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.

If the interests shared with other employees are sufficient to warrant their inclusion, the truckdrivers are included in the more comprehensive unit. On the other hand, if truckdrivers are shown to have substantially separate interests from those of the other employees, they may be excluded upon request of the petitioning union. Compare *Calco Plating*, 242 NLRB 1364 (1979), and *Chin Industries*, 232 NLRB 176 (1977). See also *Overnite Transportation Co.,* 331 NLRB 662 (2000), where the Board reversed a finding that a petitioned-for unit of dockworkers should include truckdrivers. Instead the Board found the unit should include all unskilled workers at the terminal.

In *Marks Oxygen Co*., 147 NLRB 228 (1964), the Board further clarified the *Koester* policy by announcing that it would continue to utilize relevant criteria in addition to job content in evaluating community of interest. It made it clear that, in *Koester*, it reversed the policy of requiring the inclusion of truckdrivers where there was disagreement, but that it did not reverse basic policies such as (a) a plantwide unit is presumptively appropriate; (b) a petitioner's desires as to the unit is always a relevant consideration; and (c) it is not essential that a unit be the most appropriate unit. Accord: *NLRB* v. *Southern Metal Services*, 606 F.2d 512 (5th Cir. 1979). See

also *Overnite Transportation Co*., 325 NLRB 612 (1998), rejecting the argument that consideration of petitioner's desires there violated the prohibition on making the extent of organization determinative. It is important to note here that more than one truckdriver unit may be appropriate and the union can seek an election in any appropriate unit. *Publix Super Markets, Inc.,* 343 NLRB 1023 (2004).

In *Mc-Mor-Han Trucking Co*., 166 NLRB 700 (1967), the facts did not reveal such a community of interest between the drivers and mechanics as would render a proposed driver unit inappropriate. This holding was distinguished from that of *Marks Oxygen*,)supra, in which the issue was not whether a separate unit of drivers was inappropriate, as in *Mc-Mor-Han*, but rather whether a requested unit combining drivers with production and maintenance drivers was appropriate. Thus, as we have seen, the Board, in *Marks Oxygen*, found the more comprehensive unit appropriate, but specifically reaffirmed certain basic policies which were left undisturbed by the *Koester* decision. See also *Airco, Inc*., 273 NLRB 348 (1984).

In *Tallahassee Coca-Cola Bottling Co*., 168 NLRB 1037 (1968), a unit of production and maintenance employees, which included driver-salesmen, was found appropriate. In the subsequent unfair labor practice proceeding, it was contended that the unit finding was erroneous and enforcement was resisted on that ground. The Fifth Circuit remanded the case to the Board, particularly as to its reliance on *Marks Oxygen*, supra, in relation to the *Koester* criteria. In its supplemental decision the Board expanded its rationale and adhered to its original decision. Ultimately, the court granted enforcement (*NLRB v. Tallahassee Coca-Cola Bottling Co*., 409 F.2d 201 (5th Cir. 1969)), concluding that the Board had adequately explained its rationale for this unit determination.

In *International Bedding Co.*, 356 NLRB No. 168 (2011), the Board found a unit of production, warehouse drivers and yard jockeys to be appropriate. In doing so, it rejected the employer's objection to the inclusion of drivers and yard jockeys finding that these employees shared a community of interest with the warehouse employees noting that the union sought their inclusion as part of a comprehensive unit and that to exclude them "would create a small residual unit." The Board decision relied on the longstanding *Marks Oxygen* policy with respect to units of truck drivers and production employees 147 NLRB 228 (1964).

Truckdrivers were found so functionally integrated with plant employees as to preclude separate representation where (a) the drivers spent a substantial amount of time performing the same function as other employees at the terminals, some of whom performed driving duties; (b) the drivers had the same supervision, pay scale, and benefits as other employees; and (c) the drivers' conditions of employment were substantially the same as that of the others. *Standard Oil Co*., 147 NLRB 1226 (1964). See also *Philco Corp*., 146 NLRB 867 (1964); *Donald Carroll Metals*, 185 NLRB 409 (1970); *Trans-American Video*, 198 NLRB 1247 (1972); *Levitz Furniture Co*., 192 NLRB 61 (1971); and *Calco Plating*, supra.

In *General Electric Co*., 148 NLRB 811 (1964), employees, described as "motor messengers," drove vehicles in order to distribute mail but, apart from this function, exercised clerical functions similar to those of office clerical employees, shared the same wage basis and hours, and many had the same supervision and progression pattern. Of 21 such employees, only 5 spent the majority of their time in driving. The other 16 spent about 40 percent of their time driving and about 60 percent in clerical work not involving mail handling. In these circumstances, the driving functions of some were not considered such as to set apart the whole requested unit of motor messengers, mail handlers, and addressograph operators from other office clerical employees in the manner, for example, "that truckdrivers may be considered to have interests distinct from production and maintenance employees." See also *National Broadcasting Co.*, 231 NLRB 942 (1977).

In *Container Research Corp*., 188 NLRB 586 (1971), two over-the-road drivers were excluded from a plantwide unit, although sought by the petitioning union. Thereafter, in *Fayette Mfg. Co*., 193 NLRB 312 (1971), the Board overruled *Container Research Corp*. to the extent

that decision was inconsistent with *Fayette* and in contravention of *Marks Oxygen*, discussed above.

Summing up the flexibility which exists in this policy area, the Board in *Lonergan Corp*., 194 NLRB 742, 743 (1972), a case in which it found appropriate a unit excluding truckdrivers, cited *NLRB v. Tallahassee* Coca-*Cola Bottling Co*., supra, 409 F.2d 201, and stated:

> The above facts present an overall picture which is similar to many cases involving the inclusion-exclusion problem with respect to truckdrivers, i.e., these truckdrivers have what amounts to a dual community of interest with some factors supporting their exclusion from an overall production and maintenance unit and some factors supporting their inclusion in the broader unit. As the Board has frequently noted, in such a situation and where no other labor organization is seeking a unit larger or smaller than the unit requested by the Petitioner, the sole issue to be determined is whether or not the unit requested by the Petitioner is an appropriate unit. Accordingly, while we agree that certain factors may support the Regional Director's conclusion that a unit including the truckdrivers is an appropriate unit, in our view the unit requested by the Petitioner which would exclude the truckdrivers is an appropriate unit and it is therefore irrelevant that a larger unit might also be appropriate.

Similarly, the Board concluded that a unit of drivers was an appropriate one and rejected the finding of the Regional Director that the unit should include mechanics. *Overnite Transportation Co*., 322 NLRB 347 (1996). The Board denied a motion for reconsideration of this decision in *Overnite Transportation Co*., 322 NLRB 723 (1996), and then expanded its discussion of these unit decisions in *Overnite Transportation Co*., 325 NLRB 612 (1998), and *Novato Disposal Services*, 330 NLRB 632 (2000). See also *Home Depot USA,* 331 NLRB 1289 (2000) (drivers share interest with others but have sufficient distinct interests to warrant separate unit).

15-142 Scope of Driver Units

440-1760-6200

440-3300

Single-terminal units are presumptively appropriate. *Groendyke Transport*, 171 NLRB 997 (1968); *Alterman Transport Lines*, 178 NLRB 122 (1969); and *Wayland Distributing Co*., 204 NLRB 459 (1973).

In *Alterman*, the employer's terminals in Miami, Tampa, and Orlando were separated by as much as several hundred miles; despite much centralization, a sufficient degree of autonomy had been vested in the managers of the individual terminals, and there was no history of collective bargaining at any of the terminals involved. In *Wayland,* there was little temporary interchange of drivers, very few transfers, no prior bargaining history, and no labor organization sought to represent the drivers on any basis. In these circumstances, rejecting an employer contention that the only appropriate unit would be a unit of all unrepresented drivers and shop employees wherever located, the Board found a unit appropriate of drivers "based in either Mobile, Alabama, or Pensacola, Florida." See also *Bowie Hall Trucking*, 290 NLRB 41 (1988); and *Carter Hawley Hale Stores*, 273 NLRB 621 (1984); but compare *Dayton Transport Corp*., 270 NLRB 1114 (1984).

On the other hand, in *Tryon Trucking*, 192 NLRB 764 (1971), in which the petitioner had requested a drivers' unit employed at all of the employer's terminals in four States, the Board held that, while a single-terminal unit might be appropriate, the requested employerwide unit was also appropriate in view of common skills, integration of operations of all the terminals, and "the common unity of interests of all the drivers in employment by the same company."

As the general principles applicable to multilocation unit issues are equally germane in any consideration of issues arising in the transportation industry, see chapter, ante, on Multilocation Units.

15-143 Local Drivers and Over-the-Road Drivers

440-1760-6200

Local drivers and over-the-road drivers constitute separate appropriate units where it is shown that they are clearly defined homogeneous and functionally distinct groups with separate interests which can effectively be represented separately for bargaining purposes. *Georgia Highway Express*, 150 NLRB 1649, 1651 (1965); *Alterman Transport Lines*, supra. See also *Jocie Motor Lines*, 112 NLRB 1201, 1204 (1955); and *Gluck Bros*., 119 NLRB 1848 (1958). Compare *Carpenter Trucking*, 266 NLRB 907 (1983).

15-144 Severance of Drivers

440-8325-7562

Drivers, under appropriate circumstances, are accorded the right of self-determination, notwithstanding a bargaining history on a broader basis, where it is found that they constitute a homogeneous, functionally distinct group entitled to severance. See *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137–139 (1962), in which the Board held that severance would depend on a consideration of all relevant community-of-interest factors. See also *Wright City Display Mfg. Co*., 183 NLRB 881 (1970); and *Downingtown Paper Co*., 192 NLRB 310 (1971). In *Downingtown*, severance was granted to over-the-road truckdrivers on the basis of constituting a homogeneous, functionally distinct group. The Board noted that the drivers spent most of their working time away from the plant, did no plantwork, did not load or unload their trucks at the plant, and did not interchange with other drivers or production and maintenance employees. Moreover, their basis for compensation differed from the others, they were not permitted overtime work, and they did not work in other departments or for supervisors other than those in their department.

As is generally true of severance policy when the Board's requirements are not met, the request for a self-determination election is denied. *Hearst Corp*., 200 NLRB 475 (1973); *A. O. Smith Corp*., 195 NLRB 955 (1972) (reliance for dismissal was placed on the facts that the drivers spent a substantial amount of their time performing in-plant work and shared the same immediate supervisor); *Western Pennsylvania Carriers Assn*., 187 NLRB 371 (1971) (the requested employees in 42 petitions did not constitute "a functionally distinct department or departments for which a tradition of separate representation exists"); *Consolidated Packaging Corp*., 178 NLRB 564 (1969); *Rockingham Poultry Cooperative*, 174 NLRB 1278 (1969) (over-the-road drivers denied severance on the grounds, among others, of overall unit bargaining history and performance in substantial respects of duties similar to other drivers not sought by the petitioner and similar working conditions, fringe benefits, and supervision as other employees); and *Fernandes Super Markets*, 171 NLRB 419, 420 (1968) (whatever separate community of interests the employees in question may have had was "submerged into the broader community of interest which they share with other employees by reason of several years uninterrupted association in the existing overall unit and their participation in the representation of that unit for purposes of collective bargaining"). See also *Memphis Furniture Mfg. Co*., 259 NLRB 401 (1981).

For a discussion of severance in its broader context involving crafts and departmental units, see chapter on Craft and Traditional Departmental Units, infra.

15-145 Driver-Salespersons

440-1760-6200

440-1760-7200

Employees who drive trucks or automobiles and distribute products of their employer from their vehicles have varying duties, depending on the employer's sales and distribution policies and practices. Where employees engaged in selling their employer's products drive vehicles and

deliver the products "as an incident" of their sales activity, they are regarded as essentially salespersons with "interests more closely applied to salesmen in general than to truckdrivers or to production and maintenance employees or warehouse employees." *Plaza Provision Co*., 134 NLRB 910 (1962). Thus, route salesmen were excluded from a driver's unit, being differentiated from employees with little or no function in making or promoting sales of the employer's products.

Driver- salespersons are excluded from a unit of plant employees where (a) they deal directly with customers whom they must satisfy in order to retain their patronage; (b) their value to the employer is therefore based on qualities not required of plant employees; and (c) their interests and working conditions are substantially different from the plant employees. *Gunzenhauser Bakery*, 137 NLRB 1613 (1962). Compare *Wilson Wholesale Meat Co*., 209 NLRB 222 (1974).

See also *Southern Bakeries Co*., 139 NLRB 62 (1962) (driver- salespersons excluded from a unit of transport drivers); *E. Anthony & Sons*, 147 NLRB 204 (1964) (separate units of "district managers" who promoted sales and serviced subscriptions; and truckdrivers who were principally delivery men, the distinction between delivery men and those who drive vehicles only as an incident to their sales activity thus being preserved); *Kold Kist, Inc*., 149 NLRB 1449 (1964) ("demonstrators" working primarily at off-plant locations and under separate supervision regarded as performing functions relating to sales rather than production of products, and therefore excluded from a unit of production and maintenance employees and truckdrivers); *Walker-Roemer Dairies*, 196 NLRB 20 (1972) (wholesale route salespersons combined with retail route salespersons in a single unit, despite certain distinct interests, because of "strong interests they share" in common; tank truckdrivers and van drivers excluded from the unit); and *Dr. Pepper Bottling Co*., 228 NLRB 1119 (1977).

15-146 Health Care Institution Drivers

470-1795

470-8300

Drivers are not one of the units found appropriate in the health care rules. See section 15-170, Health Care Institutions, infra, and Health Care Rulemaking, as reported at 284 NLRB 1516. While it can be expected that they will be included in the "Other Non-Professionals Unit," 284 NLRB 1516, 1565, it may be that they share sufficient community of interest to warrant inclusion in another unit. See *Michael Reese Hospital*, 242 NLRB 322 (1979), and *North Medical Center*, 224 NLRB 218, 220 (1976), decided prior to the health care unit rules. In *Duke University*, 306 NLRB 555 (1992), decided after the rules, the Board decided that busdrivers were not health care employees, even though they spent over half their time servicing the employer's medical center.

15-150 Funeral Homes

440-1720-3300

440-1760-9900

An overall unit of funeral home employees would, like any other overall unit, be presumptively appropriate. *Riverside Chapels*, 226 NLRB 2 (1976). In considering petitions for units of less than all employees, the Board has found that those employees whose duties relate to embalming and other direct funeral services show a sufficient community of interest to warrant a separate appropriate unit. *NLRB v. H. M. Patterson, Inc*., 636 F.2d 1014 (5th Cir. 1981). Compare *Oritz Funeral Home Corp*., 250 NLRB 730 (1981), in which clerical employees were included in a unit of employees performing funeral services because the nature of their work was closely related to and included funeral service responsibilities.

15-160 Gaming Units

Units of gaming casino employees have been found appropriate prior to 1965 when jurisdiction over this type of enterprise was exercised on the basis of being part of a hotel operation (see, for example, *Hotel La Concha*, 144 NLRB 754 (1963)), and thereafter directly, regardless of hotel affillatlon (*El Dorado Club*, 151 NLRB 579 (1965)).

In *Crystal Bay Club*, 169 NLRB 838 (1968), the Board was faced with the question whether the interests of casino employees are so different from those of culinary and bar, office, and maintenance employees as to require their exclusion from an overall unit where there has been no stipulation to exclude them. It held that a unit consisting of all employees was appropriate because of the fact that the same union was seeking to represent all, the lack of any substantial bargaining history, and "particularly the closeness of all the departments which function for the most part to support the casino operations." Compare *Holiday Hotel*, 134 NLRB 113 (1962), in which casino employees were found to have interests sufficiently different from those of other hotel employees to justify honoring the parties' stipulation to exclude them. See also *North Shore Club*, 169 NLRB 854 (1968).

Although in one case slot machine mechanics were found skilled craftspersons, therefore constituting an appropriate unit, excluding all other employees (*Freemont Hotel*, 168 NLRB 115 (1968)), they were not found to be craftspersons in other cases (*Hotel Tropicana*, 176 NLRB 375 (1969); *Nevada Club*, 178 NLRB 81 (1969); and *Aladdin Hotel*, 179 NLRB 362 (1969)). Thus, it was pointed out in *Aladdin*, for example, that the facts in *Freemont* were distinguishable, as in the latter the mechanics were the only unrepresented group in the casino, there was a formal apprentice program for them, they did not interchange with other employees, and they were the only employees who worked on the machines. See also *Bally's Park Place*, 255 NLRB 63 (1981), in which a slot department composed of mechanics and attendants was found appropriate.

Slot mechanics are included in the gaming unit rather than with the maintenance department employees where it appears that their contacts are basically with other gaming unit employees and casino patrons; some of their duties are the same as those assigned to the employees in the gaming unit; their work is related solely to the casino operations; and, unlike the maintenance employees, they are not concerned to any degree with other maintenance or repair functions incidental to the employer's operations. *Club Cal-Neva*, 194 NLRB 797 (1972); and *Harold's Club*, 194 NLRB 13 (1972).

Separate units of change personnel and booth cashiers were rejected as comprising neither a separate homogeneous group of employees with special skills, nor a functionally distinct department. *Horseshoe Hotel*, 172 NLRB 1703 (1968). However, self-determination elections were granted to voting groups of casino cashiers to determine whether they desired to be added to an existing croupiers' unit represented by the petitioner. *El San Juan Hotel*, 179 NLRB 516 (1969); and *El Conquistador Hotel*, 186 NLRB 123 (1970).

In *Bally's Park Place*, 259 NLRB 829 (1982), the Board rejected a petition seeking separate or combined units of hard (coins) and soft (currency) employees. The employer there contended that only an accounting department unit was appropriate. The Board dismissed the petition without commenting on the appropriateness of the employer's proposed unit.

Separate units limited to all gaming employees and all maintenance employees, respectively, are appropriate. *Silver Spur Casino*, 192 NLRB 1124 (1971); cf. *Harrah's Club*, 187 NLRB 810 (1971); and *El Dorado Club*, supra.

In *Wheeling Island Gaming, Inc*., 355 NLRB 651 (2010), the Board held that the smallest appropriate unit consisted of all table game dealers, rejecting a contention that a unit of poker dealers was appropriate.

In *Florida Casino Cruises*, 322 NLRB 857 (1997), the Board affirmed a finding that a unit of the ship's personnel was appropriate on a casino cruise ship. The employer had sought a "wall to wall" unit including the gaming and food personnel.

15-170 Health Care Institutions

470-0000

15-171 Acute Care Hospitals

On April 21, 1989, the Board set out the appropriate units for acute care hospitals in a rulemaking proceeding, reported at 284 NLRB 1515, et seq. The Rule (Sec. 103.30) provides that except in extraordinary circumstances, the following units and only these units are appropriate in an acute hospital.

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.
6. All business office clerical employees.
7. All guards.
8. All other nonprofessional employees.

The Rule provides that a petitioning union can request a consolidation of two or more of the above units and, absent a statutory restriction, e.g., guards and nonguards in the same unit, such a combined unit may be found appropriate. Characterizing the issue as novel, the Board approved a decision by a Regional Director ordering a self-determination election for nurses. The choice was between separate representation, inclusion in a unit of all professionals and, then, inclusion with nonprofessionals. *Dominican Santa Cruz Hospital*, 307 NLRB 506 (1992).

For a discussion of residual units under the Rule, see section 12-400, supra.

The Board's Rule provides one example of an extraordinary circumstance, a unit of five or fewer employees. The fact that such a unit would be an extraordinary circumstance means that the Board will consider alternative unit contentions by the parties. It does not mean that the Board's ultimate unit determination will necessarily be at variance with the units found appropriate in the Rule.

In *St. Margaret Memorial Hospital*, 303 NLRB 923 (1991), the Board reaffirmed the position stated in the Rule that a party urging "extraordinary circumstances" bears a "heavy burden." Compare *Child's Hospital*, 307 NLRB 90 (1992), where the Board found extraordinary circumstances where there was a physical joinder of a nursing home and a hospital.

The Rule also excepts from its coverage "existing nonconforming units." See *Crittenton Hospital*, 328 NLRB 879 (1999), for a discussion of the meaning of this exception. In *Pathology Institute*, 320 NLRB 1050 (1996), the Board found a nonconforming unit and evaluated it, not under the Rule, but under "traditional representation principles."

In *Rhode Island Hospital*, 313 NLRB 343 (1993), the Board rejected a contention that the research areas of a hospital are not part of an acute care hospital for purposes of application of the Rule.

15-172 Other Hospitals

177-9700

470-0100

The Board did not include psychiatric and rehabilitation hospitals in the Rule. Thus, determination as to appropriate units in these health care institutions is left to adjudication on a case-by-case basis. The Board's Rule for acute care hospitals is based on "a reasonable, finite

number of congenial groups displaying both a community of interests within themselves and a disparity of interests from other groups," and it may be that this will be the test for unit determinations in other health care cases. In *Mount Airy Psychiatric Center*, 253 NLRB 1003 (1981), the Board did reach a different unit determination in a psychiatric hospital than it would have in an acute care facility.

For a discussion of units in psychiatric hospitals, see the discussion below of *Park Manor Care Center*, 305 NLRB 872 (1991), and related cases. See also the Board's denial of review in *Holliswood Hospital*, 312 NLRB 1185 (1993), in which review of a finding of an RN unit in a psychiatric hospital was denied.

In *Virtua Health, Inc.,* 344 NLRB 604 (2005), the Board found that a unit of the employer's paramedics was too limited and that the paramedics should be included in a technical unit. The employer was a health care institution and the employer contended that it was an acute care facility and thus, within the Board's Health Care Unit Rules. The Board found it unnecessary to decide coverage under the Rule because even under the broader standard of *Park Manor,* supra, the community-of-interest test, a paramedic unit was not appropriate.

15-173 Nursing Homes

Nursing homes were initially considered in the rulemaking proceeding. The units suggested in the initial proposal were (1) all professionals, (2) all technicals, (3) all service, maintenance and clericals, and (4) all guards. After consideration of the comments and evidence received, the Board excluded these institutions from the health care rule and the determination of appropriate units in nursing homes is left to a case-by-case approach. 284 NLRB 1567, 1568.

The Board's experience in nursing home units predates the 1974 health care amendments and by 1970 the distinction between proprietary and nonproprietary nursing homes was eliminated. *Drexel Home*, 182 NLRB 1045 (1970).

In *Park Manor Care Center*, supra, the Board announced that it would apply a community-of-interest test in nursing homes together with "background information gathered during rulemaking and prior precedent." The Board reaffirmed its decision to decide nursing home units by adjudication with the "hope that . . . certain recurring factual patterns will emerge and illustrate which units are typically appropriate." For an example of this policy see *Hebrew Home & Hospital*, 311 NLRB 1400 (1993), affirming on review the decision of the Acting Regional Director approving a separate skilled maintenance unit at a nursing home.

The Board applied *Park Manor* to psychiatric hospitals. *McLean Hospital Corp*., 309 NLRB 564 fn. 1 (1992); *Brattleboro Retreat*, 310 NLRB 615 (1993); and *McLean Hospital Corp*., 311 NLRB 1100 (1993). But in *Stormont-Vail Healthcare, Inc*., 340 NLRB 1205 (2003), the Board noted that psychiatric nurses are not automatically excluded from an RN unit in an acute care hospital. Applying traditional community of interest standards, the Board included psychiatric RN nurses at outlying facilities in a unit comprised of RNs and other psychiatric RNs at the central facility.

The Board overruled *Park Manor* in *Specialty Healthcare &Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). Characterizing its approach in *Park Manor* as "idiosyncratic" the Board majority announced that it would henceforth apply traditional community of interest principles in deciding units in non-acute (long term) facilities. Also noting that nonacute facilities "seem to be evolving even further away from the intensively staffed and highly specialized acute care hospital paradigm that motivated Congressional concerns about undue fragmentation," the Board concluded that its action did not conflict with the admonition against proliferation. The Board found a unit of certified nursing assistants (CNAs) appropriation.

In *Lifeline Mobile Medics*, 308 NLRB 1068 (1992), the community-of-interest standard was applied to an ambulance service, and in *Upstate Home for Children*, 309 NLRB 986 (1992), it was applied in a residential home for retarded children and a medical equipment and clinical services facility. *CGE Caresystems, Inc.*, 328 NLRB 748 (1999).

15-174 Application of the Health Care Rule

Shortly after the Supreme Court affirmed the Rule, the General Counsel issued two memoranda—General Counsel's Exhibit 91-3 gave the Regions procedural guidance on the procedures to be followed under the Rule and General Counsel's Exhibit 91-4 summarized case law on health care unit placement. Reproduction of these memoranda would unduly burden this book. Copies may be obtained from the Board's Division of Information.

In *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), the Board addressed the application of Rule to preexisting nonconforming units. In *Kaiser* the petitioner sought to sever skilled maintenance employees from a nonprofessional unit. The Board held that the Rule only applies to "new units of previously unrepresented employees which would be an addition to the existing units at a facility." Accordingly, the Board would not apply the Rule to a severance but instead analyzed the petition under traditional *Mallinckrodt* principles (*Mallinckrodt Chemical Works,* 162 NLRB 387 (1967); see sec. 16-100 et seq.).

15-175 Registered Nurse Units

As noted earlier, the Board's Rule finds that units of registered nurses are appropriate. Issues of unit placement are determined on a case-by-case basis. Licensing is an important factor in determining whether a particular employee or group should be included in a RN unit. As the Board indicated:

> Although the Board has not included all RNs in a hospital RN unit regardless of function, the Board generally has included in RN units those classifications which perform utilization/review of discharge planning work where an employer requires or effectively requires RN licensing for the job. *Salem Hospital*, 333 NLRB 560 (2001).

In *South Hills Health System Agency*, 330 NLRB 653 (2000), the Board denied a request for review of a Regional Director's decision finding a unit of RNs appropriate in a nonacute health care facility.

See section 15-173, for discussion of unit placement of psychiatric RNs in acute care hospitals.

15-176 Other Health Care Issues

For discussions of other health care issues, see sections 1-315 (Jurisdiction), 12-400 (Residual Units), 13-1100 (Health Care), 15-146 (Health Care Institution Drivers), 16-300 (Skilled Maintenance-Health Care), 17-512 (Health Care Supervisory Issues), 19-460 (Business Office Clerical-Health Care), and 19-510 (Technical Employees-Health Care).

In *Rhode Island Hospital*, 313 NLRB 343 (1993), the Board decided a series of unit placement issues in health care. Specifically, the case involved business office clericals, technicals, skilled maintenance, and students (nursing, radiology, and pharmacy). The case also involved eligibility issues relating to employees who are involved in research that is funded by sources outside the hospital.

15-180 Hotels and Motels

The Board first asserted jurisdiction over enterprises in the hotel and motel industry in 1959 (*Floridan Hotel of Tampa*, 124 NLRB 261 (1959)), and a year later formulated a general rule of unit determination in this industry to the effect that all operating personnel have such a high degree of functional integration and mutuality of interests that they should be grouped together for purposes of collective bargaining (*Arlington Hotel Co*., 126 NLRB 400 (1960)).

Several years later, this rule was relaxed to some extent in situations in which a well-defined area practice of bargaining for less than a hotelwide unit was shown to exist. See, for example, *Water Tower Inn*, 139 NLRB 842 (1962); and *Mariemont Inn*, 145 NLRB 79 (1964). A motel

unit was approved that excluded office clerical employees, even though there was no bargaining history in the particular unit selected (*LaRonde Bar & Restaurant*, 145 NLRB 270 (1963)). See also *Columbus Plaza Hotel,* 148 NLRB 1053 (1964).

Ultimately, in 1966, the rule established in *Arlington* was considered by the Board and overruled because of its rigidity. While *Arlington* took a valid principle, i.e., if functions and mutual interests are highly integrated an overall unit alone is appropriate, and fashioned from it an inflexible rule to be applied to all hotels and motels, Board experience had indicated that the operations of every hotel or motel were not so highly integrated nor all employees so similar as to negate the existence of a separate community of interest among smaller groupings. In these circumstances, the Board decided that it would thereafter "consider each case on the facts peculiar to it in order to decide wherein lies the true community of interest among particular employees" of a hotel or motel. *Holiday Inn Restaurant*, 160 NLRB 927 (1966).

Thus, the rule now is that the general criteria used for determining units in other industries, after weighing all the factors present in each case, are also applicable to the hotel and motel industry. These factors include distinctions in the skills and functions of particular employee groupings, their separate supervision, the employer's organizational structure, and differences in wages and hours. See *Omni International Hotel*, 283 NLRB 475 (1987).

Notwithstanding the former broad rule in *Arlington*, recognition had impliedly been given by the Board even in that decision to the difference which exists between clerical employees and manual operating personnel. This had been indicated also in other cases. See, for example, *Water Tower Inn*, supra; *Mariemont Inn*, supra; *LaRonde Bar & Restaurant*, supra; *Columbus Plaza Hotel*, supra.

Accordingly, while this decisional approach to hotel unit questions does not abrogate the Board's policy of treating clerical employees as "operating personnel," it nevertheless relegates that generic classification to the status of just one factor among many others, which the Board considers in making hotel unit findings. In short, generic classification in a hotel may not be the controlling factor any more than it would be controlling in the determination of an industrial unit. *Regency Hyatt House*, 171 NLRB 1347 (1968).

For other examples of the current case-by-case approach see *Westin Hotel*, 277 NLRB 1506 (1986), in which the Board rejected a separate maintenance unit because of the absence of unique skills and of separate supervision; *Hotel Services Group*, 328 NLRB 116 (1999), finding a unit of licensed massage therapists inappropriate; *Stanford Park Hotel*, 287 NLRB 1291 (1988), holding appropriate a separate unit of housekeeping and maintenance employees; *Omni International Hotel*, supra, and *Hilton Hotel*, 287 NLRB 359 (1987), finding a unit of engineering employees appropriate; and *Dinah's Hotel & Apartments*, 295 NLRB 1100 (1989), finding a unit of front desk employees appropriate. But see *Ramada Beverly Hills*, 278 NLRB 691 (1986), finding only an overall unit appropriate in view of the extent of the integration of the operation; and *Atlanta Hilton & Towers*, 273 NLRB 87 (1984).

15-190 Insurance Industry

Although at one time only a statewide or companywide unit of insurance employees was found appropriate, the normal unit principles applied in other industries are now used in determining bargaining units in the insurance industry. This question came to a head in 1965 when it reached the United States Supreme Court in *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438 (1965) (see discussion ante on Multilocation Units). Following a remand from that Court, the Board delineated its policy pertaining to unit determination in the insurance industry in *Metropolitan Life Insurance Co*., 156 NLRB 1408 (1966).

In general, a single district office is the basic appropriate unit for insurance agents. *Metropolitan Life Insurance Co.*, supra at 1418; *Western & Southern Life Insurance Co*., 163 NLRB 138 (1967), enfd. 391 F.2d 119 (3d Cir. 1968). See also *Allstate Insurance Co*., 191 NLRB 339 (1971), finding a districtwide unit requested by the petitioner to be appropriate.

Noting that not all companies have precisely the same administrative structure or office nomenclature, the Board stated that the basic appropriate unit for insurance claims' representatives or adjusters was "the smallest component of the Employer's business structure which may be said to be relatively autonomous in its operation" and thus comparable to the district office involved in the Supreme Court *Metropolitan* decision. *State Farm Mutual Automobile Insurance Co*., 158 NLRB 925, 929 (1966). See also *American Automobile Assn*., 172 NLRB 1276 (1968).

Illustrative of the application of these principles, a unit of insurance adjusters limited to a single branch office was found appropriate. *Fireman's Fund Insurance Co*., 173 NLRB 982 (1969). Describing its approach as predicated on the presumption of the basic appropriateness of the single branch office, and finding that this presumption in the facts before it had not been overcome, the Board compared this with unit questions arising in the retail industry and pointed out that this presumption may be rebutted where it is shown that day-to-day interests shared by employees at a particular location have become merged with those of employees at other locations.

In setting out the principles governing its unit determinations in the insurance industry, the Board noted in *Metropolitan,* supra, that the fact that individual district offices qualified as separate appropriate bargaining units did not necessarily mean that a combination of such district offices into a broader more inclusive unit was to be ruled out. Accordingly, where a reasonable degree of geographic coherence existed among several locations within a proposed unit, a multilocation unit was found appropriate. *Allstate Insurance Co*., 171 NLRB 142 (1968); *State Farm Mutual Automobile Insurance Co*., supra. Compare *American Automobile Assn*., 242 NLRB 722 (1979).

On composition of insurance industry units, the Board has held that underwriters, engineers, and adjusters generally perform duties of a technical, specialized nature, in which they are called upon to exercise considerable independent judgment. Although physically located near clericals, their work requires a higher level of responsibility. They therefore have interests sufficiently different to warrant exclusion from an overall-type unit. *Reliance Insurance Cos*., 173 NLRB 985 (1969). See also *Fireman's Fund Insurance Co*., supra; *North Carolina Life Insurance Co*., 109 NLRB 625 (1954); cf. *Farmers Insurance Group*, 164 NLRB 233 (1967). See also *Empire Insurance Co*., 195 NLRB 284 (1972), in which an all-employee unit, including clerical employees, was found to be appropriate.

15-200 Law Firms

440-1720-3300

440-1760-4300

440-1760-9940

Since the Board's decision to extend jurisdiction over law firms in 1977 (*Foley, Hoag & Eliot*, 229 NLRB 456 (1977)), the majority of reported cases have centered on organizing efforts in legal services corporations. In *Wayne County Legal Services*, 229 NLRB 1023 (1977), the Board decided to treat legal services corporations like law firms for jurisdictional purposes. The unit issues presented by these cases have involved the placement of paralegals, law school graduates not yet admitted to the bar and supervisory issues.

Clearly, a unit of all professionals, i.e., attorneys, is appropriate. Similarly, a unit of all employees, professional and nonprofessional, may be appropriate provided that the professional employees agree after a separate vote to be included in the overall unit. *Neighborhood Legal Services*, 236 NLRB 1269 (1978).

Employees who are law school graduates but not as yet admitted to the bar have been held to be professional employees. *Wayne County Legal Services*, supra. Law students on the other hand have been found not to be professionals and would be included in a clerical employee unit if they

share a sufficient community of interest with the clericals. Cf. *Legal Services for the Elderly Poor*, 236 NLRB 485 fn. 15 (1978). Generally, paralegals do not have the full range of responsibility and education to qualify for inclusion in the professional unit. *Neighborhood Legal Services*, supra. Whether or not they are included in a clerical unit depends on their community of interest with those employees. In both *Twentieth Century Fox Film Corp*., 234 NLRB 172 (1978), and *Stroock, Stroock & Lavan*, 253 NLRB 447 (1981), the Board found insufficient community to warrant inclusion.

The Board has rejected the contention that employees of a law firm are "confidential" since they handle labor relations matters and information for the firm's clients. In *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1981), the Board held that employees are confidential only if they handle confidential matters concerning labor relations for their own employers.

15-210 Licensed Departments

15-211 In General

177-1633-5033

177-1650

Licensed departments are operations conducted under a lease or license agreement between a store owner and lessee under which the latter does business on the premises of the owner. The cases involving licensed departments generally pose (1) the initial question whether or not the lessor and lessee are joint employers, and (2) the ensuing question, depending on the outcome of the first, whether the employees of the lessee have a sufficient community of interest to be included in the unit of the other store employees. Although these questions arise mostly in retail or discount retail store contexts, the issues posed are not necessarily limited to that segment of business enterprise.

The general rule is that the licensor or lessor and its licensees are joint employers of the employees in the licensed departments where it is established that the licensor "is in a position to influence the licensee's labor policies." *Grand Central Liquors*, 155 NLRB 295 (1965); *Spartan Department Stores*, 140 NLRB 608 (1963); *Frostco Super Save Stores*, 138 NLRB 125 (1962); and *Pergament United Sales*, 296 NLRB 333 (1989). For the corollary, where the licensors had not exercised substantial control of the licensees' labor policies and were therefore not joint employers, see, for example, *S.A.G.E., Inc*., 146 NLRB 325 (1964); and *Esgro Anaheim, Inc*., 150 NLRB 401 (1965).

Almost invariably in these situations the lessor and lessee execute a trade agreement, one of the major purposes on their part being to create the appearance of an integrated department store. Their agreement normally provides for advertising and promotional activity; inspection of premises; store layout; audit of records; approval of alterations, fixtures, and signs; decisions as to which articles may be sold; pricing policies; customer complaints; sharing of overhead expenses (usually prorated); purchase of supplies; names on signs and labels; and, significantly, labor and personnel policies.

The Board has recognized that, in the lessor-lessee arrangement where two or more employers at one location, although retaining their separate corporate entities, cooperate to present the appearance of a single-integrated enterprise to obtain mutual business advantage, "the dominant entrepreneur will of necessity retain sufficient control over the operations of the constituent departments so that it will be in a position to take action required to remove any causes for disruption in store operations." *Disco Fair Stores*, 189 NLRB 456 (1971). However, such control has not in and of itself been sufficient justification for a joint-employer finding. Such a finding is generally made where it has been demonstrated that the lessor is in a position to control the lessee's labor relations. *S.A.G.E., Inc*., supra.

Where the lessor explicitly reserves such control in its lease arrangements, a joint-employer finding invariably results. See, for example, *S. S. Kresge Co*., 161 NLRB 1127 (1966); and *Jewel Tea Co*., 162 NLRB 508 (1967).

But the Board has not limited itself to an explicit reservation of control over labor relations and has held, in effect, that the licensor's right to dissolve the relationship entirely, its retention of overall managerial control, and the extent to which it retained the right to establish the manner and method of work performance put it in a position to influence the lessee's labor policies, whether or not such power has ever been exercised. *Value Village*, 161 NLRB 603 (1966).

The Board said: "While we would not postulate the existence of a joint-employer relationship merely on the basis of such a need—[to control the operations and labor relations of the licensees] and so stated in *Value Village*, supra—we will make such a finding where the license arrangements objectively demonstrate a response to that need. Here there is ample proof of such a response." *Globe Discount City*, 171 NLRB 830, 832 (1968). In that case, the Board concluded that the lessor's power to control or influence the labor policies of its licensees, particularly as it occurred in the context of the same type of joint business venture as was present in *Value Village*, was substantially the same as the power retained by the licensor in the latter.

On the other hand, both *Value Village* and *Globe* were distinguished in a later case, *Disco Fair Stores*, supra, in which the joint employer issue was resolved by finding that no such relationship existed. The Board held that the lease, unlike those involved in the two earlier cases, contained no provisions denominating the lessees as in default of their obligations for failure to follow or conform to such rules and regulations as *Disco* may promulgate concerning personnel. Nor did the lease arrangements give the lessor sufficiently specific control over labor relations of the lessees to warrant a joint employer finding.

15-212 Unit Composition–Licensed Departments

420-7384 et seq.

440-3350-5000 et seq.

Where no union seeks a more limited unit, a unit embracing the employees of the licensor and its licensed department employees is appropriate. *Value Village*, supra. However, even if the existence of a joint employer relationship is found, it does not necessarily follow that storewide units including all leased and licensed department employees would be the only appropriate unit. *Esgro Valley, Inc.*, 169 NLRB 76 (1968). As explicated in *Bargain Town U.S.A*., 162 NLRB 1145, 1147 (1967): "While there are circumstances indicating that all employees working at the store share a common community of interest in certain respects, there are other significant factors which establish that the employees of the leased and licensed departments in other respects also have a community of interest separate and distinct from that of the other employees." See also *Collins Mart*, 138 NLRB 383 (1962); and *Frostco Super Save Stores*, supra.

15-220 Maritime Industry

Generally, the Board considers a fleetwide unit appropriate in the maritime industry. *Inter-Ocean Steamship Co*., 107 NLRB 330 (1954). In *Moore-McCormack Lines*, 139 NLRB 796 (1962), and *Keystone Shipping Co.*, 327 NLRB 892 (1999), the Board found a less than fleetwide unit appropriate.

In *Florida Casino Cruises*, supra, the Board found a unit of the ship's personnel appropriate rejecting a request for a "wall to wall" unit.

15-230 Newspaper Units

The optimum appropriate unit in the newspaper industry is a unit comprising employees in all nonmechanical departments. *Salt Lake Tribune Publishing Co*., 92 NLRB 1411 (1951); *Lowell Sun Publishing Co*., 132 NLRB 1168 (1961); and *Minneapolis Star & Tribune Co*., 222 NLRB 342 (1976).

Thus, in the absence of a bargaining history of separate units of nonmechanical employees, the Board, based on sufficient community of interest, will grant a union's request to include all such employees in a single unit. *Dow Jones & Co*., 142 NLRB 421 (1963); *Minneapolis Star & Tribune Co*., supra at 343. A combined unit consisting of departments that do not do similar or coordinated work, and which does not include all nonmechanical employees, may be found inappropriate. *Peoria Journal Star*, 117 NLRB 708 (1957); *Lowell Sun Publishing Co*., supra. See also *Salt Lake Tribune Publishing Co*., supra.

A multidepartment unit is not, however, the only appropriate unit in every case. In each instance the question turns on the facts of the case, including the bargaining history, the employer's organizational structure, and the willingness of the labor organizations involved to represent the overall unit, a factor which may be considered although it cannot be controlling. It does not, however, turn on the ultimate desirability of the overall unit. *Peoria Journal Star*, supra. Thus, when the employer's operations are organized into separate distinct departments, separate departmental units may be found appropriate, even in the face of functional integration and control, interchangeability among employees, or uniformity of benefits and conditions of employment. See also *Chicago Daily News*, 98 NLRB 1235 (1951). Single major departments which have been held to constitute appropriate units are the news department (*Daily Press*, 112 NLRB 1434 (1955)), and the circulation department (*Times Herald Printing Co*., 94 NLRB 1785 (1951)). See also *Evening News*, 308 NLRB 563 (1992), and *Leaf Chronicle Co*., 244 NLRB 1104 (1979), in which a single-location unit was found appropriate.

In the newspaper industry, the Board usually finds separate units of the various mechanical department crafts appropriate. *American-Republican*, 171 NLRB 43 (1968); *Garden Island Publishing Co*., 154 NLRB 697, 698 (1965). These units, however, may be joined where they share sufficient community of interest. *Evening News* and *Leaf Chronicle Co*., supra. Where photoengraving employees engaged in the distinct, skilled work of making photoengraving plates under separate supervision, there was no transfer or interchange between their jobs and proofreading jobs, and their skills, training, hours, and wage scales were different, a unit limited to photoengravers was found appropriate. *American-Republican*, supra.

A combination of departments may constitute an appropriate unit when the departments perform closely related functions calling for similar skills (*Bethlehem's Globe Publishing Co.*, 74 NLRB 392 (1947); and *Dayton Newspapers*, 119 NLRB 566 (1958)), and where there has been a history of bargaining for the employees of dissimilar departments (*Sacramento Publishing Co*., 57 NLRB 1636 (1944)), or where no union seeks to represent nonmechanical employees on a broader basis (*Philadelphia Daily News*, 113 NLRB 91 (1955)).

Mailroom employees in the newspaper industry are a well-defined functionally distinct group who have been traditionally represented on a separate departmental basis. See *Bakersfield Californian*, 152 NLRB 1683 (1965). The fact that outside helpers and carriers also do some work in the mailroom does not destroy that traditional basis for a separate mailroom unit. *Bakersfield*, supra; *Suburban Newspaper Publications*, 226 NLRB 154 (1976).

15-231 Printing Industry

A unit of all production and maintenance employees involved in the lithographic process is appropriate in the printing industry. The Board will apply traditional community-of-interest analysis in deciding on petitioned-for units whether the unit is press employees, a combined unit of press and pre-press employees, or an overall production unit. The Board does accord some weight to a traditional lithographic unit—a combined unit of press and pre-press employees. *AGI Klearfold, Inc., LLC,* 350 NLRB 538 (2007).

15-240 Public Utilities

420-4000

420-4617

440-1720

440-3300

The systemwide unit is the optimum bargaining unit in public utilities industries. *Colorado Interstate Gas Co*., 202 NLRB 847 (1973); *Deposit Telephone Co*., 328 NLRB 1029 (1999); *Louisiana Gas Service Co*., 126 NLRB 147 (1960); and *Montana-Dakota Utilities Co.*, 115 NLRB 1396 (1956). The reason for this general principle lies in "the essential service rendered to their customers and the integrated and interdependent nature of their operations." *Colorado Interstate Gas Co*., supra. However the Board noted in *Deposit Telephone,* supra, "this policy does not require multi-departmental units in all instances." And, in *Verizon Wireless,* 341 NLRB 483 (2004), the Board rejected the systemwide unit for retail employees in the wireless telephone industry without passing on whether this industry is a public utility.

While public utilities, in comparison to other industries, may be more intimately interrelated and interdependent throughout a widespread system, each case must nonetheless be judged on its own merits in determining the appropriateness of bargaining units. *Idaho Power Co*., 179 NLRB 22 (1969); and *Pacific Northwest Telephone Co*., 173 NLRB 1441 (1969). Where, on balance, all the relevant factors indicate that the administrative structure or geographic features of a public utility company's operations have created a separate community of interest for certain of the company's employees, a less than systemwide unit may be found appropriate. *PECO Energy Co.,* 322 NLRB 1074 (1997); *Monongahela Power Co*., 176 NLRB 915 (1969); *Michigan Wisconsin Pipe Line Co*., 164 NLRB 359 (1967); *Sanborn Telephone Co.*, 140 NLRB 512 (1963); *Mountain States Telephone Co*., 126 NLRB 676 (1960); *Western Light Telephone Co*., 129 NLRB 719 (1961); and *Southern California Water Co*., 220 NLRB 482 (1975).

As is true of other areas of unit determination, the history of collective bargaining and existing bargaining relationships and the fact that no labor organization seeks to represent a broader unit of the employees in question are relevant factors. *Deposit Telephone Co*., supra, and *Michigan Bell Telephone Co*., 192 NLRB 1212 (1971). *Deposit Telephone* reversed *Red Hook Telephone*, 108 NLRB 260 (1967), and *Fidelity Telephone*, 221 NLRB 1335 (1976).

In the absence of a bargaining history on a more comprehensive basis, units have been found appropriate in the public utility industry which correspond to an administrative subdivision of the particular operation *PECO Energy Co.,* supra; *Mountain States Telephone Co*., supra, reflecting geographical lines of demarcation (*Philadelphia Electric Co*., 110 NLRB 320 (1955)), and reflecting operational integration of the subdivision as a separate administrative entity. *Montana-Dakota Utilities Co.*, supra. See also *Connecticut Light & Power Co*., 222 NLRB 1243 (1976); *Southern California Water Co*., supra; and *New England Telephone Co*., 242 NLRB 793 (1979).

The fact that it was not shown by "satisfactory or documented evidence" that a work stoppage in one district would have a substantial impact on the operations of other districts within the division was taken in consideration. *United Gas*, 190 NLRB 618 (1971); and *Southwest Gas Corp*., 199 NLRB 486 (1972); *Southern California Water Co*., supra.

In *United Gas*, supra, the local distribution organization in question was likened to single-store units in retail operations and single district office units in the insurance industry. See *M. O'Neil Co*., 175 NLRB 514 (1969); and *Metropolitan Life Insurance Co*., 156 NLRB 1408 (1966).

In a case litigated in the Tenth Circuit, the unit certified by the Board consisted of 10 employees in one department of a single telephone exchange in one State. There was no history of bargaining. Although the court pointed out that in a number of cases involving integrated telephone companies the Board had concluded that systemwide units are normally the appropriate

unit, the court found the Board's action neither arbitrary nor capricious and that "the designated unit is a functioning, distinct and separate operation of a group of unrepresented employees who work in a single geographical location," and, thus, appropriate for purposes of collective bargaining. *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478 (10th Cir. 1962).

Illustrative of the type of situation encountered at times in public utility unit determinations is *Michigan Wisconsin Pipe Line Co*., 194 NLRB 469 (1972), in which a unit found appropriate in a 1967 decision involving a district of the company's system (164 NLRB)359) was held no longer appropriate due to administrative and operational changes which had since occurred. In arriving at this result, consideration was given to the facts that (1) the district encompassing the requested employees became one of three districts in a major administrative subdivision of the pipeline system; (2) to continue finding the initial unit appropriate would "fragmentize" the pipeline employees; and (3) supervision of the district in question was closely coordinated with supervision in other districts in the area with the concomitant of a significant degree of employee interchange.

The opposite result follows, of course, when changes have no significant effect on the unit. Thus, where changes made since a merger had not materially affected the appropriateness of an existing unit, that unit remained appropriate and could not be absorbed into a systemwide unit unless the employees in it were accorded in a self-determination election. *Brooklyn Union Gas Co*., 123 NLRB 441 (1959); and *Houston Corp*., 124 NLRB 810 (1959).

The reluctance of the Board to "fragmentize" in establishing units for natural gas pipeline systems was a focal point in *Colorado Interstate Gas Co*., 202 NLRB 847 (1973). It found that requested districtwide units were too narrow in scope to be appropriate, relying on (1) the high degree of control exercised by the company's headquarters management over the operational districts; (2) evidence of substantial temporary interchange among the districts; (3) the systemwide procedures applied in posting and bidding for openings in higher paying positions; (4) the lack of substantial autonomy in the district superintendents with respect to day-to-day personnel matters; and (5) the uniformity of wages, hours, and conditions of employment throughout the company's system. See also *Tennessee Gas Pipeline*, 254 NLRB 1031 (1981); *Gas Pipeline Co. of America*, 223 NLRB 1439 (1976).

By way of contrast, there was no problem of "fragmentization'' in *Idaho Power Co*., supra, in which a proposed divisionwide unit was found appropriate relying on (1) geographic coherence; (2) distinctiveness of functions; and (3) the relative autonomy of operation with which the divisional managing official had been entrusted. Similarly, in *PECO Energy Co*., 322 NLRB 1074 (1997), the Board found a less than systemwide unit, conforming its determination to the employer restructuring of its operations. This case contains a collection and discussion of the key utility unit cases.

In *Alyeska Pipeline Service Co.,* 348 NLRB 808 (2006), the Board held that it would apply the presumption of a systemwide unit to a natural gas pipeline whether or not it is considered a public utility.

15-250 Retail Store Operations

15-251 Scope

440-1720

440-3300

In our consideration of multilocation bargaining units, we singled out, in particular, unit determinations in retail store operations. We addressed the marked modification in policy effected, in 1962, by the Board's decision in *Sav-On Drugs*, 138 NLRB 1032 (1962), under which a proposed retail unit would no longer be the subject of a per se rule but would instead be found appropriate or not depending on the circumstances of each case. The per se rule which *Sav-On Drugs* abandoned was generally to determine appropriateness of unit in the retail industry on

the basis of being extensive with the employer's administrative division or the geographic area in question. See chapter, ante, on Multilocation Units.

Thus, the basic rule is that single-store units are presumptively appropriate in retail merchandising. See *Haag Drug Co*., 169 NLRB 877 (1968), for a thorough review of the *Sav-On Drug* policy in affirming the prior holding.

This presumption may be rebutted where it is shown that the day-to-day interests of employees in the particular store may have merged with those of employees of other stores. *Food Marts*, 200 NLRB 18 (1973). For example, in that case the presumption was held rebutted where the Board found (1) lack of autonomy at the single-store level as reflected by the strict limitations of the store manager's authority in personnel, labor relations, merchandising, and other matters; (2) the extensive role played by officials at the main office in the daily operations of the store; (3) the geographical proximity of the store; and (4) the transfer of employees among them. See also *NAPA Columbus Parts Co*., 269 NLRB 1052 (1984); and *Big Y Foods*, 238 NLRB 860 (1978). The presumption was not rebutted in *Foodland of Ravenswood*, 323 NLRB 665 (1997).

15-252 Selling and Nonselling Employees

440-1760-7200 et seq.

The bargaining pattern in the industry, the history of bargaining in the area, and a close examination of the composition of the work force in the industry "require the recognition of the existing differences in work tasks and interests between selling and nonselling employees in department stores." The Board therefore found separate units for the selling and the nonselling employees appropriate. *Stern's Paramus*, 150 NLRB 799, 806 (1965); *Arnold Constable Corp*., 150 NLRB 788 (1965); and *Lord & Taylor*, 160 NLRB 812 (1966).

It was pointed out in *Stern's Paramus* that, although the storewide unit in retail establishments has been regarded as "basically appropriate" (*I. Magnin & Co*., 119 NLRB 642, 643 (1958)), or the "optimum unit" (*May Department Stores Co*., 97 NLRB 1007, 1008 (1951)), the single-comprehensive unit is not the *only* appropriate unit in such establishments (*Root Dry Goods Co.*, 126 NLRB 953, 955 (1960)).

However, combining various categories of nonselling employees into one proposed unit predicated "on the single negative characteristic that none of the included employees performs any selling functions" is insufficient to overcome the diversity of interests among employees in an otherwise random grouping of heterogeneous classifications. *Beco Industries*, 197 NLRB 1105 (1972).

In *Levitz Furniture Co*., 192 NLRB 61 (1971), less-than-storewide units were found inappropriate due, among other things, to the small size and functional integration of the retail store and the community of interest shared by all of the store employees. For further discussion of *Beco Industries*)and *Levitz,* see *Wickes Corp*., 231 NLRB 154 (1977).

In *Saks & Co*., 204 NLRB 24 (1973), a petition which sought a grouping of nonselling employees was dismissed on the basis of (1) lack of a separate community of interest, there being no similarity of job function among the employees sought; (2) a failure, as a nonselling unit, to include other nonselling employees; and (3) the close similarity of working conditions and benefits, and the close contact between the selling and nonselling employees, thus constituting an operation "more closely integrated than other retail establishments."

In *Sears, Roebuck & Co*., 191 NLRB 398 (1971), employees of the service station, warehouse, store dock area, and retail store were held to constitute a homogeneous grouping whose common supervision, uniform working conditions, and overlapping job functions within the framework of a substantially integrated set of operations required that they be included in a single-bargaining unit. See also *J. C. Penney Co*., 182 NLRB 708 (1970); *Montgomery Ward & Co*., 225 NLRB 547 (1976); and *Sears, Roebuck & Co*., 261 NLRB 245 (1982). See also *Sears, Roebuck & Co*., 319 NLRB 607 (1995).

In *Sears, Roebuck & Co*., 182 NLRB 777 (1970), a petition for a unit of nonselling employees was dismissed as inappropriate because of the integration of all store functions and the arbitrary exclusion of some nonselling employees.

15-253 Bargaining History in Retail Industry

420-1281

440-1760-7400

A common thread which runs through unit discussion is bargaining history. It therefore becomes readily apparent that elections are normally directed in separate units of selling and nonselling employees where there has been a history of bargaining on that basis or, for that matter, where there has been agreement among the parties.

In *Bond Stores*, 99 NLRB 1029 (1951), the petitioning union sought an overall unit. But the Board directed an election in two units: a selling unit for which an intervening union had been bargaining and a nonselling unit, saying that "either an over-all unit of both selling and nonselling employees or separate units of each may be appropriate."

In *Root Dry Goods Co*., supra, the Board directed a decertification election in a unit of selling employees that had been established by collective bargaining.

In *Supermercados Pueblo*, 203 NLRB 629 (1973), a request was denied for a proposed two-department group of meat and delicatessen employees, to be carved out from an established multistore unit composed of all nonsupervisory employees in a retail supermarket chain. A major factor in this denial was a 15-year amicable bargaining history on an overall, or "wall-to-wall," basis. Also considered in arriving at the ultimate result were factors such as functional interrelation of the work and the common interests and supervision of all the employees, the centralized control of labor relations policies, and the stabilized pattern of interwoven seniority rights and privileges within the overall unit. See also *Buckeye Village Market*, 175 NLRB 271, 272 (1969) (a 22-month bargaining history regarded as "substantial").

Where there has been no bargaining on a broader basis, a geographic grouping of retail chain stores less than chainwide in scope, particularly where such grouping coincides with an administrative subdivision within the employer's organization, may be appropriate. *U-Tote-Em Grocery Co*., 185 NLRB 52 (1970); and *Community Drug Co*., 180 NLRB 525 (1970). Hence, in the absence of a broader bargaining history, a geographic grouping of retail chain stores—eight downtown Los Angeles stores—was found appropriate. *White Cross Discount Centers*, 199 NLRB 721 (1972).

15-254 Retail Categories

440-1740

440-1760-3600

440-1760-9900

Where bargaining history on a broader basis or other factors are absent, differences in work and interest of many categories and occupations in retail stores have been accorded due recoguition in the form of smaller units. Examples of such units found appropriate are:

Alteration *department employees* comprising tailor shop employees, bushelmen-fitters, finishers, operators, rippers, and pressers, as "a basically highly skilled, distinct, and homogeneous departmental group." *Foreman & Clark, Inc*., 97 NLRB 1080 (1951). See also *Loveman, Joseph & Loeb*, 147 NLRB 1129 (1964).

Bakery employees employed in a department store. *Rich's, Inc*., 147 NLRB 163, 165 (1964). Compare *Jordan Marsh Co*., 174 NLRB 1265 (1969), and see in particular fn. 5 which distinguishes the facts in *Rich's*.

Carpet workroom employees as functional group having predominantly craft characteristics. *J. L. Hudson Co*., 103 NLRB 1378, 1381 (1953).

Display department employees sharing a substantial community of interest, apart from others, by reason of their skills and training and different working conditions. *Goldblatt Bros*., 86 NLRB 914 (1949). See also *W & J Sloane, Inc*., 173 NLRB 1387 (1969). But compare *John Wanamaker Philadelphia*, 195 NLRB 452 (1972), in which a unit of requested display department employees was held inappropriate because they had interests closely related to other selling and nonselling store employees, worked in many different areas of the store, had no special training or skills, and received the same wage rates and benefits as other employees. Compare also *Sears, Roebuck & Co*., 194 NLRB 321 (1972), in which any separate community of interest that the display employees might have enjoyed had been submerged into a broader community of interest.

Grocery employees: excluding meat department personnel, where the separate unit is sought. *R-N Market*, 190 NLRB 292 (1971). See also *Payless*, 157 NLRB 1143 (1966); *Allied Super Markets*, 167 NLRB 361 (1967); *Great Atlantic & Pacific Tea Co*., 162 NLRB 1182 (1967); and *Big Y Supermarkets*, 161 NLRB 1263, 1268 (1966).

Meat department: in Scolari's Warehouse Markets, 319 NLRB 153 (1995), the Board gave an extensive analysis of the separate meat department issue. The case collects some of the key cases in this area. See also *Ray's Sentry*, 319 NLRB 724 (1995); and *Super K Mart Center (Broadview, Illinois)*, 323 NLRB 582 (1997). In *Wal-Mart Stores*, 328 NLRB 904 (1999), the Board rejected a meatcutters unit but found a meat department unit to be appropriate.

Restaurant employees: worked different hours, received additional benefits, had separate supervision, and were not subject to frequent transfers to other jobs. *Wm. H. Block Co*., 151 NLRB 318 (1965). See also *F. W. Woolworth Co*., 144 NLRB 307, 308–309 (1963). In *Washington Palm, Inc*., 314 NLRB 1122 (1994), the Board affirmed a Regional Director's finding that a unit of nontipped kitchen employees was appropriate. In doing so, the Regional Director rejected the employer's contention that the unit included all food and beverage employees.

In *Casino Aztar,* 349 NLRB 603 (2007), the Board rejected a beverage department unit on a riverboat casino finding instead the smallest most appropriate unit to be a beverage, catering, and restaurant unit.

Service department employees: an appliance service facility operated in conjunction with a retail department store. *Montgomery Ward & Co*., 193 NLRB 992 (1971). Compare *J. C. Penney Co*., 196 NLRB 446 (1972), and *J. C. Penney Co*., 196 NLRB 708 (1972); *Sears, Roebuck & Co*., 160 NLRB 1435 (1966); and *Montgomery Ward & Co*., 150 NLRB 598 (1965).

Wireless retail stores: less than districtwide unit found appropriate based on geographic proximity, regular contact between employees, common terms and condition of employment, and transfers. *Verizon Wireless*, 341 NLRB 483 (2004).

15-260 Television and Radio Industry

440-1720 et seq.

440-1760-3400

440-1760-9900

In the television and radio industry either an overall program department unit or separate units of (1) employees regularly and frequently appearing before the microphone/camera, and (2) employees who do work preliminary to broadcasts or telecasts may be appropriate. *Radio & Television Station WFLA*, 120 NLRB 903 (1958). Where no labor organization is seeking to

represent the performing and nonperforming employees separately, a single unit of the program department employees is appropriate. Ibid. See also *El Mundo, Inc*., 127 NLRB 538 (1960).

Consistent with this principle, employees directly involved in the staging and presentation of studio productions, including both those who perform on radio and television programs and those who contribute directly to such performances, constitute essentially a production and program unit. Their functional interrelationships creates a substantial community of interest and renders the combined unit appropriate. *WTAR Radio-TV Corp*., 168 NLRB 976 (1968).

Employees who regularly or frequently appear before the microphone constitute a homogeneous, readily identifiable cohesive group appropriate as a unit for collective bargaining. *Hampton Roads Broadcasting Corp.*, 100 NLRB 238 (1951). See also *WTMJ-AM-FM-TV*, 205 NLRB 36 (1973), and *Perry Broadcasting*, 300 NLRB 1140 (1990). Compare *KJAZ Broadcasting Co*., 272 NLRB 196 (1984), in which the Board found the on-air off-air distinction had broken down. In *Perry Broadcasting*, supra, the Board described *KJAZ* as a "narrow exception."

The other major department in this industry is the engineering department. The employees in that department are generally skilled technicians who operate the electronic equipment and work in the control booth, control room, or at the transmitter sites. They are under the general supervision of a chief engineer, must have FCC licenses, and do not, as a rule, interchange with program department employees. They share many interests in common with one another, which are separate and apart from the other employees. See, for example, *Sarkes Tarzian*, 115 NLRB 535 (1956). In these circumstances, although an overall unit including the engineers may be appropriate, a unit which excludes them is also appropriate. *WTAR Radio-TV Corp*., supra. Moreover, a unit consisting of employees in the engineering and program departments of a television or radio station who contribute to the presentation of but do not appear on the TV or radio programs is also appropriate. *KMTR Radio Corp*., 85 NLRB 99 (1949); and *Indiana Broadcasting Corp*., 121 NLRB 111 (1958).

A broadcasting station's production department alone does not constitute an appropriate unit when employees in another department (e.g., program planning) are essentially production employees and work in close contact with the employees in the production department proper. In such a situation, without the program planning employees, the production department constitutes only a segment of an appropriate unit. *WTVJ, Inc*., 120 NLRB 1180, 1188 (1958). A unit of television producers/directors has been found appropriate. *WTMJ Inc*., 222 NLRB 1111 (1976). See also *KFDA-TV Channel 10*, 308 NLRB 667 (1992) (reporters included in production unit).

A unit of radio and television newsmen is not appropriate if limited only to a portion of the integrated services performed by the newsmen. *American Broadcasting Co*., 153 NLRB 259, 266 (1965). See also *WLNE-TV*, 259 NLRB 1224 (1982), in which a unit of camera employees was not appropriate because of the working conditions they shared with other employees.

A unit of radio news editors, production assistants, and copyroom employees was found appropriate. Among the issues raised was whether the television newsroom operations should be considered as separate departments. The Board found that each is run as a separate department as indicated by different immediate supervision, different physical locations, different final products, and little, if any, employee interchange. A unit confined to the radio news operations was therefore appropriate. *Post-Newsweek Stations*, 203 NLRB 522 (1973).

A proposed unit of traffic and compliance employees alone was held inappropriate as it comprised but a segment of the employees performing the same or similar work. *National Broadcasting Co*., 202 NLRB 396 (1973).

Artists have been included in program department units where they contribute directly to the station's program activities, but where they constituted an arbitrary segment of the unrepresented employees they were found not to be an appropriate voting group. *WPVI TV*, 194 NLRB 1063 (1972).

15-270 Universities and Colleges

In 1970, the Board, reversing a prior policy, asserted jurisdiction over private nonprofit universities and colleges. *Cornell University*, 183 NLRB 329 (1970). It later issued a rule establishing a jurisdictional standard. See chapter on Jurisdiction, ante, and 35 Fed.Reg. 18370; 29 C.F.R. 103.1.

In *Cornell University*, supra, mindful of entering into "a hitherto uncharted area," the Board reiterated a number of established unit principles where an employer operates a number of facilities as "reliable guides to organization in the educational context as they have been in the industrial." These were described as: prior bargaining history, centralization of management particularly in regard to labor relations; extent of employee interchange; degree of interdependence or autonomy; differences or similarities of skills and functions of the employees; and geographical locations of the facilities in relation to each other.

15-271 Faculty

420-9660

440-1760-4300

460-5033

In *C. W. Post Center*, 189 NLRB 904 (1971), it was urged that various attributes of faculty status require the application of different principles from those applied by the Board in determining units involving other types of employees. But, as in *Cornell*, the Board could not discern from cases decided by state labor relations boards any clear-cut pattern or practice of collective bargaining in the academic field requiring the Board to modify its ordinary unit determination rules. A unit of professional employees was found appropriate, with certain specific inclusions and exclusions. See also *Long Island University*, 189 NLRB 909 (1971).

In 1975 the Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), held that the full-time faculty there were managerial and thus not employees within the meaning of the Act. The Supreme Court found that the Yeshiva faculty "exercise authority which in any other context unquestionably would be managerial," supra at 686. *Yeshiva* has had a substantial effect on Board unit considerations in higher education cases because of the extent of the inquiry that the *Yeshiva* case requires as to faculty authority. This inquiry includes the authority of faculty as to hiring, promotion, and tenure of themselves, and their authority in setting university policy including standards for admission and graduation. The fact that they may not have final authority over these matters does not preclude a finding of managerial. For cases in which the Board found managerial status see *LeMoyne-Owen College,* 345 NLRB 1123 (2005); *University of Dubuque*, 289 NLRB 349 (1988); *Lewis & Clark College*, 300 NLRB 155 (1990); *Livingstone College*, 286 NLRB 1308 (1987); *Boston University*, 281 NLRB 798 (1986); *Duquesne University*, 261 NLRB 587 (1982); and *University of New Haven*, 267 NLRB 939 (1983). See also *Elmira College*, 309 NLRB 842 (1992), where a divided Board denied review of a managerial determination of a Regional Director.

The Board has found employee rather than managerial status in other cases. See, e.g., *Carroll College, Inc.,* 350 NLRB No. 30 (2007) (not reported in Board volumes); *University of Great Falls*, 325 NLRB 83 (1997); *Cooper Union of Science & Art*, 273 NLRB 1768 (1985); *Kendall School of Design*, 279 NLRB 281 (1986); and *Lewis University*, 265 NLRB 1239 (1983).

The Board has included graduate and undergraduate faculty in the same unit. *Nova Southeastern University*, 325 NLRB 728 (1998).

In *Brown University*, 342 NLRB 483 (2004), the Board reversed *New York University*, 332 NLRB 1205 (2000), finding that graduate assistants are not employees. See section 20-400, infra. In cases predating *New York University*, the Board had held that the relationship between a faculty member and a graduate assistant is basically a teacher-student relationship which does not make the faculty member a supervisor. *Fordham University*, 193 NLRB 134 (1971).

In a later *New York University* case, 356 NLRB No. 7 (2010), the Board announced its willingness to reconsider its decision in *Brown University*. At the time of publication of this edition, the matter was still under consideration by the Board.

In *Research Foundation-SUNY,* 350 NLRB 197 (2007), and *Research Foundation of the City University of New York,* 350 NLRB 201 (2007), the Board distinquished *Brown University* finding that research project assistants employed by a private corporation are employees within the meaning of the Act.

Before *Brown,* the Board held that graduate assistants do not share a sufficient community of interest with the regular faculty to warrant their inclusion. *Adelphi University*, 195 NLRB 639 (1972). Graduate assistants were distinguished in *Adelphi* from the "research associate" included in the professional unit in *C. W. Post Center*, supra. See also *University of Vermont*, 223 NLRB 423 (1976). Unlike graduate assistants, the research associate already had a doctoral degree and was eligible for tenure. Graduate assistants were more comparable to the technical laboratory assistants who were excluded from a professional teaching unit in *Long Island University*, supra. See also *College of Pharmaceutical Sciences*, 197 NLRB 959 (1972). The viability of all these unit placement cases after *New York University* may be in doubt.

Members of a religious order were excluded from a faculty unit where the order operates the university, *Seton Hill College*, 201 NLRB 1026 (1973), but are included if the university is operated by another order. *Niagara University*, 227 NLRB 313 (1977). See also *NLRB v. Universidad Central de Bayamon*, 793 F.2d 383 (1st Cir. 1986), in which an evenly divided First Circuit considered the application of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), to a university.

It will be recalled that in *Cornell University,* 183 NLRB 329 (1970), unit guidelines adapted from the industrial world were initially applied in the academic field, and that in *C. W. Post Center* a similar approach was used. But in *Adelphi University*, supra, the Board commented that "the industrial model cannot be imposed blindly on the academic," and in *Syracuse University*, 204 NLRB 641 (1973), in the context of such a reevaluation, it accorded individual treatment to a law school faculty, as a group, by directing a special type of election for them. The rationale for this was summarized as follows: "Granting a voice merely in determining whether such a group shall be swallowed up by the collective body or shall have separate representation will not answer. Rather it requires yet another choice, that of standing alone without representation regardless of the choice of the university body as a whole." The new type of election in *Syracuse* (see discussion, in chapter on Self-Determination Elections, infra), was directed within the framework of the holdings in *Fordham University*, supra, and *Catholic University of America*, 201 NLRB 929 (1973), of the separate unit status of law school faculty. The differences between professional school faculty and other faculty is often sufficient to support separate units absent a petition to include the entire faculty. See *Boston University v. NLRB*, 575 F.2d 301 (1st Cir. 1978).

The unit guidelines set out in *Cornell* for an employer operating a number of facilities—the same as those used in unit determinations in the industrial field—were nonetheless applied in *Claremont University Center*, 198 NLRB 811 (1972), which involved a petition for professional and nonprofessional employees of a college library. In that case, in keeping with these factors, the Board found the proposed unit of library employees an identifiable group with a separate community of interest, distinguishing on the facts the ruling in *Cornell* with respect to nonprofessional library employees. It was also pointed out that, since *Cornell*, the Board has found less than an overall unit appropriate where, as in *Claremont*, the work situation shows a homogeneous group of employees who share a close community of interest. See, for example, *Syracuse University*, supra; *Catholic University of America*, supra; *Fordham University*, supra (separate elections for faculty members in the law school of a university); *Leland Stanford Jr. University*, 194 NLRB 1210 (1972) (maintenance employees at a university; campus police at a university; firemen at a university); and *California Institute of Technology*, 192 NLRB 582

(1971) (central plant employees comprising but a section of the physical plant department of a university).

Librarians were found to be professional employees engaged in functions closely related to teaching and therefore included in a unit of faculty members. *Florida Southern College*, 196 NLRB 888 (1972). See also *C. W. Post Center*, supra; *Long Island University (Brooklyn Center)*, supra. These cases, however, do not hold that librarians and supporting personnel in a library system, which is not part of any of the colleges it serves, cannot organize themselves separately in an appropriate unit. See *Claremont University Center*, supra.

The Board is now convinced that the differences between full-time and part-time faculty members are so substantial in most colleges and universities that it should not adhere to its normal rationale concerning part-time employees. Accordingly, the Board excluded part-time faculty members who were not employed in "tenure track" positions. *New York University*, 205 NLRB 4 (1973). See also *Bradford College*, 211 NLRB 565 (1974).

15-272 Other Categories

Turning to groupings other than faculty and those engaged in functions closely related to teaching, "the Board applies the rules traditionally used to determine the appropriateness of a unit in an industrial setting.'' *Livingstone College*, 290 NLRB 304 (1988); and *Cornell University*, 183 NLRB 329 (1970). They are discussed here.

In *Yale University*, 184 NLRB 860 (1970), the Board dismissed a petition for a unit of nonfaculty, clerical, and technical employees in the Department of Epidemiology and Public Health. Relying on the *Cornell* guidelines, it was concluded that these employees did not share a sufficiently special community of interest which would justify creating a separate unit for them. Taken into consideration, inter alia, were the facts that they were subject to the same working conditions as all other Yale employees, their skills and techniques did not vary substantially from those of others doing parallel jobs, and the thorough integration of the EPH Department into the Yale School of Medicine and the University.

Food service employees were found appropriate in a separate unit. In *Cornell University*, 202 NLRB 290 (1973), the Board analogized the situation of a university which operates dining facilities for its students to a hotel which operates a restaurant for its guests (see, for example, *Denver Athletic Club*, 164 NLRB 677 (1967)). It concluded that the food service employees shared a substantial community of interest separate from that of other university employees on the Ithaca campus and may therefore constitute a separate bargaining unit. See also *ITT Canteen Corp*., 187 NLRB 1 (1971). Compare *Harvard College*, 269 NLRB 821 (1984), in which the Board found insufficent bases for a separate unit of clerical and technical employees from the university's medical area.

Service employees were found appropriate in a separate unit. *Duke University*, 194 NLRB 236 (1972). In that case, the Board determined that, since the hospital operated by the employer was exempt from the Board's jurisdiction under Section 2(2), the unit of service employees would exclude any employees working more than 50 percent of their time within the hospital. (See distinction drawn on this point in the later case, *Duke University*, 200 NLRB 81 (1972). Describing a service and maintenance employees unit as "analogous to the usual production and maintenance unit in the industrial sphere," and therefore a classic appropriate unit, the Board directed an election in such a unit. *Georgetown University*, 200 NLRB 215 (1972). As this type of unit does not normally include office clerical or technical employees, they were excluded. The percentage rule applied to hospital employees, as first devised in *Duke University*, supra, was used in *Georgetown*. See also *Loyola University Medical Center*, 194 NLRB 234 fn. 5 (1971), and cases cited therein. "Library assistants" were excluded as clerical employees, but "library aides" and messenger clerks, as essentially "blue collar" workers, were included with the service and maintenance employees.

Note: the 1974 Health Care amendments mooted the need for the 50-percent rule in *Duke.*

Applying the *Cornell* guidelines, a unit of bookstore employees was found inappropriate. *George Washington University*, 191 NLRB 151 (1971). In light of the basic criteria, these employees did not have a community of interest sufficiently separate and distinct from other nonacademic employees to justify the creation of a separate unit for them.

In *California Institute of Technology*, supra, a unit of central plant personnel was deemed a typical functionally distinct and homogeneous powerhouse departmental unit of the type customarily found appropriate where there is no collective-bargaining history on a broader basis. Self-determination elections were directed in (1) a voting group of central plant section personnel (powerhouse employees), and (2) all other employees of the physical plant department. More limited intermediate groups were found inappropriate.

In *Tulane University*, 195 NLRB 329 (1972), the operations of four facilities were found integrated and centralized and a community of interest shared by all the wage employees. A unit confined to the main campus was therefore held inappropriate, and an election was directed in a bargaining unit embracing the wage employees of all four facilities.

15-280 Warehouse Units

440-1760-6700

The Board has recognized a distinction between employees in the retail store industry who perform warehouse functions and those who perform other functions. *A. Harris & Co*., 116 NLRB 1628 (1957). The employer's organizational integration of its operations does not preclude the establishment of any unit less than storewide in scope where the operations of the unit sought are devoted essentially to the warehousing functions of servicing the main and branch retail stores and the employees' principal and regular duties consist of performing what were typically warehouse functions. See also *Esco Corp*., 298 NLRB 837 (1990), in which the Board noted that *Harris* did not apply to nonretail warehouses, overriding inconsistent cases. Later, in *A. Russo & Sons, Inc.,* 329 NLRB 402 (1999), a divided Board answered the issue left open in *Esco* by holding that *Harris* does not apply in combination retail and wholesale operations.

The policy, adopted in *Harris*, may be spelled out as follows: A separate unit of warehouse employees is presumptively appropriate where (1) the warehouse operation is geographically separated from the retail store operations; (2) there is separate supervision of employees engaged in the warehousing functions; and (3) there is no substantial integration among the warehouse employees and those engaged in other functions. *A. Harris Co*., supra; and *J. W. Robinson Co*., 153 NLRB 989 (1965).

Thus, where the warehouse employees were under supervision separate from the retail stores, performed their work in a building geographically separated from the retail stores, were not integrated with any other employees in the performance of their regular work, and had different hours and wage rates, they constituted an employee group of a type the Board has found appropriate as a bargaining unit, at least in the absence of a controlling bargaining history including employees in a broader unit. *Wigwam Stores*, 166 NLRB 1034 (1967).

On the other hand, where warehouse employees were sought, but they were not geographically separated from the retail store operations and were engaged in activities substantially integrated with other store functions, the Board found that the proposed unit failed to meet the criteria for a separate warehouse unit enunciated in the *Harris* decision. *Wickes Corp*., 201 NLRB 610 (1973). The Board pointed out, for example, in *Levitz Furniture Co*., 192 NLRB 61 (1971), that the *Harris* factors must be satisfied for a separate warehouse unit to be found appropriate. See also *Sears, Roebuck & Co*., 180 NLRB 862 (1965); *Wickes Corp*., 201 NLRB 615 (1973).

For a period of time, the Board construed the geographically separate requirement broadly. See *Wickes Corp*., 255 NLRB 545 (1981). However, in *Roberds, Inc*., 272 NLRB 1318 (1984), the Board announced that it would henceforth apply a narrow construction to the requirement.

In *Sears, Roebuck & Co*., 151 NLRB 1356 (1965), the Board held that the warehouse employees having a degree of functional difference and autonomy, including geographic and supervisory separateness within the overall complex of the employer's retail operations, clearly demonstrated a community of interest among the warehouse employees sufficient to warrant placing them in a separate unit. See also *City Stores Co*., 152 NLRB 719 (1965); *John's Bargain Stores Corp*., 160 NLRB 1519 (1966); *Sears, Roebuck & Co*., 201 NLRB 1057 (1973), the only issues in that case involved the composition of the warehouse unit, and the Board found a unit appropriate larger than that petitioned for and permitted the election subject to a sufficient additional showing of interest. In an unnumbered publication, however, the Board vacated its Decision and Direction of Election in this case on withdrawal by the petitioner. This withdrawal came after the Board, for grounds not stated, had granted the employer's motion for reconsideration. Thus, what parts, if any, of the case are suspect are unknown so the case should be cited with caution, if at all.

A proposed warehouse unit was rejected when the facts showed that shipping and receiving, the functions performed by warehouse department employees, had been integrated with the material-moving functions performed by other commissary department employees in production areas. *Frisch's Restaurants*, 182 NLRB 544 (1970). See also *Rexall Drug Co*., 156 NLRB 1099, 1101 (1966); and *Charrette Drafting Supplies*, 275 NLRB 1294 (1985), in which the Board found that some of the *Harris* criteria had been met and rejected a separate unit.

The fact that overlapping of work skills exists among some employees in the stores and in the warehouse does not, in and of itself, destroy the homogeneity and mutuality of interests of the warehouse employees in the warehouse. *H. P. Wasson & Co*., 153 NLRB 1499, 1500 (1965). See also *Famous-Barr Co*., 153 NLRB 341 (1965); and *Sears, Roebuck & Co*., supra.

A retail warehouse unit should comprise employees performing "typical" warehouse functions. *A. Harris Co*., supra at 1633. For this reason, all employees in radio repair workrooms, and those who work in the fur storage vaults, were excluded from a warehouse unit. *Famous-Barr Co*., supra at 344.

Relevant considerations are the absence of a bargaining history on a broader basis, as noted, for example, in *Wigwam Stores*, supra, and the fact that no union seeks a broader unit, as for example, in *Sears, Roebuck & Co*., 152 NLRB 45, 48 (1965).

The lead case, A. *Harris Co*., supra, dealt with warehouse units in the retail store industry, and the cases discussed were therefore those which arose in that industry. Cases have been decided, however, in other industries, involving other enterprises in which the Board considers "all relevant factors'' in determining whether a separate unit would be appropriate. *Esco Corp*., supra. See also *Vitro Corp*., 309 NLRB 390 (1992).

Thus, by way of illustration, where the employer was engaged in providing health, accident, medical, hospital, and physicians' reimbursement insurance, a warehouse was involved which served as a storage facility for various forms used in filing claims under medical insurance programs. The warehouse was geographically separate from any of the employer's other facilities; there was different immediate supervision; 6 of the 12 employees sought were in job classifications unique to the warehouse; few transfers into or out of the warehouse occurred; and there was no bargaining history at the warehouse. A warehouse unit was found appropriate. *California Blue Shield*, 178 NLRB 716, 719–720 (1969).

Where an insurance company operated a storage facility, located away from its main office, which was used as a repository for records as well as supplies and forms, and six employees performed the receiving, storage, and transportation duties, the Board was of the opinion that the employees working in the storage facility might appropriately be separately represented if sought on that basis. However, they were included in an overall unit since the petitioning labor organization sought the more comprehensive unit. *Reliance Insurance Cos*., 173 NLRB 985, 986 (1969).

In *Scholastic Magazines*, 192 NLRB 461 (1971), an employer who manufactures and sells paperback books was involved. The petitioner sought a unit limited to the warehouse and maintenance departments. The Board found that the employer was engaged in a single highly integrated process and that the employees of the processing departments and warehouse employees participated equally and fully in the single process of filling customer orders. Therefore, for this reason and because no substantial distinctions could be drawn between the warehouse and maintenance departments and the processing departments with respect to wages, level of skills, supervision, benefits, and other conditions of employment, the comprehensive unit was found appropriate. Cf. *Garrett Supply Co*., 165 NLRB 561 (1967).

15-290 Research and Development Industry

The Board applies a traditional community-of-interest standard in determining bargaining units in the research and development industry. *Aerospace Corp*., 331 NLRB 561 (2000). In doing so, it considers "the nature of the business, i.e., testing to be a significant but not a determinative factor." and has rejected the contention that only facilitywide units are appropriate.

16. CRAFT AND TRADITIONAL DEPARTMENTAL UNITS

401-2525

440-1760-9101

Section 9(b) of the Act confers on the Board the discretion to establish the unit appropriate for collective bargaining and to decide whether such unit shall be the employer unit, craft unit, plant unit, or subdivision thereof. A craft unit is defined as:

> . . . one consisting of a distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment. [*Burns & Roe Services Corp*., 313 NLRB 1307, 1308 (1994).]

With respect to craft units, Section 9(b)(2) of the Act prohibits the Board from deciding "that any craft unit is inappropriate for [collective-bargaining] purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation." The procedures for such an election are at section 11091.3 of the Casehandling Manual.

Generally, employees constituting a functionally distinct departmental grouping with a tradition of separate representation have been treated in a manner similar to craft groups, and the Board has applied craft severance principles to them as well.

While special attention is given in this chapter to craft and departmental severance, particularly in the context of Section 9(b)(2) of the Act, we are also concerned with the *initial* establishment of craft and departmental units, i.e., where there has been no previous history of collective bargaining on a more comprehensive basis. Our discussion will proceed in that order.

16-100 Severance

440-8325-7591 et seq.

The interpretation of Section 9(b) of the Act has been reflected in the Board's decisional policy, and changes in interpretation have resulted in policy changes.

A policy change in this respect manifested itself in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967), the ostensible purpose being to free the Board "from the restrictive effect of rigid and inflexible rules" in determining bargaining units. Attention was called to the need in severance cases of balancing the interest of the employer and the total employee complement in maintaining industrial stability and the resulting benefits of an historical plantwide bargaining unit as against the interest of a portion of such complement having an opportunity to break away from the historical unit by a vote for separate representation. As a result, instead of being limited by the former tests (as set out in *American Potash Corp*., 107 NLRB 1418 (1954), the Board in *Mallinckrodt* broadened its judgmental scope "to permit evaluation of all considerations relevant to an informed decision in this area."

A number of factors were spelled out in *Mallinckrodt* to be considered in deciding craft issues. A more recent Board decision discussed a number of these criteria in the context of a skilled maintenance unit in a health care institution. *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993).

Historical Note: Under *American Potash Corp*., supra, severance had been granted when the employees sought constituted a true craft or traditional departmental group and the union which sought to represent them was their "traditional" representative. The only exceptions made were in four industries (basic steel, basic aluminum, lumber, and wet milling). These exceptions were designed to preserve firmly established bargaining patterns created by the degree of integration in the production process.

16-110 The *Mallinckrodt* Criteria

16-111 True Craft or Functionally Distinct Department

440-1760-9133-0500

The first questions to be decided are: Does the proposed unit consist of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis? See *Firestone Tire Co*., 223 NLRB 904 (1976). Does it consist of employees constituting a functionally distinct department employed in trades or occupations for which a tradition of separate representation exists? These requirements have always been in effect. The emphasis in *Mallinckrodt* was on avoiding the use of a "loose definition" of what constitutes a true craft or a traditional department. Craft units include apprentices and helpers. *American Potash Corp.*, supra at 1423, and *Fletcher Jones Chevrolet*, 300 NLRB 875 (1990).

In *Metropolitan Opera Assn*., 327 NLRB 740 (1999), a Board majority found that a group of choristers were not a distinct and homogenous group.

See definition of craft in introduction to this chapter and set out in *Burns & Roe,* supra. See also *Schaus Roofing*, 323 NLRB 781 (1997).

16-112 History of Collective Bargaining of Employees Sought to be Represented

440-1760-9133-2100

This criterion entails an evaluation of the history of collective bargaining of the employees sought to be represented at the plant involved, and at other plants of the employer. Special consideration is required in deciding whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation. Inquiry is also made into the history and pattern of collective bargaining in the industry involved. See, e.g., *Firestone Tire Co*., supra. See also *Kaiser Foundation Hospitals*, supra and *Metropolitan Opera*, supra.

16-113 Separate Identity

440-1760-9133-7800

To what extent have the employees in the proposed unit established and maintained their separate identity during the period of inclusion in the broader unit? Also relevant is the nature of their participation, or lack of it, in the establishment and maintenance of the existing pattern of representation, and the prior opportunities, if any, afforded them to obtain separate representation. See, e.g., *Beaunit Corp*., 224 NLRB 1502 (1976).

16-114 Degree of Integration of the Employer's Production Processes

440-1760-9133-8300

The degree of integration of the employer's processes is evaluated, including the extent to which the continued normal operation of the production processes is dependent on the performance of the assigned functions of the employees in the proposed unit. Integration of operations requiring some crossover between craft and noncraft employees, or between employees of different crafts, is permissible in a craft situation. See *E. I. du Pont & Co*., 162 NLRB 413 (1966). See also *Burns & Roe*, supra.

16-115 Qualifications of the Union Seeking Severance

440-1760-9133-1200

A subject of inquiry relates to the qualifications of the union seeking to "carve out" a separate unit in the face of a broader bargaining history. These, in turn, depend on its experience in representing employees such as those involved in the severance proceeding; while no longer a sine qua non, the fact that it may or may not have devoted itself to representing the special

interests of a particular craft or traditional departmental group of employees nonetheless bears consideration. See *Beaunit Corp*., supra at 1505. See also *Kaiser Foundation Hospitals*, supra.

The former requirement that craft severance petitions be filed by traditional representatives of the employees was noted by the Board in an early case declining to permit craft severance in a decertification case. *Campbell Soup Co*., 111 NLRB 234 (1955).

The above factors, as already indicated, should not be regarded as an inclusive or exclusive listing of all the criteria involved in making unit determinations in severance cases. As the Board pointed out in *Mallinckrodt* these are examples of the pertinent areas of inquiry and are intended to illustrate the fact that "determinations will be made on a case-by-case basis," and only after weighing all relevant factors. "In severance cases such as this we do not apply automatic rules but rather evaluate all relevant considerations." *Kimberly-Clark Corp*., 197 NLRB 1172 (1972).

16-120 Application of Severance Principles

440-8325-7591

440-8325-7596

440-8325-7562

A petitioning union and an intervenor sought a unit of tool-and-die makers, allied toolroom craftsmen, and their apprentices. The Board found that the employees sought to be severed shared a substantial community of interest with other employees in the existing plantwide unit; although they possessed special skills, their work was not confined to tasks requiring the exercise of such skills; there was an overlap in actual work assignments between employees within and outside the proposed unit; and the toolroom employees, even when engaged in their specialized tasks, performed work that was an integral part of the production process. On this basis, including a long bargaining history, severance was denied. *Holmberg, Inc*., 162 NLRB 407 (1967).

Where, among other things, the functional coherence and community of interest of toolroom and production employees had long been recognized, as reflected in part by existing job posting and seniority practices and in a 20-year bargaining history, and no attempt had been made for separate representation or recognition, severance was denied. *Universal Form Clamp Co*., 163 NLRB 184 (1967).

In another toolroom severance case, the petition for the requested unit was denied on the basis of the functional interrelationship of toolroom employees with other phases of the employer's production operation; frequent contact and common interest with production employees and with other skilled employees; a 12-year bargaining history; and "the questionable qualifications of the Petitioner as a specialist in craft representation." *American Bosch Arma Corp.*, 163 NLRB 650 (1967). A machinist group was not entitled to severance where, in the face of a long bargaining history, it was found that the employees in the group were primarily engaged in production work under the same supervision as the production employees, and there was no showing that "any of their alleged special interests have been prejudiced by their inclusion in the existing unit." *Paris Mfg. Co*., 163 NLRB 964 (1967).

The factor of integrated production processes was significant in the denial of severance to proposed separate units of electricians and instrumentmen. Thus, the finding that the necessity for continuity in the production processes and the high degree to which these employees were integrated with these processes militated heavily against severance from an established plantwide unit. *Alton Box Board Co*., 164 NLRB 919 (1967).

Although in a decision prior to *Mallinckrodt* a severance election had been directed, the contention that this decision constituted binding precedent was rejected on the ground that the policy which existed at that time no longer prevailed and that *all* relevant factors must now be considered. *Allied Chemical Corp*., 165 NLRB 235 (1967).

Elections in separate units of maintenance mechanics, auto mechanics, and instrumentmen, as well as in a unit of production and maintenance employees, were sought in a case where the

employees in the first three units had been continuously represented as part of the production and maintenance unit. One of the reasons, among others, for denying severance elections was the fact that, under the bargaining contracts covering the plantwide unit, all personnel enjoy common seniority rights, allowing auto mechanics, for example, to "bump" into production jobs in the event of layoff. *Bunker Hill Co*., 165 NLRB 730 (1967).

Craft status, the petitioner's qualifications as representative, coordination in the production process, bargaining history, and industry and area bargaining—all these factors *seriatim*—were considered in a case involving severance requests for units of maintenance electricians and instrument maintenance employees. Both groups were found to consist of craftsmen and the petitioning union qualified as the traditional representative. However, coordination of the requested employees in the production processes was found to exist, and the bargaining history at the plant and in the industry and area favored the plantwide unit. A contention by the petitioner that the incumbent union had not "provided adequate representation for the special interests of the craftsmen" was rejected on the basis of the evidence. *Allen-Bradley Co*., 168 NLRB 15 (1968).

Adequacy of representation was treated as a factor in cases involving toolroom employees in which severance was denied. *Trico Products Corp*., 169 NLRB 287 (1968). See also *Square D Co*., 169 NLRB 1040 (1968). In another case where adequacy of representation was an issue, viz., the question revolving around grievance handling, it was concluded that the grievances were relatively minor compared to the total picture of representation and that the employees sought to be severed had not maintained a separate identity for bargaining purposes, "but over the years have acquiesced in the established bargaining pattern, have participated therein, and have received the benefits of that participation." *Radio Corp. of America*, 173 NLRB 440 (1969). See *Beaunit Corp*., supra, petitioning union was newly formed and the Board considered that as one factor in rejecting severance.

Mailing room employees were found not to possess the essential attributes of craftsmen and therefore did not meet the tests for severance from an established bargaining unit. *Republican Co*., 169 NLRB 1146 (1968). Composing room employees who possessed some skills, but such skills were not equal to those in the commercial printing industry generally, were for this reason, among others, denied severance. *International Tag & Business Forms Co*., 170 NLRB 35 (1968).

Powerhouse employees were denied severance under the *Mallinckrodt* policy on the basis, inter alia, of a long and stable bargaining history at the terminal in question and the similar bargaining practice at like terminals of the employer involved and other major oil companies, and the high degree of integration existing between the powerhouse function and the storage and distribution operations of the terminal. It was pointed out, however, that this did not imply that units of powerhouse employees were inherently or presumptively inappropriate and could never be severed; the circumstances in each case would be examined. *Mobil Oil Corp*., 169 NLRB 259 (1968).

In *Firestone Tire Co*., supra, the Board affirmed the dismissal of a petition seeking to sever a group of "skilled tradesmen" from an overall production and maintenance unit. The Regional Director denied severance based on the heterogeneous nature of the unit sought, the absence of bargaining history, and the high degree of integration of operation.

On the other hand, in a case involving toolroom employees, where such employees were found to constitute an identifiable departmental group engaged in the tool-and-die making craft, who had retained their separate identity, the Board noting that contract negotiations had resulted in a 9-cent-per-hour increase for all production and maintenance employees but the contract was "conspicuous by the absence of any reference to toolmakers as within the contract coverage," severance was granted. *Buddy L. Corp*., 167 NLRB 808, 809–810 (1967). The Board stated:

> . . . to deny separate representation where to do so advances the cause of stability little, if at all, might also carry the seeds of instability. We think that it might do so in the present situation, and, we also think that to deny separate representation in the present case would be

> contrary to the policies of the Act as it would deny employees the freedom of choice Congress considered as equally essential; in proper circumstances, to achieve the peace and stability necessary if our commerce is to flow without interruption.

In like vein, the Board granted a craft severance election to a group of toolroom employees, holding that they constituted an identifiable group of highly skilled employees who, notwithstanding their inclusion for 13 years in the production and maintenance unit, had maintained their separate identity and had not participated actively in the affairs of the intervenor or utilized the contractual grievance procedure. "On this record," said the Board, "we cannot conclude that the separate community of interests which the toolroom employees enjoy by reason of their skills and training has been irrevocably submerged in the broader community of interest which they share with other employees." *Eaton Yale & Towne, Inc*., 191 NLRB 217, 218 (1971). See also *Jay Kay Metal Specialties Corp*., 163 NLRB 719 (1967).

A severance election was granted to a group of tool-and-die makers and machinists. Among the reasons given for granting them a self-determination election, in addition to noting that they constituted "a homogeneous, identifiable, traditional, departmental group with a nucleus of craft tool and die makers and machinists who are engaged in the skills of their trade," was the fact that they had retained their identity as a distinct group during their inclusion in the broader unit. *Mason & Hanger-Silas Mason Co*., 180 NLRB 467 (1970). Compare *Union Carbide Corp*., 205 NLRB 794 (1973).

In *La-Z-Boy Chair Co*., 235 NLRB 77, 78 fn. 5 (1978), the Board distinguished its no severance decision there from its holding in *Buddy L* and *Eaton Yale & Towne*, supra, stating, "the lack of showing here that the Employer contracts out any diemaking or repair work clearly distinguished this case from *Eaton Yale* and *Buddy L*."

A group of powerhouse employees was granted severance from a production and maintenance unit on the basis of special circumstances, including a relatively short bargaining history on a comprehensive basis and the fact that separate representation of employees only recently added to the existing unit could not prove unduly disruptive. *Towmotor Corp*., 187 NLRB 1027 (1971).

Truckdrivers were accorded a self-determination election as a "homogeneous, functionally distinct group such as the Board has traditionally accorded the right of self-determination, notwithstanding a history of bargaining on a broader basis." The fact that the petitioning union had historically represented truckdrivers was also taken into consideration. *Wright City Display Mfg. Co*., 183 NLRB 881 (1970). See also *Downingtown Paper Co*., 192 NLRB 310 (1971), but compare *Olinkraft, Inc*., 179 NLRB 414 (1969), and *Dura-Containers*, 164 NLRB 293 (1967).

Bakers were accorded a severance election. The Board based its decision on the fact that they were "an identifiable group unit of craft bakers who are engaged in the skills of their trade and who perform functions that are different from and not integrated with those of other in-store employees." It added that the bargaining history of their inclusion in the broader unit did not militate against their severance, "particularly in view of the recent changes in the Employer's method of baking and the changed job requirements." Also bearing on this determination was the inconclusive history and pattern of bargaining in the industry. *Safeway Stores*, 178 NLRB 412 (1969). Compare *Jordan Marsh Co*., 174 NLRB 1265 (1969).

For other cases involving the craft severance issue, see *Walker Boat Yard*, 273 NLRB 309 (1984) (no severance of diesel repair shop in boatyard unit); *Supermercados Pueblo*, 203 NLRB 629 (1973) (meat department and delicatessen); *Animated Film Producers Assn*., 200 NLRB 473 (1973) (animated "Storymen"); *Kimberly-Clark Corp.*, supra (tradesmen and warehousers); *Cameron Iron Works*, 195 NLRB 797 (1972) (die sinkers); *Lone Star Industries*, 193 NLRB 80 (1971) (marine department employees); *ASG Industries*, 190 NLRB 557 (1971) (electricians and powerhouse employees); *Dixie-Portland Flour Mills*, 186 NLRB 681 (1970) (drivers); *Goodyear*

Tire Co., 165 NLRB 188 (1967) (electricians); *Aerojet-General Corp*., 163 NLRB 890 (1967) (tool-and-die makers); and *North American Aviation*, 162 NLRB 1267 (1967) (welders).

See *Burns & Roe Services Corp.*, 313 NLRB 1307 (1994), a craft issue case containing an excellent discussion of other electrician cases.

16-130 Severance of Maintenance Departments

440-8325-7510

Employees comprising a maintenance department do not constitute a homogeneous group of skilled craftsmen to whom craft severance is customarily granted. Although the Board had in the past permitted separate representation of maintenance employees in the absence of a prior collective-bargaining history, it has been the Board's established policy, before *Mallinckrodt* as well as after, to decline to sever a group of maintenance employees from an existing production and maintenance unit in the face of a substantial collective-bargaining history on a plantwide basis. *Armstrong Cork Co*., 80 NLRB 1328, 1329 (1949). *Union Steam Pump Co*., 118 NLRB 689, 693 (1957); and *Seville-Sea Isle Hotel Corp*., 125 NLRB 299, 300 (1960).

Thus, a petition seeking to sever a unit of all maintenance employees from an historic production and maintenance unit was denied. *General Foods Corp*., 166 NLRB 1032 (1967). The Board in dismissing a petition for severance of a unit of maintenance employees characterized the proposed unit as a heterogeneous group of diversified workers who perform routine maintenance functions at locations all over the plant. *Moloney Electric Co*., 169 NLRB 464 (1968). Similarly, maintenance employees were not severed from an overall production and maintenance unit. *Wah Chang Albany Corp*., 171 NLRB 385 (1968).

In these cases, the Board, despite the policy which was in existence before *Mallinckrodt*, referred to the factors described in that decision. There was no indication, however, that a different result would have been reached in the absence of these factors.

16-140 Construction Industry

For a discussion of craft units in construction, see chapter 15.

16-200 Initial Establishment of Craft or Departmental Unit

355-2200

420-1200

440-1760-1000

440-1760-9133 et seq.

Up to this point, we described the application of Board law to petitions seeking severance from more comprehensive units of craft or departmental groups, including maintenance departments. We turn now to the initial establishment of craft or departmental groups.

An obvious distinction exists between the two situations, and the cases clearly point up the dichotomy between the two.

With respect to craft or departmental units, the general rule is: Where no bargaining history on a more comprehensive basis exists, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is generally appropriate. See, for example, *E. I. du Pont & Co*., 162 NLRB 413 (1966). See also *Mirage Casino-Hotel*, 338 NLRB 529 (2002); and *E. I. du Pont & Co*., 192 NLRB 1019 (1971).

In *Burns & Roe*, supra at 1308, the Board described the test:

> In determining whether a petitioned-for group of employees constitutes a separate craft unit, the Board looks at whether the petitioned-for employees participate in a formal training or apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the petitoned-for employees overlap with the duties of the excluded employees; whether the employer assigns work according to need

rather than on craft or jurisdictional lines; and whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.

With respect to maintenance departments, the general rule is: Where no bargaining history on a broader basis exists, and the maintenance employees are readily identifiable as a group whose similarity of functions and skills create a community of interest such as would warrant separate representation, an election is directed in such unit. If a production and maintenance unit is also sought, a self-determination election is directed in voting groups of (a) maintenance employees and (b) production employees. *American Cyanamid Co*., 131 NLRB 909, 911–912 (1961).

In that case, the Board stated:

> The Board must hold fast to the objectives of the statute using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees. To be effective for that purpose, each unit determination must have a direct relevancy to the circumstances within which collective bargaining is to take place. While many factors may be common to most situations, in an evolving industrial complex the effect of any one factor, and therefore the weight to be given it in making the unit determination, will vary from industry to industry and from plant to plant. We are therefore convinced that collective-bargaining units must be based upon all the relevant evidence in each individual case. Thus we shall continue to examine on a case-by-case basis the appropriateness of separate maintenance department units, fully cognizant that homogeneity, cohesiveness, and other factors of separate identity are being affected by automation and technological changes and other forms of industrial advancement.

In *Ore-Ida Foods*, 313 NLRB 1016 (1994), the Board summarized the cases involving initial establishment of maintenance units. See also *Macy's West*, *Inc.,* 327 NLRB 1222 (1999). The Board found a separate maintenance unit appropriate in the following cases: *Lawson Mardon U.S.A.*, 332 NLRB 1282 (2000); *Yuengling Brewery Co. of Tampa*, 333 NLRB 893 (2001); and *Capri Sun, Inc*., 330 NLRB 1124 (2000).

It should be noted that in *U.S. Plywood-Champion Papers*, 174 NLRB 292 (1969), the Board dismissed a petition for a separate departmental maintenance unit and directed an election in the overall production and maintenance unit. It noted that in *American Cyanamid* it "did *not* hold that every maintenance department unit must automatically be found to be an appropriate unit for collective bargaining purposes, but only that such unit may be appropriate where the record establishes that maintenance employees are a separately identifiable group performing similar functions which are separate from production and having a community of interest such as would warrant separate representation." Distinguishing *Crown Simpson Pulp Co*., 163 NLRB 796 (1967), the Board found on its evaluation of all relevant factors that the proposed maintenance department unit was not composed of a distinct and homogeneous group of employees with interests separate from those of other employees. It was therefore inappropriate as a bargaining unit. See also *F. & M. Schafer Brewing Co*., 198 NLRB 323 (1972); and *Franklin Mint Corp*., 254 NLRB 714 (1981).

Integration of operations and functions was posed as a factor in a case involving no prior bargaining history and considered together with all other relevant factors. Nonetheless, separate groups of craft employees were found entitled to self-determination elections. In arriving at this decision, the Board pointed out that this did not foreclose the possibility that, in other circumstances, the integration of operations and functions may be such as to warrant a finding that only an overall unit is appropriate. It added: "Nor do we express an opinion as to how we would rule in a case similar to this one, but where, however, there is a history of bargaining on a production and maintenance basis and severance of craft units is sought." *Union Carbide Corp*., 156 NLRB 634 fn. 7 (1966) .

In another case without a prior bargaining history, however, it was concluded that maintenance electricians were essentially no more than specialized workmen with limited skills

and training, adapted to the particular processes of the employer's operations, and therefore were not entitled to separate representation on a craft unit basis. *Timber Products Co*., 164 NLRB 1060 (1967). The Board there noted that the history of bargaining in the lumber industry has been "wall to wall units." The Board appears to have varied from this history. See *Willamette Industries v. NLRB*, 144 F.3d 877 (D.C. Cir. 1998), denying enforcement to Board certification. Similarly, even absent a bargaining history, a group of "setup and operator-setup employees" was held not to constitute a craft unit of printing pressmen because they were "not predominantly engaged in such function." *Kimball Systems*, 164 NLRB 290 (1967). See also *Monsanto Co.*, 172 NLRB 1461 (1968), and *Proctor & Gamble Paper Products Co*., 251 NLRB 492 (1980).

On the other hand, maintenance electricians were found to possess the traditional skills of their craft. The only factor weighing against the separate craft group unit was the highly integrated nature of the employer's production process. But since this did not obliterate the lines of separate craft identity, it was not, in itself, sufficient to preclude the formation of a separate craft unit. There was no prior bargaining history at the plant. *Anheuser-Busch, Inc*., 170 NLRB 46 (1968). Note: in this case the Board used the *Mallinckrodt* tests in its determinations, advising, however, that such were "not controlling" in a nonseverance case.

In *Buckhorn, Inc*., 343 NLRB 201 (2004), the Board rejected a petition for a separate maintenance unit at a plastic container manufacturer. In doing so, the Board relied on a high degree of functional integration at the plant, the absence of a skills disparity, evidence of permanent transfers between the maintenance and production employees, and the absence of common surpervision among the maintenance employees. Accord: *TDK Ferrites Corp.,* 342 NLRB 1006 (2004).

The Board has held that automobile mechanics can constitute a group of craft employees and be represented in a unit separate and apart from other service department employees. *Dodge City of Wauwatosa*, 282 NLRB 459 (1986); and *Fletcher Jones Chevrolet*, 300 NLRB 875 (1990). See also *Phoenician*, 308 NLRB 826 (1992), involving a group of golf course maintenance employees who were included in a unit with landscape employees using traditional community of interest criteria. In doing so, the Board found that neither of the groups had special skills.

In *Mirage Casino-Hotel*, 338 NLRB 529 (2002), a panel majority directed an election in a unit of carpenters and upholsterers at a gaming hotel/casino. In doing so, that Board noted that the carpenters performed craft work, and together with the upholsterers, were separately supervised, and had limited interchange with other engineering department employees. The Board included the upholsterers with the carpenters, noting such a unit was an area practice.

In *Turner Industries Group, LLC,* 349 NLRB 428 (2007), the Board considered the bargaining unit history in a multicraft unit with the predecessor employer but decided that there was a strong community of interest with other excluded employees and directed their inclusion in the multicraft unit. This case is also of interest because the Board found it unnecessary to decide whether the employer was primarily engaged in the building and construction industry for purposes of determining an appropriate eligibility formula.

16-300 Skilled Maintenance-Health Care

Skilled maintenance units are one of the appropriate units under the Health Care Rules. See section 15-170. See *Jewish Hospital of St. Louis*, 305 NLRB 955 (1991).

In *University of Pittsburgh Medical Center*, 313 NLRB 1341 (1994), the Board found telecommunication specialists to be skilled maintenance employees. It also rejected a contention that a skilled maintenance unit should become part of a larger unit. The test in such a case is one of traditional community of interest and in this case the Board concluded that the unit maintained itself as a distinct entity notwithstanding mergers and consolidations.

In *Toledo Hospital*, 312 NLRB 652 (1993), the Board dealt with a number of classifications that are included in a skilled maintenance unit including biomedical technicians. See also *San Juan Medical Center*, 307 NLRB 117 (1992). In another case, the Board excluded

groundskeepers from these units and decided a number of other skilled maintenance placement issues. *Ingalls Hospital*, 309 NLRB 393 (1992). See also *St. Luke's Health Care Assn*., 312 NLRB 139 (1993). And in *Silver Cross Hospital,* 350 NLRB 114 (2007), the Board found that the computer operators did not have the skills or duties common to skilled maintenance employee classifications nor were they helpers or assistants who might qualify for inclusion in such a unit.

In *Hebrew Home & Hospital*, 311 NLRB 1400 (1993), the Board affirmed the decision of an Acting Regional Director approving a separate skilled maintenance unit at a nursing home.

In *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), the Board denied craft severance of a skilled maintenance unit by applying *Mallinckrodt* principles (see sec. 15–170, supra).

17. STATUTORY EXCLUSIONS

In defining "employees," Section 2(3) of the Act specifically excludes agricultural laborers, domestic service employees, individuals employed by their parent or spouse, independent contractors, supervisors, individuals employed by employers subject to the Railway Labor Act, and employees of any other person who is not an employer within the meaning of the statutory definition.

We consider these statutory exclusions in the order in which they appear in Section 2(3).

17-100 Agricultural Employees

177-2484-1200 et seq.

460-7550-1200

Annually, since July 1946, Congress has added to the Board's appropriation a rider which in effect directs the Board to be guided by the definition set forth in Section 3(f) of the Fair Labor Standards Act in determining whether an employee is an agricultural laborer within the meaning of Section 2(3) of the National Labor Relations Act.

The Board has frequently stated that its policy is to consider, whenever possible, the interpretation of Section 3(f) adopted by the Department of Labor, which is charged with the responsibility for administering the Fair Labor Standards Act. See, for example, *Bayside Enterprises v. NLRB*, 429 U.S. 298 (1977); *Davis Grain Corp.*, 203 NLRB 319 (1973); *Jack Frost, Inc.*, 201 NLRB 659 (1973); *CPA Trucking Agency*, 185 NLRB 452 (1970); *D'Arrigo Bros. Co. of California*, 171 NLRB 22 (1968); *Samuel B. Gass*, 154 NLRB 728 (1965); *Bodine Produce Co.*, 147 NLRB 832 (1964); and *Imperial Garden Growers,* 91 NLRB 1034 (1950).

Thus, in *Jack Frost*, supra, the Board referred to Section 3(f) of the Fair Labor Standards Act which reads, in pertinent part, as follows:

> [A]griculture includes farming in all its branches and among other things includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . 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.

As the truckdrivers and egg processing plant employees involved in this case were not engaged in direct farming operations of the type enumerated in the primary definition of agriculture, the question was whether they were engaged in activities included in the secondary definition of that term (see *Farmers Reservoir Irrigation Co. v. McComb, Wage & Hour Administrator*, 337 U.S. 755, 762 (1949)). The Board then relied on a Labor Department Interpretive Bulletin (see 29 CFR § 780.135), indicating that when processors enter into contractual agreements with independent farmers whereby the farmers agree to raise poultry to marketable size and the processor supplies the baby chicks, furnishes the required feed, and retains title to the chickens until they are sold, the activities of the independent farmers and their employees in raising the poultry are clearly exempt, but the activities of the processors are not considered "raising of poultry" and their employees are therefore not exempt on that ground. The Board's position was affirmed by the Supreme Court in *Bayside Enterprises*, supra. See also *Holly Farms Corp. v. NLRB*, 116 S.Ct. 1396 (1996).

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). And the question of employee status is not decided on an employerwide basis, but on a classification by classification analysis. Id. at fn. 1.

A thorough discussion of several of the criteria used by the Board in determining whether or not employees are "agricultural laborers" may be found in *Bodine Produce Co.*, supra. These depend in major measure on the nature of the employer's business.

One criterion is whether the operation is an established part of agriculture, is subordinate to the farming aspect involved, and does not amount to an independent business. See Labor Department Interpretive Bulletin, 29 CFR § 780; *Jack Frost, Inc.,* supra, and *Bayside Enterprises,* supra.

Where the employer produced and supplied the feed which enabled the production of the poultry and then processed and marketed the product, with the agricultural function of tending and feeding the live birds performed by the independent growers intervening in the chain, the agricultural phase of the entire operation was an incident of the employer's nonagricultural activities rather than the converse. *CPA Trucking Agency*, supra. See also *Draper Valley Farms*, 307 NLRB 1440 (1992), finding that chicken catchers are not agricultural when working on the farms of independent growers. The Supreme Court upheld as reasonable, the Board's conclusion that "livehaul crews" are employees. The Court found that the work of these crews was tied to the employers processing operations rather than incidental to farming operations. *Holly Farms Corp. v. NLRB*, supra.

Another criterion is whether the employer confines the operation in question to his own produce.

Where the employer was engaged in the production, processing, and wholesaling of eggs, had been purchasing about half of its eggs from outside sources, and could not substantiate his claim that new production facilities would be able to replace the outside sources, the Board could not find that the employer came within the terms of the agricultural exemption. *Cherry Lane Farms*, 190 NLRB 299 (1971). See also *CPA Trucking Agency*, supra; *D'Arrigo Bros. Co. of California*, supra. More recently, the Board has declined to set a standard based on the percentage coming from outside sources. Rather the Board will assert jurisdiction "if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question." *Camsco Produce Co.*, 297 NLRB 905 (1990). See also *Campbells Fresh*, 298 NLRB 432 (1990); *Cal-Maine Farms*, 307 NLRB 450 (1992); and *Agrigeneral L.P.,* supra.

A different test applies when considering whether workers who perform agricultural and nonagricultural work are exempted from the definition of "employee." In these cases, the test is substantiality, not regularity. Thus, where cutter packers spent 50 percent of their time performing nonagricultural work, they were considered to be employees because the amount of nonagricultural work was substantial. *Produce Magic, Inc*., 311 NLRB 1277 (1993). But in *Pictsweet Mushroom Form*, 329 NLRB 852 (1999), the Board denied review of a Regional Director finding that mushroom slicers were agricultural employees. In doing so, the Regional Director relied on the fact that all the other workers were agricultural laborers, that the slicing did not essentially change the natural state of the mushroom and that the slicers were only a small part of the employers operation.

Other cases holding that employees were not exempt from the coverage of the Act: *Mario Saikhon, Inc.*, 278 NLRB 1289 (1986) (field packing employees); *Davis Grain Corp.*, 203 NLRB 319 (1973) (grain elevator employees); *Batley-Janss Enterprises*, 195 NLRB 310 (1972) (drivers of freshly cut alfalfa); and *John Bagwell Farms*, 192 NLRB 547 (1971) (feed mill employees).

A Fifth Circuit decision rejected a distinction between workers on large mechanized farms and those employed on family farms. The court held that both groups are excluded from the Act's coverage because the agricultural exemption "is not measured by the magnitude of [the farmer's] planting nor in the prolificacy of his harvest." *Food & Commercial Workers Local 300 v. McCulloch*, 428 F.2d 396, 399 (5th Cir. 1970).

Adverting again to the legislative rider to the Board's appropriation act, mention should be made of the fact that annually, since 1954, Congress has added in the definition of agricultural laborers, and, thus, exempts from the Board's jurisdiction "employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 percent of the water stored or supplied thereby is used for farming purposes."

Thus, where employees were found by the Board to have engaged solely in the functions here described and more than 95 percent of the water stored or supplied by their employer was used for farming purposes, the Board found that it was precluded from asserting jurisdiction by reason, inter alia, of the fact that these employees were agricultural employees as defined in the rider to the Board's current appropriation act. *Minidoka Irrigation District*, 175 NLRB 880 (1969). See also *Truckee-Carson Irrigation District*, 164 NLRB 1176 (1967); and *Sutter Mutual Water Co.*, 160 NLRB 1139 (1966).

Similarly, employees engaged in the revegetation of mined land as a part of a reclamation project, are exempt from Board jurisdiction. *Drummond Coal Co.*, 249 NLRB 1017 (1980).

17-200 Domestics

177-2484-2500

Individuals who are in the domestic service of any family or person at his home are excluded from the coverage of the Act. See the definition of "employees" in Section 2(3). Individuals employed by a business rather than a family are employees. The Board's "focus is on the principals to whom the employer-employee relationship *in fact* runs and not merely to the undisputely 'domestic' nature of the services rendered." *Ankh Services*, 243 NLRB 478, 480 (1979). See also *NLRB v. Imperial House Condominiums*, 831 F.2d 999 (11th Cir. 1987).

17-300 Individuals Employed by Their Parent or Spouse

177-2484-3700

The problems encountered by the Board under this heading go beyond problems with the statutory language. The question is in some cases one of Board policy underlying the unit treatment of "relatives of management" when corporate ownership is involved. This is treated specifically in section 19-300, infra.

17-400 Independent Contractors

177-2414

177-2484-5000

460-7550-6200

Section 2(3) of the Act excludes from the definition of "employee," as spelled out in that section, "any individual having the status of an independent contractor."

In meeting this provision, Congress did not define the status, but intended that in each case the issue should be determined by the application of general agency principles. *NLRB v. United Insurance Co.,* 390 U.S. 254 (1968). The party asserting independent contractor status bear the burden of establishing that status. *Community Bus Lines,* 341 NLRB 474 (2004).

Under agency principles, each case is determined on its own facts. *Frito-Lay, Inc. v. NLRB*, 385 F.2d 180 (7th Cir. 1967).

Restatement 2d, *Agency* § 220(2), sets out the following factors for determining whether one acting for another is a servant or an independent contractor:

(a) the extent of control which . . . the master may exercise over the details of work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the . . . occupation;
(e) whether the employer or top workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

With respect to item (c) above—Community Custom—see *Amerihealth Inc./Amerihealth HMO*, 329 NLRB 870 (1999), holding physicians to be independent contractors.

The major principle, regularly enunciated by the Board and the courts in this phase of the law, is that the appropriate test to apply in determining whether certain individuals are independent contractors (and not under the Act) or "employees" (and therefore under the Act) is the common law of agency. *NLRB v. United Insurance Co.*, supra; *Ace Doran Hauling Co. v. NLRB*, 462 F.2d 190 (6th Cir. 1972); *Gary Enterprises*, 300 NLRB 1111 (1990); *Portage Transfer Co.*, 204 NLRB 787 (1973); and *Associated General Contractors*, 201 NLRB 311 (1973).

Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. See for example *Lakes Pilots Assn*., 320 NLRB 168 (1995). On the other hand, when control is reserved only as to the result sought, an independent contractor relationship exists. *Gold Medal Baking Co*., 199 NLRB 895 (1972).

The Board does not consider requirements imposed by the government to constitute employer control; it is considered government control, *Air Transit,* 271 NLRB 1108, 1110 (1984), and *Elite Limousine Plus*, 324 NLRB 992 (1997).

In *Standard Oil Co.*, 230 NLRB 967, 968 (1977), the Board described the test:

> Among factors considered significant at common law in connection with the "right to control" test in determining whether an employment relationship exists are (1) whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business; (2) whether they have permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have proprietary interest in the work in which they are engaged; and, (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.

The Board does not regard as determinative the fact that the written agreement defines the relationship as one of "independent contractor" (*National Freight*, 153 NLRB 1536 (1965), and *Big East Conference*, 282 NLRB 335, 345 (1986)); or that the employer does not make payroll deductions and the drivers pay their own social security and other taxes (*Miller Road Dairy*, 135 NLRB 217, 220 (1962)); or that the drivers are free to solicit their own passengers in addition to complying with the employer's dispatch orders, or that the employer does not give the drivers written driving instructions (*Southern Cab Corp.*, 159 NLRB 248 fn. 4 (1966)); and *Diamond Cab*, 164 NLRB 859 (1967)). In *BKN, Inc.,* 333 NLRB 143 (2001), the Board found the freelance writers, designers and artists for a television production company to be employees noting extensive supervision by that company.

In any analysis of the cases presenting independent contractor issues, once the general rule has been stated, its application can only be discussed in empiric terms for, as the Seventh Circuit, among others, has said, each case must be determined on its own facts (*Frito-Lay, Inc. v. NLRB*, supra at 188). In these circumstances, several illustrative cases will be considered here in the light of the factual content in which they were decided. It may be helpful to divide our examples along

the more typical industry lines. As the independent contractor issue arises with some degree of frequency in the trucking industry, we shall begin with that industry.

Before doing so, note that the Board held oral argument on two independent contractor cases and then found the pickup and delivery drivers in *Roadway Package System*, 326 NLRB 842 (1998), to be employees and the customer delivery drivers to be independent contractors in *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). In *Argix Direct, Inc.*, 343 NLRB 1017 (2004), the Board found independent contractor status in a unit of truckdrivers on facts similar to *Dial-A-Mattress*.

Later in *Igramo Enterprise, Inc*., 351 NLRB 1337 (2007), the Board distinguished *Argix* to find that carrier drivers who picked up laboratory specimens, were not independent contractors. The Board particularly noted that the drivers had no written agreements with the employer, could not elect not to work without penalty and could not change the order of deliveries.

17-410 Trucking Industry

177-2484-5067

The trucking industry has generated a large number of cases presenting the independent contractor issue. Because, as indicated, the determinations are so fact-based, little purpose is served by summarizing the facts of particular cases. Rather, we have listed below a series of cases presenting independent contractor issues with different results. Among the factors considered by the Board in reaching its decisions are: (1) right to reject loads; (2) right to perform hauling for other carriers; (3) right to determine work schedules; (4) obligations to pay for fuel and maintenance; and (5) requirements to run predetermined routes.

Cases Finding Independent Contractor Status

– *Central Transport, Inc.*, 299 NLRB 5 (1990).
– *Precision Bulk Transport*, 279 NLRB 437 (1986).
– *Don Bass Trucking*, 275 NLRB 1172 (1985).
– *Austin Tupler Trucking*, 261 NLRB 183 (1983).
– *C. C. Eastern, Inc.*, 309 NLRB 1070 (1992).
– *Diamond L Transportation*, 310 NLRB 630 (1993).
– *Dial-A-Mattress Operating Corp.,* 326 NLRB 884 (1998).
– *Argix Direct, Inc.*, 343 NLRB 1017 (2004).
– *AAA Cab Services,* 341 NLRB 462 (2004).

Cases Finding Employee Status

– *Corporate Express Delivery System,* 332 NLRB 1522 (2000).
– *Slay Transportation Co.,* 331 NLRB 1292 (2000).
– *R. W. Bozel Transfer,* 304 NLRB 200 (1991).
– *Roadway Package System*, 288 NLRB 196 (1988).
– *North American Van Lines*, 288 NLRB 38 (1988).
– *Redieh's Interstate*, 255 NLRB 1073 (1980).
– *Standard Oil Co*., 230 NLRB 967 (1977).
– *Roadway Package System,* 326 NLRB 842 (1998).
– *Metro-Taxicab Co*., 341 NLRB 722 (2004).

17-420 Newspaper Industry

177-2484-5033-0133

177-2484-5076

177-8540-2700

Persons in the "motor routemen" classification ordinarily delivered to single subscribers in rural areas but also delivered in bulk to carriers and dealers. In holding them to be "employees," the Board addressed itself to "the result to be accomplished," i.e., the circulation and sale of newspapers, as well as the right to control the manner and means. Thus, it found that they must purchase the newspapers at the cost established by the employer and sell them at a price no higher than the published price in the area or territory defined and controlled by the employer; their risk of loss and capacity to draw on personal initiative to increase earnings were minimized significantly by the extent of the employer's practices and policies of preventing competition between the motor routemen, of accepting return for credit, of adjusting the wholesale rate, and of granting subsidies, apparently to compensate for added expenses, thus affecting their earnings; and the motor routemen had no proprietary interest in their routes. *Beacon Journal Publishing Co*., 188 NLRB 218 (1971). Compare *Las Vegas Review Journal*, 223 NLRB 744 (1976).

In a case involving carrier boys, the Board found that their opportunities for profits were limited by the company's regulation and control of their work, having, to a large extent, reserved the right to control the manner and means, in addition to the result, of their work. They were therefore held to be "employees." *A. S. Abell Co.*, 185 NLRB 144 (1970). *St. Louis Post-Dispatch*, 205 NLRB 316 (1973).

For other "employee" findings in the newspaper industry, see *Vindicator Printing Co.*, 146 NLRB 871 (1964) (contract distributors engaged in the sale and distribution of newspapers to newstands and carriers); *Sacramento Union*, 160 NLRB 1515 (1966) (district dealers); *Citizen-News Co.*, 97 NLRB 428 (1951) (carrier boys); *News Syndicate Co.*, 164 NLRB 422 (1967) (franchised dealers); *El Mundo, Inc.*, 167 NLRB 760 (1967) (newspaper dealers who, under contract, distribute and sell the employer's newspapers to stores, newsstands, and newsboys, and by means of vending machines); *Herald Co.*, 181 NLRB 421 (1970), enfd. 444 F.2d 430 (2d Cir. 1971) (distributors); *News-Journal Co.*, 185 NLRB 158 (1970), enfd. 447 F.2d 65 (3d Cir. 1971); *Long Beach Press-Telegram*, 305 NLRB 412 (1991) (area managers and district advisers); *Evening News*, 308 NLRB 563 (1992); and *North Shore Weeklies, Inc*., 317 NLRB 1128 (1995) (comparing press supervisors and press operators).

In *Hearst Corp.*, 174 NLRB 934 (1969), distributors were found to be supervisors rather than either "employees" or "independent contractors." The fact that several news deliverers threatened suit to enforce "their individual contractor status" was held insufficient, when weighed against other factors, to change the finding that they were "employees" and not "independent contractors." *News-Journal Co.*, supra. On the other hand, in *Denver Post*, 196 NLRB 1162, 1164 (1972), the Board held that "distributors" engaged principally in the delivery of newspapers to subscribers, either directly or through carriers, were independent contractors.

In two recent cases the Board found newspaper carriers to be independent contractors. In *St. Joseph News-Press,* 345 NLRB 474 (2005), the Board found that five of the common-law factors weighed in favor of independent contractor status: (1) the company exercised little control over the carriers; (2) the carriers, not the company, provided the tools necessary to perform the work at issue: (3) the carriers had entrepreneurial control over the amount of compensation; (4) the carriers performed their duties with little company supervision; and (5) the parties intended to create an independent contractor relationship. The Board found that four other factors weighed in favor of finding that the carriers were employees: (1) the carriers' work was an integral part of the company's business; (2) the work was unskilled; (3) the parties relationship was for an indefinite period; and (4) the company performed similar—though not identical—work. The

Board concluded that, on balance, the factors weighed in favor of finding independent contractor status. Accord: *Arizona Republic Co.,* 349 NLRB 1040 (2007).

17-430 Taxi Industry

177-2482-5067-6000

Cabdrivers' status presents a frequent occasion for litigation of the independent contractor issue.

As with any determination of this issue, the right to control test will apply. The Board has, however, been inclined to find independent contractor status where the cabdrivers lease their own cabs and there is no relationship between their base fees and the fares generated. For cases holding independent contractor status see *City Cab of Orlando*, 285 NLRB 1191 (1987); and *Air Transit*, 271 NLRB 1108 (1984).

In *Metropolitan Taxicab Board of Trade,* 342 NLRB 1300 (2004), an administrative law judge found most of the cabdrivers in New York are independent contractors. In doing so, he recounts the history of the conversion of these drivers from employees to independent contractors. See also *AAA Cab Services,* 341 NLRB 462 (2004), finding independent contractors status and *Metro-Taxicab Co.,* 341 NLRB 722 (2004), find employee status.

In *Yellow Taxi of Minneapolis*, 262 NLRB 702 (1982), in which the Board, sua sponte, reconsidered its original decision that the drivers were employees and reached the same result notwithstanding adverse decisions by the courts in other factually similar cases.

The Board was reversed by the court in *Suburban Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983). The Board later distinguished *Suburban Yellow Taxi* and a number of other taxi cases in which the courts refused to enforce Board orders. See *Yellow Cab of Quincy*, 312 NLRB 142 (1993).

In *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (2008), the Ninth Circuit affirmed a Board finding that taxi drivers were employees and not independent contractors. In affirming the Board's representation case decision (341 NLRB 722 (2004)), the Court relied upon, among other things, the control exercised by the employer by limiting outside business, exercising a strict disciplinary regime, imposing a strict dress code, and requiring training that exceeded that required by government regulations.

In *Stamford Taxi, Inc.,* 332 NLRB 1372 (2000), the Board found taxi drivers to be employees based on a *Roadway Package System*, 326 NLRB 842 (1998), analyses.

For an analysis of limousine drivers see *Elite Limousine Plus,* 324 NLRB 992 (1997).

17-440 Other Industries

177-2484-5033-0167

177-2484-5067

Where American Oil Company leased a service station to a lessee, and the lease contained no requirements or limitations on the method or manner of operating the station; the lessee being free to set his own hours, hire and fire whomever he pleased, set his employees' wage rates, and, except for the sale of American Oil gasoline, sell either its products or those of its competitors at his own prices, the lessee was found to be an independent contractor. The Board did not regard a "Financial Assistance Plan" available to the lessee as a sufficient basis for changing the result. *American Oil Co.*, 188 NLRB 438 (1971).

A franchisee was held to be an independent contractor in the factual context of the case. Citing *Clark Oil & Refining Corp.*, 129 NLRB 750 (1960), the Board pointed out that it has never held that the right to terminate a franchise agreement, standing alone, negates the existence of independent contractor status. *Speedee 7-Eleven*, 170 NLRB 1332 (1968).

Where a photographer used his own equipment, paid for his own photographic supplies, received payment only for each picture accepted for publication, stood the loss for each picture

not accepted, sold copies of pictures to any customers other than the employer's competitors, he was found to be an independent contractor, particularly since the employer did not control the manner or means by which he was to perform the work. *La Prensa*, *Inc.*, 131 NLRB 527 (1961). See also *Young & Rubicam International*, 226 NLRB 1271 (1976).

In *Pennsylvania Academy of the Fine Arts,* 343 NLRB 846 (2004), the Board found that artists models were independent contractors. In doing so, the Board panel majority relied on the facts that these models could choose the classes before which they will model, that they were paid by the class and not by the hour, that they supply their own robes and that they can work for other schools or independent artists. The Board also noted the high degree of skill of the models in striking and holding a pose.

In *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011), a Board majority reversed a Regional Director's conclusion that symphony orchestra musicians are independent contractors. The Board found inter alia that the orchestra, not the musicians, controls the manner and means by which performances are accomplished and that the musicians do not have any entrepreneurial risk of loss.

On the other hand, where contract salesmen at a dairy products plant were used exclusively in the company's service, and the company built up their routes, limited the prices they could charge, made charge accounts subject to its approval, and required daily reports and cash settlements each day of the day's receipts, the salesmen were found to be employees. *Albert Lea Creamery Assn.*, 119 NLRB 817 (1957).

Consideration was accorded the fact that the employers "reserved the right to control the manner and means as well as indirectly the result of the work performed" in finding drivers "employees" rather than independent contractors. *Okeh Caterers*, 179 NLRB 535 (1969).

A factor in arriving at a finding that "auto shuttlers," also known as "car transporters," were not independent contractors was that no opportunity existed for the individuals in question "to make business decisions affecting their profit or loss." *Avis Rent-A-Car System*, 173 NLRB 1366 (1968). See also *Avis Rent-A-Car System*, 173 NLRB 1368 (1968); and *A. Paladini, Inc.*, 168 NLRB 952 (1967).

In *Lakes Pilots Assn*., 320 NLRB 168 (1995), the Board found that pilots in training—applicant maritime pilots—were employees not independent contractors. The Board noted that the employer retained the right to control the manner in which these pilots performed their services.

See also *Cardinal McCloskey Services*, 298 NLRB 434 (1992), in which the Board found day care providers to be independent contractors. Compare *People Care, Inc.*, 311 NLRB 1075 (1993), finding the providers there to be employees.

In *Ameri Health HMO*, 326 NLRB 509 (1998), the Board remanded for further proceedings the question of whether physicians are employees of a health maintenance organization.

17-500 Supervisors

177-8501

177-8540

177-8580

Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

> 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.

In discussing the above statutory definition, the Sixth Circuit declared that Section 2(11) is to be interpreted in the disjunctive and that "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571 (1994); *American Commercial Barge Line Co*., 337 NLRB 1070 (2002); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1948); *Harborside Healthcare Inc.,* 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1999); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995).

It is axiomatic, of course, that the existence of the power determines whether an individual is an employee or a supervisor (see, for example, *West Penn Power Co. v. NLRB*, 337 F.2d 993, 996 (3d Cir. 1964)), but the real task which confronts the Board is the difficult one of finding whether the supervisory power in fact exists, and this can only be ascertained as a result of a painstaking analysis of the facts in each case.

Supervisory issues are among the most common in representation cases, and the Board volumes are replete with findings of both supervisory and nonsupervisory status in a veritable myriad of factual situations, sometimes simple but more often complex. A number of factors are considered in resolving supervisory issues. These, of course, include the statutory requirements described above. The problem, however, lies mainly in the application of these factors in order to ascertain from the relevant facts and circumstances whether or not the terms of the statutory definition are met. It is an individual's duties not job title that determines status. *Dole Fresh Vegetables, Inc*., 339 NLRB 785 (2003).

Supervisory status cannot be measured in individually distinct terms, nor can hard-and-fast rules be laid down. In each case, the differentiation must be made between the exercise of independent judgment and the routine following of instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. See, e.g., *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J. C. Brock Corp.*, 314 NLRB 157 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992); *McCollough Environmental Services*, 306 NLRB 565 (1992); and *Quadrex Environmental Co.*, 308 NLRB 101 (1992), all of which involved finding of no independent judgment. Compare *Virginia Mfg. Co*., 311 NLRB 992 (1993), and *Allen Services Co.*, supra.

The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 711–712 (2001); *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006); *Benchmark Mechanical Contractors, Inc*., 327 NLRB 829 (1999); *Alois Box Co.,* 326 NLRB 1177 (1998); and *Youville Health Care Center, Inc*., 326 NLRB 495 (1998). And, any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535 fn. 8 (1999). Conclusionary statements without supporting evidence do not establish supervisory authority. *Volair Contractors, Inc.,* 341 NLRB 673 (2004).

In *RCC Fabricators, Inc*., 352 NLRB 701 fn. 5 (2008) (two Member decision), the Board drew an adverse inference from the failure of the employer to produce job descriptions for foremen that it contended were not supervisors. The Board found that employer's repeated refusals to produce an existing job description warranted the adverse inference.

Listed below is a series of cases in which the Board found that the burden was not met. *Barstow Community Hospital*, 356 NLRB No. 15 *Spentonbush/Red Star Cos*., 319 NLRB 988 (1995) (tugboat captains), enf. denied 106 F.3d 484 (2d Cir. 1997); *Northwest Florida Legal Services*, 320 NLRB 92 (1995) (supervisory attorney); *K.G. Knitting Mills*, 320 NLRB 374 (1995); *Azusa Ranch Market*, 321 NLRB 811 (1996) (department manager in grocery store); *New Jersey Newspapers*, 322 NLRB 394 (1996) (pressroom foremen); *Pine Brook Care Center*, 322 NLRB 740 (1996) (charge nurses); *PECO Energy Co*., 322 NLRB 1074 (1997) (lead

maintenance technicians at a public utility); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997) (registered nurses); and *Chrome Deposit Corp*., 323 NLRB 961 (1997) (crew leaders).

A discussion of criteria follows:

17-501 Supervisory "Authority" as Defined in Section 2(11)

177-8520

177-8560

Individuals who possess the authority spelled out in the statutory definition contained in Section 2(11) are, of course, "supervisors" and can be held to be supervisors even if the authority has not yet exercised. *Fred Meyer Alaska, Inc*., 334 NLRB 646 fn. 8 (2001). *U.S. Gypsum Co.,* 93 NLRB 91 (1951), and *Wasatch Oil Refining Co*., 76 NLRB 417 fn. 17 (1948).

Accordingly, supervisory findings resulted where "news producers" at a television station, among other responsibilities, assigned overtime (*Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972)), or made work assignments (*Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971)); "strip supervisors" and "dispatchers" discharged drivers in a trucking operation for serious misconduct, which was one indication of their authority (*Pennsylvania Truck Lines*, 199 NLRB 641 (1972)); an individual in a welding operation scheduled work, assigned it to employees, gave them orders, and had sole responsibility for the workload (*Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972)); a personnel manager actively engaged in the hiring process (*Lawson Milk Co.*, 143 NLRB 916, 919–920 (1963)); an individual had the authority to grant time off and furlough employees during slack periods (*Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963)); "shift leaders" had the responsibility for transmitting work orders and for seeing to it that these orders were carried out (*Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962)); a "working foreman" who, among other indicia of authority, granted employees time off (*Western Saw Mfrs.*, 155 NLRB 1323, 1329 fn. 11 (1965)); "line leaders" who had the authority to maintain discipline (*Lee-Rowan Mfg. Co.*, 129 NLRB 980, 984 (1960)); department and line supervisors who have disciplinary authority and who could make effective hiring recommendations (*Venture Industries*, 327 NLRB 918 (1999)); licensed practical nurses who had disciplinary authority (*Heartland of Beckley*, 328 NLRB 1056 (1999)); and assistant supervisors whose evaluations led to automatic wage increases (*Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995)). Compare *Arizona Public Service Co.*, 310 NLRB 477 (1993).

Nonsupervisory findings resulted in situations where a dentist's reassignment authority was a means of assuring compatibility. (*Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995)); where the authority to order intoxicated employees to leave was not disciplinary (*Chevron Shipping*, supra); where "associate architects" had no authority as statutorily defined, the firm principal reserving for himself "the final determination on all architectural decisions" (*Howard A. Friedman & Associates*, 192 NLRB 919 (1971)); work assignments are routine in nature (*Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989)); authority had not in fact been exercised (*Northwest Steel*, 200 NLRB 108 (1972)); airport bus dispatchers were not required to exercise independent judgment or test their own initiative (*Greyhound Airport Services*, 189 NLRB 291 (1971)); "district managers" employed by a newspaper publishing company possessed minimal discretion (*Suburban Newspaper Group*, 195 NLRB 438 (1972)); telephone company "traffic supervisors" who, despite enlarged responsibilities and new title, nonetheless did not possess the kind of responsibility contemplated by Section 2(11) (*Hawaiian Telephone Co.*, 186 NLRB 1 (1970)). See also *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991), in which the Board held that "batchers" employed by a concrete producer do not exercise independent judgment; and *Hogan Mfg.*, supra, testing welders was not authority to recommend hire. The presence or absence of the exercise of independent judgment is an important factor weighed by the Board in making its supervisory determinations. *Sears*, *Roebuck & Co.*, 304 NLRB 193 (1991).

Moreover, although an individual's duties may include relaying to management complaints against other employees, also reports of inefficiency, if these are investigated independently by higher management, he is not a supervisor within the meaning of the statutory definition. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493–494 (1965). Nor is he a supervisor if the control he exercises is merely that which is derived from job experience. *Sanborn Telephone Co.*, 140 NLRB 512, 515 (1963). Similarly, the authority to evaluate is not a supervisory indicia if the evaluation does not affect employee status or tenure. *Volair Contractors, Inc.,* supra; *Williamette Industries*, 336 NLRB 743 (2001). Compare *Trevilla of Golden Valley*, 330 NLRB 1377 (2000).

Quality control work—inspecting and reporting the work of others—is not supervisory. Nor is the testing of welds. *Brown & Root, Inc.,* 314 NLRB 19, 21 fn. 6 (1994). Authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority, *Byers Engineering Corp.*, 324 NLRB 740 (1997).

In an unfair labor practice case, the Board described the proper balancing of interests in assessing supervisory authority. The case involved a series of disciplinary actions by the alleged supervisor. The Board found that some of the incidents did not establish supervisory authority but concluded that one incident was sufficient to find supervisory status rejecting an argument that it was a sporadic exercise of authority. *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993).

The Board has found that distribution and system dispatchers in the utility industry are not supervisors. *Mississippi Power & Light Co.,* 328 NLRB 965 (1999), reversing *Big Rivers Electric Corp*., 266 NLRB 380 (1983).

In *Entergy Mississippi, Inc*., 357 NLRB No. 178 (2011), a unit clarification case, a Board majority found that electric utility dispatchers are not supervisors and should continue to be included in the unit. In doing so, the Board applied an *Oakwood Healthcare* analysis (348 NLRB 686 (2006)). Commenting that this issue "is not an unfamiliar issue for the Board," the Board reviewed the history of its decisions as to utility dispatchers. It decided not to apply its earlier holdings (*Mississippi Power*, 328 NLRB 965 (1999), and *Big Rivers Electric*, 266 NLRB 380 (1983)), because of the Board's intervening decision in *Oakwood*. To do otherwise the Board stated would be to ignore "the significant doctrinal developments" in this area of the law. The Board thereafter went on to find that these dispatchers do not responsibly direct employees or have the authority to assign field employees.

In *Rockspring Development, Inc*., 353 NLRB 1041 (2009) (two Member decision), the Board found that a mine safety coordinator did not have supervisory authority. The Board noted that the record did not support a finding that the individual was "accountable" for his actions in directing employees in safety matters and that his designation of employees to accompany a mine safety inspector was, at best "routine or clerical."

Section 2(11) requires that the alleged supervisor exercise authority "in the interest of the employer." In *Allstate Insurance Co.,* 332 NLRB 759 (2000), the Board found that the individual in question had complete discretion whether to work alone or to have assistance. The Board found that the essential components of the employers business were not affected by such a decision and therefore the individual was not exercising authority in the interest of the employer.

For a full discussion of "interest of the employer" see *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571 (1994).

17-502 Assignment/Responsible Direction/Independent Judgment

177-8520

177-8560

Employees who must and do use independent judgment in directing other employees are supervisors within the meaning of Section 2(11). See, e.g., *Sears, Roebuck & Co*., supra. See also *DST Industries*, 310 NLRB 957 (1993). Similarly, those who use independent judgment in effectively recommending discipline are supervisors. *Progressive Transportation Services*, 340

NLRB 1019 (2003). See also *Mountaineer Park, Inc*., 343 NLRB 1473 (2004). Compare *Armstrong Machine Co.,* 343 NLRB 1149 (2004).

Recently, the Board had occasion to consider its policies with respect to the 2(11) phrases, "responsibly to direct," "the use of independent judgment" and the term "assign." This review was engendered by the adverse decision of the Supreme Court in *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). The Court rejected the Board's interpretation of "independent judgment" finding that the Board incorrectly held that "employees 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. The Court saw this as a "categorical exclusion" and rejected it. Thus, the Court found that the nature of the judgment, whether professional, technical, or experimental, does not determine whether a judgment is "independent" in the sense used in Section 2(11). The Court's holding did not reject the Board's traditional holding that the judgment of a subordinate is "routine" if it is limited by the directions of higher officials who have not delegated the power to make significant judgments or if the subordinates' judgments are constrained by employer specified standards.

Following the *Kentucky River* decision the Board, after extensive briefing by the parties and amici issued decisions in three cases *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006); *Croft Metals, Inc*., 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

Oakwood was the lead case and in it the Board majority defined "assign" as the act of "designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties to an employee." 348 NLRB at 689.

The majority stated that it did not see the terms "assign" and responsibly to direct" as synonymous. Noting that the Board "rarely" has sought to define the parameters of the term "responsibly to direct" the Board examined the decisions of the courts and adopted their holding that "for direction to be responsible, the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly." 348 NLRB at 692.

Finally, the *Oakwood* Board majority defined "independent judgment" to be "at a minimum" the authority to "act or effectively recommend action, free of the control of others" and to "form an opinion or evaluation by discerning and comparing data." Independent judgment "contrasts with actions that are of a merely routine or clerical nature."

The Board majority used this analytic framework to find that certain of the charge nurses in *Oakwood* were supervisors. In the two companion cases the Board found that the disputed classifications of charge nurses in *Golden Crest* and lead persons in a manufacturing plant in *Croft Metals* were not supervisors.

Post *Oakwood* decisions have repeatedly emphasized the point that supervisory status must be proven and that conclusory evidence will not satisfy the burden of proof. *Alternate Concepts Inc.,* 358 NLRB No. 38 (2012); *Lynwood Manor*, 350 NLRB 489 (2007); *Austal USA, L.L.C.,* 349 NLRB 561 (2007); and *Avante at Wilson, Inc.,* 348 NLRB 1056 (2006).

In two cases the Board has found individuals to be supervisors where they used independent judgment in the exercise of a Section 2(11) indicia. See *Metropolitan Transportation Services,* 351 NLRB 657 (2007) (discipline), and *Sheraton Universal Hotel,* 350 NLRB 1114 (2007) (discipline).

And in two other cases the Board found independent judgment to be lacking. *Shaw, Inc.,* 350 NLRB 354 (2007) (assignment), and *CGLM, Inc.,* 350 NLRB 974 (2007) (direction).

See also two pre-*Oakwood* cases *American River Transportation Co.,* 347 NLRB 925 (2006), and *Marquette Transportation/Bluegrass Marine,* 346 NLRB 449 (2006), where tug boat captains (*American*) and river pilots (*Marquette*) were found to be supervisors.

Team leaders in an automobile parts manufacturing facility were found not to be supervisors. In an extensive post-*Oakwood* decision, the Board found that these employees did not use independent judgment in making assignments, or have authority to effectively recommend discipline or hire. *Pacific Coast M.S. Industries*, 355 NLRB 1422 (2010); *Alternate Concepts Inc*., 358 NLRB No. 38 (2012)

In *Dynamic Science, Inc.,* 334 NLRB 391 (2001). The Board found that test leaders of a military test facility were not supervisors applying the *Kentucky River* analysis. Accord: *American Commercial Barge Line Co.,* 337 NLRB 1070 (2002) (tugboat pilots).

Kentucky River was a health care case involving registered nurses. The Court did not rule that all nurses are supervisors. See *Beverly Health & Rehabilitation Services,* 335 NLRB 635 (2001).

The facts in *Custom Bronze & Aluminum Corp.*, supra, are illustrative of Board analysis in traditional industrial settings. While it was not contended that the individual in question had the authority to hire or discharge, reward, promote, suspend, layoff, discipline, reprimand employees, effectively recommend such action, or handle grievances, it was nonetheless found that he alone was responsible for the work of the shop employees and the daily production of the shop; he was in charge of the shop and its workload, exercised responsibilities and duties that his colleague did not, scheduled and assigned work, gave employees their orders and instructions, helped them in performing their jobs, made certain that the work was done and done properly, and determined whether overtime or additional help was needed. Compare *Dean & Deluca New York, Inc.,* 338 NLRB 1046 (2003) (being in charge of store does not evidence supervisory authority in absence of showing of use of independent judgment). *Croft Metals, Inc.,* supra.

For other pre-*Oakwood* cases, in which a supervisory finding was made on the basis of responsible direction or independent judgment, see *Arlington Masonry Supply, Inc.,* 339 NLRB 817 (2003); *Wal-Mart Stores*, 335 NLRB 1310 (2001); *Venture Industries,* 327 NLRB 918 (1999); *Superior Bakery*, 294 NLRB 256 (1989); *Rose Metal Products*, 289 NLRB 1153 (1988); *Illini Steel Fabricators*, 197 NLRB 303 (1972); *Consolidated Freightway Corp.*, 196 NLRB 807 (1972); *Wolverine World Wide*, 196 NLRB 410 (1972); and *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972).

Illustrative of the opposite result under this heading is *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970). While the individual in question recruited substitute drivers and occasionally directed "an extra delivery to a good customer," a company principal was always on call and was reached on the telephone for instructions in matters involving substitution of drivers or other emergencies. He worked the same hours and received the same benefits as other members of the crew. In assigning overtime, he did so at his principal's specific instructions. And although the individual in question claimed to have discharged an employee, there was no evidence that he actually did, and it was clear from the facts that he possessed no such authority. As he was "not free to use his own independent judgment," concluded the Board, "he could not be said to responsibly direct other employees." See also *Wal-Mart Stores*, 340 NLRB 220 (2003).

In two television station cases, a divided Board found that producers did not have the independent authority to make work assignments and thus were not supervisors. *KGW-TV*, 329 NLRB 378 (1999), and *KGTV-TV*, 329 NLRB 454 (1999).

For other cases decided along similar lines, see *Dynamic Science, Inc.*, supra; *Health Resources of Lakeview,* 332 NLRB 878 (2000); *Arlington Electric*, 332 NLRB 845 (2000); *Carlisle Engineered Products,* 330 NLRB 1359 (2000); *Freeman Decorating Co.,* 330 NLRB 1143 (2000); *Fleming Cos.,* 330 NLRB 277 fn. 1 (1999); *Crittenton Hospital,* 328 NLRB 879 (1999); *Tree-Fiber Co.*, 328 NLRB 389 (1999); *Millord Refrigeration Services*, 326 NLRB 1437 (1998); *Ryder Truck Rental*, 326 NLRB 1386 (1998); *Alois Box Co.,* 326 NLRB 1177 (1998);

Greenhorne & O'Mara, Inc., 326 NLRB 514 (1998); *Youville Health Care Center, Inc.,* 326 NLRB 495 (1998); *General Security Services Corp.,* 326 NLRB 312 (1998); *Hausner Hard Chrome of KY, Inc.,* 326 NLRB 426 (1998); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Suburban Newspaper Group*, supra; *Willis Shaw Frozen Food Express*, 173 NLRB 487 (1968); *John Stalfort & Sons*, 156 NLRB 84, 86 (1965); and *Bakersfield Californian*, 316 NLRB 1211 (1995).

In *Armstrong Machine Co.,* 343 NLRB 1149 (2004), a panel majority found no supervisory status for the most senior employees in the department who answered questions concerning work and who made work assignments based on "a priority list generated by management." In absence of the owner, the employee answered customer inquiries. The panel found that the work assignments were routine not "based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together." Citing *Hausner Hard Chrome of KY, Inc.,* supra, the panel found that the employees work did "not demonstrate the exercise of independent judgment as envisioned by Section 2(11) of the Act." Accord: *CHS, Inc.,* 357 NLRB No. 54 (2011), citing *Armstrong* with approval.

Direction of work that is routine in nature and typical of a leadperson was held not to be supervisory in the following cases: *Croft Metals, Inc.,*, supra; *Central Plumbing Specialties*, 337 NLRB 973 (2002); *Byers Engineering Corp.,* 324 NLRB 740 (1997); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996); *Consolidated Services*, 321 NLRB 845 (1996); *Azusa Ranch Market*, 321 NLRB 811 (1996); and *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Authority to initial timecards is not generally considered supervisory authority. *Los Angeles Water & Power Employees' Assn.,* 340 NLRB 1232 (2003).

17-503 Power Effectively to Recommend

177-8520

Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. See, e.g., *Entergy Systems & Service*, 328 NLRB 902 (1999); *Detroit College of Business*, 296 NLRB 318 (1989); and *Westwood Health Care Center*, 330 NLRB 935 (2000).

In *Mountaineer Park, Inc.,* 343 NLRB 1473 (2004), a divided panel found two individuals to be supervisors where they could "on their own volition . . . bring a potential disciplinary issue" to their superiors and discipline is imposed at the level recommended.

A supervisory finding was made, based in part, on the power effectively to recommend hiring and firing. A factual situation served as a predicate: When an employee was discharged, he asked a company official for another chance and was told that the company official must abide by the decision of the individual found to be a supervisor. *Elliott-Williams Co.*, 143 NLRB 811, 816 (1963). On the other hand, where recommendations concerning discipline and reward "were not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority," a nonsupervisory determination followed. *Hawaiian Telephone Co.*, supra. See also *Mower Lumber Co.*, 276 NLRB 766 (1985). Compare *Oak Park Nursing Care Center,* 351 NLRB 27 (2006), holding that filling out counseling form was an effective recommendation.

The Board has rejected the contention that mere suggestions are effective recommendations. *Brown & Root, Inc.,* 314 NLRB 19 (1994), and that signatures on a discipline form amounted to an effective recommendation. Rather in this latter case, the Board adopted the hearing officer's conclusion that such signatures were for witness purposes. *Necedah Screw Machine Products*, 323 NLRB 574 (1997). See also *Children's Farm Home*, 324 NLRB 61 (1997). Accord: *Pacific Coast M.S. Industries Co.,* 355 NLRB 1422 (2010); *Los Angeles Water & Power Employees' Assn.,* supra (initialing timecards).

In *DirectTV U.S. DirectTV Holdings, LLC*, 357 NLRB No. 149 (2011), a Board majority rejected a contention that field supervisors were statutory supervisors. The Board overruled the finding of the hearing officer that these field supervisors effectively recommend discipline because they had authority to initiate discipline. The Board found that such initiation did not amount to an effective recommendation because it is "merely one step in a three-level review process."

The Board has held that the mere issuance of a directive to alleged supervisors setting forth supervisory authority is not determinative of their supervisory status. *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). See also *Bakersfield Californian*, supra. In *Security Guard Service*, 154 NLRB 8 (1965), despite some evidence that certain "sergeants" had at one time been advised that they had supervisory authority, including the power to make effective recommendations, there was no evidence that this had been exercised. See also *World Theatre Corp.,* 316 NLRB 969 (1995), where unit employees routinely recommended hires.

Authority to submit reports on employee conduct that are merely records of instruction or are investigated independently, does not establish supervisory status. *Williamette Industries,* 336 NLRB 743 (2001); *Ken-Crest Services*, 335 NLRB 777 (2001); *Tree-Fiber Co.,* 328 NLRB 389 (1999); *Green Acres Country Care Center*, 327 NLRB 257 (1998); *Custom Mattress Mfg.*, 327 NLRB 111 (1998); *Ryder Truck Rental,* 326 NLRB 1386 (1998); *Hausner Hard Chrome of KY, Inc.,* 326 NLRB 426 (1998); *F. A. Bartlett Tree Expert Co.,* 325 NLRB 243 (1997); *MJ Metal Products*, 325 NLRB 240 (1997); and *Mount Sinai Hospital*, 325 NLRB 1136 (1998). Nor is the assessment of an applicant for employments technical skills an effective recommendation to hire that individual. *Aardvark Post*, 331 NLRB 320 (2000). In *Hogan Mfg.*, 305 NLRB 861 (1991), the testing of welders as part of the hiring process was not considered to be an effective recommendation.

Individuals must have been notified of their authority if they are to be supervisors. *Volair Contractors, Inc.,* 341 NLRB 673 (2004).

17-504 Limited, Occasional, or Sporadic Exercise of Supervisory Power; Part-Time Supervisors

177-8560-5000

Employees who spend a substantial part of each workday or workweek as supervisors are customarily excluded as such from the bargaining unit. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999), and *U.S. Radium Corp.,* 122 NLRB 468 (1958). Those who exercise supervisory authority for a portion of the year and perform rank-and-file functions for the remainder are described as "seasonal supervisors" and are included in the bargaining unit with respect to their rank-and-file duties. *Great Western Sugar Co.,* 137 NLRB 551 (1962). This does not mean that persons exercising only sporadic or irregular supervisory functions meet the statutory definition of supervisor. *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985); *Meijer Supermarkets*, 142 NLRB 513 (1963); and *Indiana Refrigerator Lines*, 157 NLRB 539 (1966).

Occasional isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to predicate a supervisory finding. *Volair Contractors, Inc.,* supra. *Kanawha Stone Co*., 334 NLRB 235 (2001). *Commercial Fleet Wash*, 190 NLRB 326 (1971). Thus, where a "crew leader" had occasionally been consulted about an employee's progress and an employee had been granted a raise after his crew leader had recommended the raise, these isolated instances, without more, were not regarded sufficient to establish supervisory indicia. *Highland Telephone Cooperative*, 192 NLRB 1057 (1971). See also *Robert Greenspan, D.D.S., P.C.,* 318 NLRB 70 (1995); *Hygeia Coca-Cola Bottling Co.,* 192 NLRB 1127 (1971); *Billows Electric Supply*, 311 NLRB 878 (1993); *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993); and *Brown & Root, Inc.,* supra. Compare *Union Square Theatre Management, Inc.,* 326 NLRB 70 (1998), where the Board reversed a Regional Director's finding of sporadic hiring by an individual. Instead the Board found that that authority was "part and parcel" of their duties.

In *Oakwood Healthcare, Inc.,* 348 NLRB 686, 694 (2006), the Board majority held that an individual who "spends a regular and substantial portion of his/her worktime performing supervisory functions" is a supervisor. The Board noted that it "has not adopted a strict numerical definition of substantiality" but that 10–15 percent of total worktime is sufficient to find supervisory status.

17-505 Substituting for a Supervisor

177-8520-8500

177-8560-1800

Where an employee completely takes over the supervisory duties of another, he is regarded as a supervisor under the Act. *Birmingham Fabricating Co.,* 140 NLRB 640 (1963); and *Illinois Power Co.,* 155 NLRB 1097 (1965). However, isolated supervisory substitution does not warrant a supervisory finding. *Latas de Alumino Reynolds*, supra. The Board has stated that, where intermittent supervision of unit employees is involved, the test is whether the part-time supervisors spent a "regular and substantial" portion of their time performing supervisory duties, or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products,* 330 NLRB 1359 (2000), and *Aladdin Hotel*, 270 NLRB 838 (1984). This test applies even if there is a clear demarcation between the individuals' supervisory and rank-and-file duties. *Canonie Transportation*, 289 NLRB 299 (1988). See also *Billows Electric Supply*, 311 NLRB 878 (1993); *Brown & Root, Inc.,* supra; and *OHD Service Corp.,* 313 NLRB 901 (1994).

In *St. Francis Medical Center-West*, 323 NLRB 1046 (1997), the Board found that substitution for a substantial period of time (5 of the 10 months before the election) was not regular because it was caused by extraordinary circumstances and was not likely to reoccur. Thus, the Board found that the individual was not a supervisor. Merely being "in charge" of store on weekends is not sufficient to establish supervisory authority in absence of use of independent judgment. *Dean & Deluca New York, Inc.,* 338 NLRB 1046 (2003).

For an interesting discussion of this point see *Benchmark Mechanical Contractors, Inc.,* 327 NLRB 829 (1999), where the Board found that an employee who quit on the day of the election but who had been promoted to a supervisory position at that time would not have spent a substantial portion of his time as a supervisor even if he had not quit.

17-506 Promotions to Supervisory Positions and Management Trainees

177-8520-6200

177-8560-6000

The possibility of promotion to a supervisory position in the future does not in and of itself warrant exclusion from a unit. *Weaver Motors*, 123 NLRB 209 (1959). See also *International General Electric*, 117 NLRB 1571 (1957). Thus, individuals whose future assignment to supervisory status is contingent on demonstration of required qualifications are, if otherwise warranted by the facts, included in the unit. *Continental Can Co.,* 116 NLRB 1202 (1956).

Management trainees are generally treated the same as other individuals who are in line for elevation to supervisory positions. Thus, "manager trainees" who were in a training program ranging from 3 to 6 years, a period devoted to learning all store duties, but who had no indicia of supervisory authority and shared the same fringe benefits and working conditions with other employees, were included in the unit. *Neisner Bros., Inc*., 200 NLRB 935 (1972). Compare however, *M. O'Neil Co.,* 175 NLRB 514 (1969). The latter case involved "management trainees," who were given broad experience in the employer's operation with the hope that they would eventually qualify for positions as supervisors, management personnel, or administrative personnel. Gradually, those who did not so graduate left the company. Finding that these employees had a community of interest different from that of regular employees, the Board

excluded them from the unit. Note, however, that the exclusion was not on a supervisory ground. See also *Gibson Discount Center*, 191 NLRB 622 (1971).

A person in supervisory training who exercises some supervisory authority, is excluded from the unit. *Augusta Chemical Co.*, 124 NLRB 1021 (1959). The probationary character of supervisory authority does not affect supervisory status, and probationary supervisors are excluded from the unit. *Shelburne Shirt Co.,* 86 NLRB 1308 (1949). Nor will the fact that an individual may in the future exercise supervisory authority on a sporadic basis support a supervisory determination. *Indiana Refrigerator Lines*, .supra. See also *Du-Tri Displays,* 231 NLRB 1261 (1977).

For an excellent summary of the four-part test for determining whether management trainees (nonsupervisory) are included in the unit under community-of-interest principles, see *Nationsway Transport Service*, 316 NLRB 4 (1995).

See also section 20-620 (Trainees).

17-507 Secondary Indicia

Nonstatutory indicia can be used as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. See *Training School of Vineland,* 332 NLRB 1412 (2000), and *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Three such secondary indicia are the ratio of alleged supervisors to employees, differences in terms and conditions of employment and attending management meetings.

a. Ratio of supervisors to nonsupervisors

The ratio of supervisors to rank-and-file employees is a background factor which may enter into Board consideration when resolving a supervisory issue, but it is not itself statutory indicia. *Ken-Crest Services*, 335 NLRB 777 (2001). Where the ratio is unrealistic, a practical evaluation of employees' functions in this context is normally made.

The Board pointed out, for example, in *Pennsylvania Truck Lines*, 199 NLRB 641 (1972), that "if strip supervisors and dispatchers were found to be nonsupervisory, there would be no more than three supervisors . . . at any of the employer's terminals, some of which have as many as 100 drivers, and there would be no supervisors at the terminals on weekends, when a dispatcher or strip supervisor is in charge."

See also *Harborside Healthcare, Inc*., 330 NLRB 1334 (2000); *Naples Community Hospital*, 318 NLRB 272 (1995); *Essbar Equipment Co*., 315 NLRB 461 (1994); *Sears, Roebuck & Co.,* 292 NLRB 753 (1989); *Washington Beef Producers*, 264 NLRB 1163 (1982); *Ridgely Mfg. Co.,* 198 NLRB 860 (1972); *Maryland Cup Corp.*, 182 NLRB 686 (1970); *U.S. Gypsum Co.,* 178 NLRB 85 (1969); *Welsh Farms Ice Cream*, 161 NLRB 748 (1966); and *West Virginia Pulp & Paper Co.*, 122 NLRB 738 (1958).

b. Difference in terms and conditions of employment

177-8250-5500

A substantial difference in terms and conditions of employment, while also not a statutory indicia, may be condensed as a background factor or secondary critira militating in favor of finding supervisory status. *American Commercial Barge Line Co*., 337 NLRB 1070 (2002); *North Shore Weeklies, Inc.,* 317 NLRB 1128 (1995); *Essbar Equipment Co.,* supra; *Illini Steel Fabricators*, 197 NLRB 303 (1972); *Grand Union Co.*, 193 NLRB 525 (1971); and *Little Rock Hardboard Co.*, 140 NLRB 264 (1962). It is, however, a secondary indication and is not dispositive. *General Security Services Corp.*, 326 NLRB 312 (1998); *St. Francis Medical Center-West*, supra, and *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 fn. 2 (1996). *Tri-City Motor Co.*, 284 NLRB 659 (1987). See also *Waterbed World*, 286 NLRB 425 (1987). Compare *Brown & Root, Inc.*, 314 NLRB 19 (1994), and *Custom Mattress Mfg.*, 327 NLRB 111 (1998),

where the difference in pay was due to technical skills not supervisory duties. See also *Ken-Crest Services*, supra, difference in salary and being highest ranking person on premises did not establish supervisory status. *Central Plumbing Specialties*, 337 NLRB 973 (2002).

In *Illini Steel Fabricators*, supra, the Board considered as one of the elements the higher rate of pay received by the individual found to be a supervisor. Among the factors relied on for a supervisory finding in *Grand Union Co.*, supra, was the fact that the employer raised the scale of salaries to accord with newly assigned "supervisory responsibilities." And in *Little Rock Hardboard Co.*, 140 NLRB 264 (1962), the Board took into consideration, among other factors, the higher rate of pay, as compared with the pay of the production employees, which the disputed "shift leaders" received.

c. Attendance at management meetings

The fact that an individual may attend management meetings is a secondary indicator of supervisory authority and does not in and of itself establish such authority. *Dean & Deluca New York, Inc.,* 338 NLRB 1046 (2003).

17-508 Ostensible or Apparent Authority

177-8520-7000

Ostensible or apparent authority can be a basis for making the supervisory determination. *Poly-America, Inc.*, 328 NLRB 667 (1999), and *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998).

For example, where two "all around" men and four "floor girls" were in dispute, it appeared that all six were held out as supervisors to employees by the respective department foremen and the employees were instructed to do as they were told by them. That was one circumstance noted by the Board in making a supervisory finding. *Wolverine World Wide*, 196 NLRB 410 (1972). See also *SAIA Motor Freight, Inc.,* 334 NLRB 979 (2001), where the Board said that "the test is whether under all the circumstances," the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. Accord: *Facchina Construction Co.,* 343 NLRB 886 (2004); *Ready Mix, Inc.,* 337 NLRB 1189 (2002); *Mid-South Drywall Co.,* 339 NLRB 480 (2002); and *D&F Industries,* 339 NLRB 618 (2002).

The Board found an individual was reasonably perceived by the employees to be a supervisor where the employer permitted him to continue to function as a supervisor during a transition period between his supervisory position and a nonsupervisory position. *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994).

In *2 Sisters Food Group, Inc*., 357 NLRB No. 168 fn. 12 (2011), the Board found an individual to be an agent of the employer where, inter alia, he translated during an employee termination meeting, accompanied a discharged employee from the plant and arranged for and participated in meetings between an employee and the human resource department.

Where the employees looked on the individual in question as a supervisor and "there is valid basis for such judgment on their part," this was given some weight in the resolution of the supervisory question. *Bama Co.*, 145 NLRB 1141 (1964). However, the fact that an individual is held out as a supervisor is not necessarily dispositive of supervisory status. *Williamette Industries,* 336 NLRB 743 (2001); *Pan-Oston Co.,* 336 NLRB 305 (2001); and *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991). In *Carlisle Engineered Products*, 330 NLRB 1359 (2000), the Board stated: "It is well established that rank and file employees cannot be transformed into supervisors merely being invested with that title."

See also *Spirit Construction Services,* 351 NLRB No. 56 (2007); *SKC Electric, Inc.,* 350 NLRB 857 (2007); *G.E. Maier Co.,* 349 NLRB 1052 (2007); *Suburban Electrical Engineers/Contractors,* 351 NLRB 1 (2007); *Thriftway Supermarket*, 276 NLRB 1450 (1985); *Washington Beef Producers*, supra; and *G.T.A. Enterprises*, 260 NLRB 197 (1982); *Waterbed World*, supra, for other ostensible authority holdings.

The doctrine of apparent authority also applies to conduct by alleged union representatives. In *Foxwoods Resort & Casino*, 352 NLRB 771 (2008), a two Member Board found insufficient evidence that union organizing committee members were union agents. The same two Members found apparent authority (agency) in a Section 8(b)(1)(A) unfair labor practice case in the alleged conduct of a steward. The Board found that an employee could reasonably have believed that the steward was acting on behalf of the union.

17-509 Supervision of Nonunit Employees

177-8501-7000

The Board is often confronted with the question of whether an individual is a supervisor when only a portion of the individual's time is spent in supervising nonunit employees. In *Detroit College of Business*, 296 NLRB 318 (1989), the Board rejected what it believed had become a misapplication of its decision in *Adelphi University*, 195 NLRB 639 (1972). *Adelphi* involved the status of the director of admissions in a unit of faculty where the director supervised his secretary, an out-of-unit employee. As more fully described in *Detroit College*, supra, the *Adelphi* principle soon became the 50-percent rule, "any individual who supervises nonunit employees less than 50 percent of his time is not a supervisor."

In *Detroit College*, supra, the Board rejected "any such shorthand approach" to the resolution of these cases. Instead, the Board stated that it would "make a complete examination of all the factors present to determine the nature of the individuals alliance with management."

The Board described these factors as including:

> [T]he business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included.

See also *Pepsi-Cola Co.*, 327 NLRB 1062 (1999); *Union Square Theatre Management, Inc.*, 326 NLRB 70 (1998); *Rite Aid Corp.*, 325 NLRB 717 (1998); and *Legal Aid Society of Alameda County*, 324 NLRB 796 (1997).

In the case of supervision of employees of another employer, the Board will not find the individual to be 2(11) supervisor. In order to qualify as a supervisor, one must supervise the employees of the employer in question. *Crenulated Co.*, 308 NLRB 1216 (1992).

17-510 Supervisory Issues Affecting Educational Institutions

177-8540-8200

177-8540-8200

A concomitant to the Board's assertion of jurisdiction over colleges and universities in recent years has been the need for resolving supervisory issues in cases involving such institutions. Some of the more typical determinations in this area follow:

"Department chairmen" with authority effectively to recommend the hire and reappointment (or nonreappointment) of all part-time faculty members, and to allocate merit increases without the approval of the department's faculty, were found to be supervisors within the meaning of Section 2(11). *Berry Schools*, 234 NLRB 942 (1978); *University of Vermont*, 223 NLRB 423 (1976); and *Adelphi University*, supra. See also *C. W. Post Center*, 189 NLRB 904 (1971). It should be noted, however, that in *Fordham University*, 193 NLRB 134 (1971), the "department chairmen" were found to be nonsupervisory and included in the unit. The distinction is explained in the text and in footnote 19 in the decision in *Fordham*. And in *University of Detroit*, 193 NLRB 566 (1971), the university was said to regard the "department chairmen" as faculty members, not administrators. They did not sign an administrative agreement on being appointed; they represented the faculty at university senate meetings; they received no additional

compensation; and they taught courses albeit fewer than their fellow faculty members. Thus, as in *Fordham*, they were held not to be supervisors within the meaning of the statutory definition.

In *Adelphi University*, supra, the Board also considered, inter alia, whether the members of a "personnel committee" and those of a "grievance committee" are supervisors within the statutory definition and concluded that, "[w]e are not disposed to disenfranchise faculty members merely because they have some measure of quasi-collegial authority either as an entire faculty or as representatives elected by the faculty." Accordingly, several members of these committees were held *not* to be supervisors within the meaning of the Act "solely by reason of such membership" and were included in the bargaining unit (supra at 648). Consult the text of this decision for a thorough discussion of supervisory and nonsupervisory determinations in an educational institution. On the other hand, consider the effect of the Supreme Court's *Yeshiva* decision, there regarding managerial status, on the concept of collegiality as a factor to be considered. (*NLRB v. Yeshiva University*, 444 U.S. 672 (1980).)

A contention that the bargaining unit cannot consist of faculty members because they are supervisors and managerial employees was rejected in *C. W. Post Center*, supra, and in *Manhattan College*, 195 NLRB 65 (1972). The Board observed in the latter: "That faculty members participate, by various means, in decisions regarding the operation of the college is no more persuasive here than it was in the earlier cases in establishing faculty members as members of management or as supervisors. As in those cases we find the faculty members to be professional employees under the Act who are entitled to vote for or against collective-bargaining representation." See also *Fordham University*, supra at 135.

The relationship between a faculty member and a graduate student is basically a teacher-student relationship which does not make the faculty member a supervisor. *Fordham University*, supra at 136. See *Detroit College of Business*, supra, for analysis of the effect of supervisory authority over nonunit clerical employees. See also section 17-510 of this chapter.

17-511 Health Care Supervisory Issues

177-8540-8000

177-8560-2800

177-8580-8000

Health care jurisdiction has occasioned considerable litigation of a number of supervisory issues especially those involving charge nurses. The litigation often centered on a line drawn by the Board between decisions and actions taken as part of patient care and more general 2(11) actions.

In *Northcrest Nursing Home*, 313 NLRB 491 (1993), the Board discussed at length the issue of whether LPN charge nurses responsibly direct nurses aides. In finding the nurses not to be statutory supervisors, the Board reaffirmed its "patient care" analysis, i.e., a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised "in the interest of the employer." *Northcrest*, 313 NLRB at 493–497.

Shortly thereafter, however, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), the Supreme Court considered the Board's patient care analysis for determining the supervisory status, specifically the phrase "in the interest of the employer." In a five to four decision, the Court found the Board's test to be inconsistent with the statutory criteria of Section 2(11). Succinctly put, the Court majority found no basis for the Board's assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer. "Patient care is the business of a nursing home and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." *Health Care & Retirement*, supra at 577. The Court also admonished the Board for devising a test that was industry specific. According to the Court, the Board erred in giving such

statutory terms as "responsibly to direct" and "independent judgment" a different meaning in the health care industry than it does in other industries.

Recently the Supreme Court decided important issues of healthcare supervisory analysis on the independent judgment question. For more detail see, *NLRB v. Kentucky River Community Care,* 532 U.S.706 (2001), and the *Oakwood* trilogy discussed at section 17-502.

For "effective recommendation" cases see *Oak Park Nursing Care Center,* 351 NLRB 27 (2007) (filling out counseling forms is effective recommendation); *Coventry Health Center,* 332 NLRB 52 (2000) (nurse role in evaluation procedure not effective recommendation); *Trevilla of Golden Valley*, 330 NLRB 1377 (2000) (nurse evaluations had direct linkage to merit pay increase); *Third Coast Emergency Physicians*, P.A., 330 NLRB 756 (2000) (physicians did not make effective recommendation to hire, discipline or evaluate); and *Michigan Masonic Home*, 332 NLRB 1409 (2000) (recommendations for discipline not effective).

In a nonnurse health care case the Board rejected a contention that a maintenance employee was a supervisor. The Board found that his involvement in discipline was reportorial only.

In *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995), the Board did find that that authority of assistant supervisors with respect to annual evaluations was sufficient to conclude that they were supervisors.

For discussion of related supervisory issues involving the exercise vel non of independent judgment, see section 17-501.

17-600 Railway Workers

177-1683-7500

177-2484-7500

460-7550-3700

Individuals employed by employers subject to the Railway Labor Act are excluded from the coverage of the National Labor Relations Act.

The definition of an employer subject to the Railway Labor Act is reasonably clear, and individuals employed by such employers are, of course, not covered by the National Labor Relations Act.

In interpreting this statutory exclusion, a question arose in relation to individuals employed by a labor organization which regularly acts as bargaining agent for railway workers. As the union was acting "in its capacity of an employer" with respect to its employees, the considerations appropriate to other employers under the National Labor Relations Act were applicable, and the union was found not to be "an employer subject to the Railway Labor Act." Neither the National Mediation Board nor the National Railroad Adjustment Board had jurisdiction because "the Railway Labor Act is only applicable to carriers and employees of carriers, and does not regulate labor unions and their employees as such." *Locomotive Firemen & Enginemen*, 145 NLRB 1521 (1964).

For a fuller discussion of the interplay between the National Labor Relations Act and the Railway Labor Act, see chapter on Jurisdiction, ante.

17-700 Employees of "Nonemployers"

177-1683

Individuals employed by employers who do not come within the meaning of the definition of "employer" in Section 2(2) of the Act are excluded from its coverage. Similarly, individuals who "supervise" persons who are not employees are not supervisors. See *North General Hospital*, 314 NLRB 14 (1994), where attending physicians who "supervise nonemployee" residents and interns were held not to be supervisors.

18. STATUTORY LIMITATIONS

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

18-100 Professional Employees

177-9300

355-2260

470-1700

18-110 The Statutory Mandate

355-2260

401-2570-1450

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

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

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

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

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

The Board requires that there be a *Sonotone* election each time that there is an election in which professionals and nonprofessionals may be included in the same unit. Thus, subsequent *Sonotone* elections are required in the same unit regardless of whether the professionals have

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

18-120 Professionals Defined

177-9325

470-1700

440-1760-4300

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

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

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

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

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

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

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

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

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

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

18-130 Previously Established Units

347-4040-3333-6767

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

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

18-200 Plant Guards

401-2575-2800

440-1760-5300

18-210 The Statutory Mandate

177-3950-9000

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

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

18-220 Guards Defined

401-2575-2800

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

Several examples may be cited:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In one interesting case, a divided Board remanded a guard's case to the Regional Director to conduct a hearing on whether the unit employees (guards) enforce rules to protect the premises and property of a statutory employer. The Board did not decide whether individuals who protect the premises of nonstatutory employers are guards within the meaning of the Act. *Watkins Security Agency for DC*, 356 NLRB No. 12 (2010).

18-230 Guards Unions

339-7575-7500

401-2575-2800

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

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

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

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

indirect affiliation, the Board will entertain a motion to revoke the certification. *Bonded Armored Carrier*, 195 NLRB 346 (1972).

Thus, where petitioner continued to accept substantial financial aid from the nonguard union and to permit the nonguard union to participate in its affairs, including negotiations and the organization and management of a strike, it was clear that the petitioner was not free to formulate its own policies and decide its own course of action with the complete independence from control by the nonguard union which the Act requires. And the certification was accordingly revoked. *International Harvester Co.*, 145 NLRB 1747 (1964).

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

See also sections 6-200 and -310.

18-240 Scope of Unit

339-7575-7500

401-7500

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

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

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

19. CATEGORIES GOVERNED BY BOARD POLICY

Apart from the categories excluded by the statute, or as to which statutory limitations require specific treatment, several other special categories are governed by Board policy. There are established rules based on policy considerations which apply to these categories, which include confidential employees, managerial employees, plant clerical employees, office clerical employees, and technical employees. Another category is that of relatives of management which, except to the extent of the exclusion of "any individual employed by his parent or spouse" under Section 2(3), is also the subject of Board policy.

All of these are treated here.

19-100 Confidential Employees

177-2401-6800

460-5033-5000

"Confidential employees" are defined as employees 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. Under Board policy, they are excluded from the bargaining unit. *Waste Management de Puerto Rico,* 339 NLRB 262 (2003); *Ladish Co*., 178 NLRB 90 (1969); *Chrysler Corp*., 173 NLRB 1046 (1969); *Eastern Camera Corp*., 140 NLRB 569, 574 (1963); *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956); and *Hampton Roads Maritime Assn.*, 178 NLRB 263 (1969).

Historical note: The policy relating to confidential employees is known as the "labor nexus test" and was described in *B. F. Goodrich Co*., supra, in which the Board stated:

> Upon further reexamination our holdings in the instant connection, we are still of the opinion expressed in the *Ford Motor Co*. case [66 NLRB 1317 (1946)] that any broadening of the definition of the term "confidential" as adopted in that decision needlessly precludes employees from bargaining collectively together with other employees sharing common interests. Consequently it is our intention herein and in future cases to adhere strictly to that definition and thus to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations.

Affirmed: *NLRB v. Hendricks County Electric Membership Corp*., 454 U.S. 170 (1981).

These considerations are to be "assessed in the conjunctive." *Weyerhaeuser Co*., 173 NLRB 1170 (1969).

The parties' agreement in the past to exclude clerks as confidential is not necessarily binding in a subsequent representation proceeding. *Chrysler Corp*., supra, and the party asserting confidential status has the burden of proof. *Crest Mark Packing Co*., 283 NLRB 999 (1987).

The Board dealt with the issue of confidential status of secretaries to the employer's negotiating team and to management officials responsible for formulating the employer's contract proposals. Since these secretaries assisted in the preparation of and/or had access to confidential labor relations information such as the employer's data in preparation for contract negotiations, minutes of negotiating sessions, and grievance investigation reports, they were found to be confidential employees. So were two other employees who substituted for the regular secretaries. *Firestone Synthetic Latex Co*., 201 NLRB 347 (1973). See also *National Cash Register Co*., 168 NLRB 910, 912–913 (1968), and *Bakersfield Californian*, 316 NLRB 1211 (1995).

The Board denied review of two Regional Director's decision on cases that presented a number of confidential issues and listed a number of recent cases *PTI Communications*, 308 NLRB 918 (1992); and *Inland Steel Co*., 308 NLRB 868 (1992).

The secretaries to vice presidents and the secretary to the secretary-treasurer of the employer were found to be confidential employees. These employees were present on occasion when labor

relations matters were discussed by their supervisors, including confidential meetings between the officers and supervisors at which the employer's policy as to grievances and union negotiations were discussed. They were also responsible for preparing orders and documents in labor relations matters. *Grocers Supply Co*., 160 NLRB 485, 488–489 (1966). See also *Triangle Publications*, 118 NLRB 595 (1957); and *Santa Fe Trail Transportation Co*., 119 NLRB 1302 (1958). See also *Low Bros. National Market*, 191 NLRB 432 (1971).

However, secretaries to factory managers, agricultural managers, plant controllers, and sales managers were held not to be confidential employees. *Holly Sugar Corp*., 193 NLRB 1024 (1971). The factory and agricultural managers in this case merely made administrative determinations with regard to the collective-bargaining agreement; they did not formulate, determine, and effectuate the labor relations policies of management. They participated in only a limited advisory way in the bargaining process. The mere fact that they were involved in the handling of routine grievances was not sufficient to impart confidential status to their secretaries. *B. F. Goodrich Co*., supra; *Weyerhaeuser Co.*, supra. As the plant controllers and the sales managers had less responsibility in the field of labor relations than the factory and agricultural managers, a fortiori, their secretaries could not properly be classified as confidential employees. See also *Greyhound Lines*, 257 NLRB 477 (1981); and *Waste Management de Puerto Rico,* supra.

An employee's access to personnel records and the fact the employee can bring information to the attention of management, which may ultimately lead to disciplinary action by management, is not enough to qualify an employee as confidential. *RCA Communications*, 154 NLRB 34, 37 (1965); *Ladish Co*., supra; *Hampton Roads Maritime Assn*., supra. See also *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994); and *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995).

Thus, an employee who has access to confidential matters dealing with contract negotiations is a confidential employee (*Kieckhefer Container Co*., 118 NLRB 950, 953 (1957)), but a clerk who prepares statistical data for use by an employer during contract negotiations is not confidential because the clerk cannot determine from the data prepared by him what policy proposals may result (*American Radiator Corp*., 119 NLRB 1715, 1720–1721 (1958)).

Employees who handle material dealing only with the financial matters of the employer are not confidential. *Dinkler-St. Charles Hotel*, 124 NLRB 1302 (1959). *Brodart, Inc*., 257 NLRB 380, 384 fn. 1 (1981).

Those who may at some time in the future function as confidential employees but who are not doing so at the time the determination is made do not belong to this normally excluded category. *American Radiator & Sanitary Co*., supra. This is also true of employees who spend only a small proportion of their time substituting for those who act in a confidential capacity. *Waste Management de Puerto Rico,* supra; *Meramec Mining Co*., 134 NLRB 1675 (1962); and *Swift & Co*., 129 NLRB 1391, 1393 (1961).

Single incidents of note-taking or isolated occasions of confidential duties have been held insufficient to exclude an employee from a bargaining unit. *Crest Mark Packing Co*., supra; *International Electric Assn*., 277 NLRB 1 (1985). But, generally, the amount of time devoted to labor relations matters is not a controlling factor in establishing confidential status. *Reymond Baking Co*., 249 NLRB 1100 (1980).

Contentions have been made that an employee who may be in a position to overhear conversations relating to labor relations due to his job location in the plant or because of his operation of the switchboard should be excluded as a confidential employee. These contentions have been uniformly rejected. See, for example, *Swift & Co*., 119 NLRB 1556, 1567 (1958).

The Board has not deemed "the mere possession of access to confidential business information by employees sufficient reason for denying such employees representation as part of any appropriate unit of work-related employees." *Fairfax Family Fund*, 195 NLRB 306, 307 (1972).

The fact that some employees may be entrusted with business information to be withheld from their employer's competitors or that their work may affect employees' pay scales does not render such employees either confidential or managerial. *Swift & Co*., supra.

Timekeepers were not excluded from a multiemployer unit as confidential employees where the record showed that, to the extent they had access to information of their employers, the information pertained to the performance of their duties as timekeepers and had nothing to do with the employers' labor policies. Moreover, there was no evidence that the timekeepers otherwise participated in the formulation or effectuation of the employers' general labor policies. *Hampton Roads Maritime Assn*., supra.

Like employees of labor organizations who are not "confidential" unless they meet the standard test for confidentiality prescribed by the Board *Air Line Pilots Assn*., 97 NLRB 929 (1951), only employees of a management association who act in a confidential capacity in relation to persons who formulate, determine, and effectuate management labor relations policy affecting directly the association's own employees are excluded as "confidential." *Pacific Maritime Assn*., 185 NLRB 780 (1970). See also *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C*., 253 NLRB 450 (1981), in which the Board reaffirmed the requirement that the duties relate to the employers' *own* employees (law firm), and *Dun & Bradstreet, Inc*., 240 NLRB 162 (1979) (credit reporters).

19-110 Status of Confidentials

460-5033-5000

Under Board precedent, confidential employees enjoy the protection of the Act. *Peavey Co.*, 249 NLRB 853 (1980). But see *NLRB v. Hendricks County Electric Corp*., 454 U.S. 170 fn. 19 (1981). In *E & L Transport Co*., 315 NLRB 303 (1994), the Board held that applicants for confidential positions are employees within the meaning of Section 2(3) and are protected by Section 8(a)(3).

19-200 Managerial Employees

177-2401-6700

460-5033-7500

Although the Act makes no specific provision for "managerial employees" under Board policy, this category of personnel has been excluded from the protection of the Act. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *Ford Motor Co*., 66 NLRB 1317 (1946); and *Palace Dry Cleaning Corp*, 75 NLRB 320 (1948).

"Managerial employees" are defined as employees who have authority to formulate, determine, or effectuate employer 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 policies. *Tops Club, Inc*., 238 NLRB 928 fn. 2 (1978), quoting *Bell Aerospace*, 219 NLRB 384 (1975), on remand from the Supreme Court's decision 416 U.S. 267 (1974). The decisions must be made in the interest of the employer. *Allstate Insurance Co*., 332 NLRB 759 (2000), discussed supra at 17-501.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), Supreme Court described managerial employees:

> Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.

> Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. [Id. at 682–683.]
>
> Thus, the duties of "final credit analysts" were compared with those of employees engaged as security brokers, insurance claim adjusters, bank tellers, and note collectors, whom the Board has found to be nonmanagerial. *Fairfax Family Fund*, supra at fn. 5. See also, for example, *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971) (brokers); *Banco Credito y Ahorro Ponceno*, 160 NLRB 1504 (1966) (bank collectors, loan officers, loan adjusters).

The exclusionary practice with respect to individuals found to be "managerial" within the confines of the definition in *North Arkansas Electric Cooperative*, supra, rests on the premise that the functions and interests of such individuals are more closely allied with those of management than with production workers and, therefore, they are not truly "employees" within the meaning of the Act. However, it should be made clear at the outset that "supervisory status is specifically defined in Section 2(11) of the Act and is not equitable with managerial status." *Howard Cooper Corp*., 121 NLRB 950, 951 (1958).

The Board in *North Arkansas Electric Cooperative*, supra, and *Bell Aerospace Co*., 190 NLRB 431 (1971); and *Bell Aerospace Co*., 196 NLRB 827 (1972), had determined that "managerial" employees are "employees" within the meaning of the Act, and directed elections in units of managerial employees. However, in *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974), the Supreme Court reversed this decision on the basis of prior Board precedent and legislative history.

District supervisors responsible for dealing with newspaper circulation have in some cases been held to be managerial because they exercise independent judgment in entering into and canceling contracts as well as in determining compensation. *Eugene Register Guard*, 237 NLRB 205 (1978). But see *Washington Post Co*., 254 NLRB 168, 183 (1981); *Long Beach Press-Telegram*, 305 NLRB 412 (1991); and *Reading Eagle Co*., 306 NLRB 871 (1992).

In *NLRB v. Yeshiva University*, supra, the Supreme Court concluded that university professors who can take or recommend discretionary actions that effectively control or implement employer policy were managerial employees. See *Lewis & Clark College*, 300 NLRB 155 (1990), and cases cited therein. See also *University of Great Falls*, 325 NLRB 83 (1997), rejecting an argument that the professors were management and that the college was outside the Board's jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In *Carroll College, Inc.,* 350 NLRB No. 30 (2007) (not reported in Board volumes), the Board, after considering all of the faculty's duties, held that faculty are not managerial because they determine admission of those who fall below traditional admissions standards. But in *LeMoyne-Owen College,* 345 NLRB 1123 (2005), the Board found the faculty to be managerial where inter alia, they control decisions on curriculum, courses of study and course content, degrees and degree requirements, tenure standards and selections, and faculty evaluation procedures.

In finding timekeepers not to be managerial employees, the Board stated that an employee does not acquire managerial status by making some decisions or exercising some judgment "within established limits set by higher management." A conclusion is arrived at in each case based on the degree of discretion and authority exercised by the disputed employee. *Holly Sugar Corp*., supra; see also *Sampson Steel & Supply*, 289 NLRB 481 (1988); *Central Maine Power Co*., 151 NLRB 42, 45 (1965); and *American Radiator & Sanitary Corp*., supra. See also *Case Corp*., 304 NLRB 939 (1991), in which the Board found industrial engineers are not managerial even though they participate in grievance handling and bargaining. In neither case did the record show that they had extensive authority to make employer policy. Accord: *George L. Mee*

Memorial Hospital, 348 NLRB 327 (2006) (utilization review nurse whose duty is to insure that hospital provides care consistent with established utilization guidelines is not managerial).

In addition see *Bakersfield Californian*, 316 NLRB 1211 (1995) (certain newspaper duties not managerial); and *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994) (decision of social workers not those of managers).

A mine safety coordinator was found not to be a managerial employee inasmuch as he did not formulate safety policy or have authority to enter into agreements with mine safety inspectors that would bind the employers to take remedial actions. *Rockspring Development, Inc*., 353 NLRB 1041 (2009) (two Member decision).

The definition of a managerial employee, as developed by the Board, has been urged as to union organizers and field representatives. The Board has held that the fact that such organizers do not work under close supervision but exercise wide discretion, represent their employer (which is the union) to the public, pledge their employer's credit to a limited extent, and sign agreements on its behalf is not determinative of managerial status as they fail to meet the Board's view that managerial employees are those who formulate, determine, and effectuate the employer's policies. *American Federation of Labor*, 120 NLRB 969 (1958); and *Textile Workers UTWA*, 138 NLRB 269 fn. 2 (1962). Compare *Retail Clerks Local 428*, 163 NLRB 431 (1967); and *Retail Clerks Local 880*, 153 NLRB 255, 258 (1965).

19-210 Stock Ownership

Employee shareholders who are able to influence management policy by selecting members of the board of directors are managerial. See *Sida of Hawaii, Inc*., 191 NLRB 194 (1971); and *Florence Volunteer Fire Department*, 265 NLRB 955 (1982) (firefighter members of nonprofit fire company). See also *Science Applications Corp*., 309 NLRB 373 (1992). Compare *Upper Great Lakes Pilots*, 311 NLRB 131, 132 (1993), "stock ownership alone does not deprive an employee from the protection of the Act" and *Centurion Auto Transport,* 329 NLRB 394 (1999). See also *Citywide Corporate Transportation, Inc.,* 338 NLRB 444 (2002).

19-300 Relatives of Management

177-2484-3700

362-6798

460-5033-2550-2900 et seq.

The statutory definition of an employee in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse." This definition is clear on its face and one would not anticipate a need for further amplification. However, in view of developments in the cases in relation to this category, special consideration here is necessary.

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. See *Campbell-Harris Electric*, 263 NLRB 1143 (1983), and *Ideal Elevator Corp*., 295 NLRB 347 (1989). Clearly, the child of a sole shareholder is excluded. *Bridgeton Transit*, 123 NLRB 1196 (1959). So also are children of majority shareholders. *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 individuals involved in *Action Automotive Inc*., were the wife of the corporate president and one-third owner of the employer and the mother of the three brothers who owned the corporation.

The court also endorsed the Board's policy requiring that eligibility of relatives in a nonclosely held corporation depend 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 on the stockholder, and similar considerations. The individual in question may also be excluded if his or her job duties reflect a special relationship. See *Blue Star Ready-Mix Concrete Corp*., 305 NLRB 429 (1991), in which the Board found that the nephew of one owner and the grandson of the another did not enjoy any special status. Compare *Luce & Son, Inc*., 313 NLRB 1355 (1994), finding special status under different circumstances than those in *Blue Star*, supra. See also *R & D Trucking*, 327 NLRB 531 (1999), and *M. C. Decorating*, 306 NLRB 816 (1992).

The special status test is also applied to determine the eligibility of relatives of nonowner managers, who are not subject to the expanded community-of-interest test. *Cumberland Farms*, 272 NLRB 336 (1984); and *Allen Services Co*., 314 NLRB 1060 (1994). In *Peirce-Phelps, Inc.,* 341 NLRB 585 (2004), a divided Board found no special relationship distinguishing *Novi American Inc.–Atlanta*, 234 NLRB 421 (1978), which found special relationship.

19-400 Office Clerical and Plant Clerical Employees

440-1760-1900 et seq.

440-1760-2400

440-1760-2900

Generally

As a general rule, absent agreement of the parties, office clerical and plant clerical employees are not joined in a single unit. *Kroger Co*., 204 NLRB 1055 (1973); *L. M. Berry & Co*., 198 NLRB 217 (1972). *Fisher Controls Co*., 192 NLRB 514 (1971); *Weyerhaeuser Co*., 173 NLRB 1170 (1969); *Rudolph Wurlitzer Co*., 117 NLRB 6 (1957); *Republic Steel Corp*., 131 NLRB 864 (1961); and *Vulcanized Rubber & Plastics Co*., 129 NLRB 1256 (1961). As noted, an exception is made where there is an agreement of the parties. See *Eljer Co*., 108 NLRB 1417, 1423–1424 (1954); and *Otis Hospital*, 219 NLRB 164, 166 (1975). For the same reason, plant clerical employees are excluded from a unit of office clerical employees where any party objects to their inclusion. *Mosler Safe Co*., 188 NLRB 650 (1971); *Copeland Refrigeration Corp*., 118 NLRB 1364 (1957).

Under normal circumstances, a distinct difference exists between office employees and plant clerical employees. See, e.g., *Dunham's Athleisure Corp*., 311 NLRB 175 (1993).

19-410 Definitions

401-7500

440-1760-1900

440-1760-2400

As the Board has stated, "the distinction between office clericals and plant clericals is not always clear." *Hamilton Halter Co*., 270 NLRB 331 (1984). The test generally is whether the employees' duties are related to the production process (plant clericals) or related to general office operations (office clericals). The distinction is grounded in community-of-interest concepts. *Cook Composites & Polymers Co*., 313 NLRB 1105 (1994).

Typical plant clerical duties are timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. *Kroger Co.,* 342 NLRB 202 (2004); *Caesars Tahoe,* 337 NLRB 1096 (2002); and *Hamilton Halter*, supra. In contrast, typical office clerical duties are billing, payroll, phone, and mail. *Dunham's Athleisure Corp*., supra; *Mitchellace, Inc*., 314 NLRB 536 (1994); *Virginia Mfg. Co*., 311 NLRB 992 (1993); and *PECO Energy Co*., 322 NLRB 1074 (1997) (public utility P & M unit).

Plant clerical employees are customarily included in a production and maintenance unit because they generally share a community of interest with the employees in the plantwide unit. *Kroger Co.,* supra; *Caesars Tahoe,* supra; *Raytec Co*., 228 NLRB 646 (1977); and *Armour & Co*., 119 NLRB 623 (1958). *Brown & Root, Inc*., 314 NLRB 19 (1994). For this reason, in *Fisher Controls Co*., supra, where the plant clericals were sought to be represented by a union recognized as the representative of the production and maintenance employees, the plant clericals were afforded a self-determination election to indicate whether or not they wished to become part of the existing unit. See also *Columbia Textile Services*, 293 NLRB 1034, 1037 (1989). Compare *Avecor, Inc*., 309 NLRB 59 (1992).

Office clerical employees on the other hand, although they may be under the same supervision as plant clerical employees and share the same mode of compensation, are nonetheless excluded from the production and maintenance unit while the plant clerical employees are included. *Lilliston Implement Co*., 121 NLRB 868, 870 (1958); and *PECO*, supra.

Although the Board has recognized that plant clericals may, in some circumstances, be separately represented in a unit apart from all other categories of employees, it has declined to establish such a unit, in the absence of agreement by the parties, in which plant clericals are sought to be represented by a union which enjoys recognized status as the representative of work-related and commonly supervised production employees. This was the factual situation in *Weyerhaeuser Co*., supra. See also *Swift & Co*., 119 NLRB 1556 (1958); *Robbins & Myers, Inc.*, 144 NLRB 295, 299 (1963); *Armstrong Rubber Co*., 144 NLRB 1115, 1119 (1963); and *Swift & Co*., 131 NLRB 1143 (1961). In these special circumstances, observed the Board, it "has made a practical judgment that the interests of all concerned would best be served by adding related plant clericals to the established unit of production and maintenance employees if they desire to be represented by the same union."

Under Board policy, office clerical employees are customarily excluded from the production and maintenance unit. *Hygeia Coca-Cola Bottling Co*., 192 NLRB 1127, 1129 (1971); and *Westinghouse Electric Corp*., 118 NLRB 1043 (1957).

Similarly, the Board excludes office clerical employees from a residual unit of production and maintenance employees (*California Steel & Supply Corp*., 104 NLRB 787, 789 (1953)), and from a previously unrepresented fringe group of production and maintenance employees which a labor organization seeks to add to an existing production and maintenance unit (*Minneapolis-Honeywell Regulator Co*., 115 NLRB 344, 348 (1956). Thus, in *Swift & Co*., 166 NLRB 89 (1967), the Board found appropriate a separate unit of office clericals, refusing to include them in a unit of currently unrepresented production employees working in the stockyards. But see *Montgomery Ward & Co*., 259 NLRB 280 fn. 4 (1981), in which the Board suggests, in the absence of a request for review on that issue, that it would approve inclusion of office clericals in a residual warehouse unit. In *United Parcel Service*, 258 NLRB 223 (1981), the Board designated separate units of office clericals and operating clericals.

This policy holds even when a prior bargaining history on an overall basis exists. *Westinghouse Electric Corp*., supra. However, when, in addition to a long bargaining history for all employees in a single unit, there is also a high degree of functional integration and identity in terms and conditions of employment, resulting in a community of interest of all employees, a historical unit which includes office clerical employees is appropriate. *Townley Metal & Hardware Co*., 151 NLRB 706, 708–709 (1965).

As with production and maintenance units, the Board stressed lack of community of interest as the basis for including office clericals from a sales unit, despite the fact that the clericals were engaged in daily work tasks which necessarily brought them into contact with the sales employees and which were related to the sales campaign. *L. M. Berry & Co*., supra. See also *Fireman's Fund Insurance Co*., 173 NLRB 982 (1969).

19-420 Clerical Units Generally

As is invariably the rule in unit matters, a unit limited to a segment of the office clerical employees or of the plant clerical employees is inappropriate. *Aurora Fast Freight*, 324 NLRB 20 (1997); *Olin Mathieson Chemical Corp*., 117 NLRB 665 (1957); *Beech Aircraft Corp*., 170 NLRB 1595 (1968); and *California Blue Shield*, 178 NLRB 716 (1969).

19-430 Clericals—Warehouse Units

One difficult area concerns the placement of clericals in warehouse-type integrated operations. See, e.g., *Esco Corp*., 298 NLRB 837 (1990); cf. *Scholastic Magazines*, 192 NLRB 461 (1971); *Jacob Ash Co*., 224 NLRB 74 (1976); and *Gustave Fischer, Inc*., 256 NLRB 1069 (1981), order takers and others involved in the ordering process have proved particularly troublesome. *ABS Corp*., 299 NLRB 516 (1990); *Hamilton Halter Co*., 270 NLRB 331 (1984); *Cincinnati Bronze*, 286 NLRB 39 (1987); and *John N. Hansen Co*., 293 NLRB 63 (1989).

Customarily, separate units of office clerical employees alone and plant clerical employees alone are appropriate. *Carling Brewing Co*., 126 NLRB 347 (1960). But see Montgomery *Ward & Co*., supra at fn. 4, in which office and plant clericals were included in a residual warehouse unit. See also *Fleming Foods*, 313 NLRB 948 (1994), involving the breadth of a warehouse clerical unit and a finding this petitioned unit was residual. In *United Parcel Service*, 258 NLRB 223 (1981), the Board designated separate units of office clericals and operating clericals. But see *Kalustyans*, 332 NLRB 843 (2000), where office workers were included in a unit of shipping clerks.

19-440 Self-Determination Elections—Clericals

When there was only one office clerical employee in an employer's industrial engineering department and the Board found that this employee did not have a sufficient community of interest with the industrial engineers to be included with them in a departmental unit, the Board gave the employee the opportunity to vote for representation by the petitioner as an indication that she wished to be included in the plantwide office clerical unit currently represented by the petitioner. Otherwise, the employee would remain unrepresented. *Chrysler Corp*., 194 NLRB 183 (1972).

Where electronic data processors were found to constitute a homogeneous and identifiable group, the Board called for a self-determination election because they might constitute a separate appropriate unit, as petitioner requested or, because of their functional integration, they might appropriately be part of the intervenor's unit of office and clerical employees. *Safeway Stores*, 174 NLRB 1274 (1969).

For full discussion of self-determination elections, see chapter 21.

19-450 Multiplant Clerical Units

440-3300

In a case which presented a clerical unit issue in a multiplant situation, the Board found a unit of office clerical employees at the employer's three branches an appropriate unit in the following circumstances: The hiring and firing of clericals for all three locations was handled through a central personnel department; there were common policies at the three locations with respect to wages, hours, and working conditions; there was frequent interchange of personnel among the three locations, both temporary and permanent; and supervision was structured primarily along departmental rather than plant lines, so that an employee working at one location might be supervised from another location. *Dean Witter & Co*., 189 NLRB 785 (1971).

See also chapter 13.

19-460 Business Office Clerical—Health Care

470-6700

Business office clericals are an appropriate unit in acute care hospitals under the Board's Health Care Unit Rule. 284 NLRB 1515, 1562.

For a discussion of business office clericals, see *Charter Hospital of Orlando South*, 313 NLRB 951 (1994). See also *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995), including nursing department secretaries and payroll clerks in a business office unit. Note that this case also rejected the contention that these nursing department secretaries are confidential employees and that receptionists are business office clericals.

See also section 15-170, Health Care Institutions.

19-500 Technical Employees

177-2401-2500

440-1760-3400

440-1760-3800 et seq.

470-3300

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 specialized training usually acquired in colleges or technical schools, or through special courses. *Folger Coffee Co*., 250 NLRB 1 (1980); *Augusta Chemical Co*., 124 NLRB 1021 (1959); *Dayton Aviation Radio & Equipment Corp*., 124 NLRB 306 (1959); *Container Corp. of America*, 121 NLRB 249, 251 (1958); *Design Service Co*., 148 NLRB 1050 (1964); *Avco Corp*., 173 NLRB 1199 (1969); and *Fisher Controls Co*., 192 NLRB 514 (1971). See also *Audiovox Communications Corp*., 323 NLRB 647 (1997).

Initially, the policy had been automatic exclusion of technical employees from a production and maintenance unit if either party objected to their inclusion. See, for example, *Litton Industries*, 125 NLRB 722, 724–725 (1960). However, in *Sheffield Corp*., 134 NLRB 1101, 1103–1104 (1962), this per se rule was eliminated. The Board concluded that automatically excluding all technical employees from production and maintenance units whenever their unit placement was in issue was not a salutary way of achieving the purposes of the Act. "To do so is to give primacy in unit placement to the parties' disagreement rather than to the overriding consideration of the community of interests." For a discussion of the history of Board policy on "technical employee" in the research and development industry, see *Aerospace Corp*., 331 NLRB 561 (2000) (unit of maintenance employees at research and development facility held not to warrant facilitywide unit).

The Board announced that henceforth a "pragmatic judgment" would be made in each case based on, among other things, the following considerations: (a) bargaining history, (b) common supervision, (c) similarity of skills and job functions, (d) contracts or interchange with other employees, (e) type of industry, (f) location of employees within the plant, (g) the desires of the parties, and (h) whether any union seeks to represent the technical employees separately. See also *Virginia Mfg. Co*., 311 NLRB 992 (1993).

The Sheffield policy was applied where the petitioner did not dispute the technical status of "planners" and "estimators" but adduced no evidence to support the claim that these technical employees shared a special community of interest with the plant clerical employees. The Board found no warrant for combining them in the same voting group with such employees. *Weyerhaeuser Co*., supra. See also *Meramec Mining Co*., 134 NLRB 1675 (1962); *Hazelton Laboratories*, 136 NLRB 1609 (1962); and *Robertshaw-Fulton Controls Co*., 137 NLRB 85

(1962). Compare *Livingstone College*, 290 NLRB 304, 306 (1988), in which the petitioner sought an all nonprofessional unit including technicals.

"Systems analysts" and "programmers" were included in a unit comprised mainly of office clericals because most of the employees sought to be represented were data processors, the employer's operations were highly integrated, equipment was shared by employees with different classifications, and there was frequent contact among all data processing employees. The demonstrated close community of interest between the disputed systems analysts and programmers and the other data processing employees and the absence of a labor organization seeking to represent the disputed employees separately outweighed the significance of the geographical separation of the systems analysts and programmers from the other employees. *Computer Systems*, 204 NLRB 255 (1973). The same technical categories (systems analysts and programmers) were in issue in *Ohio Casualty Insurance Co*., 175 NLRB 860 (1969). They were excluded from a requested unit consisting mostly of office clerical employees because of significant differences between them and the latter in regard to "job functions, responsibilities, use of initiative, and independent judgment, immediate supervision, wages, and hours." See also *Postal Service*, 210 NLRB 477 (1974); and *Lundy Packing Co*., 314 NLRB 1042 (1994), involving timestudy employees/industrial engineers.

When community of interest exists among all the employer's technical employees, a unit including some, but not all, of such employees is inappropriate. *Whitehead & Kales Co*., 196 NLRB 111 (1972); *General Electric Co*., 173 NLRB 399 (1969); *Boeing Co*., 169 NLRB 916 (1968); *Bendix Corp*., 150 NLRB 718, 720–721 (1965); *Allis-Chalmers Mfg. Co*., 117 NLRB 749 (1957); and *Solar Aircraft Co*., 116 NLRB 200 (1957). See also *Pratt & Whitney*, 327 NLRB 1213 (1999). But if, in the more unusual case, there are several independent, identifiable groups of technical employees, separate units may be appropriate. *Federal Electric Corp*., 157 NLRB 1130 (1966). In that case, the petitioner's unit request, which the Board granted, limited the technical employees in the proposed unit to those working aboard ships as distinguished from those who were land based.

A unit of technical, plant clerical, and office clerical employees will be found appropriate if no party objects. *Otis Elevator Co*., 116 NLRB 262 (1957). But even where several factors support such a unit finding, a unit of technical employees alone is found where these employees have a community of interest in terms and conditions of employment separate from the other employees. *Worthington Corp*., 155 NLRB 59 (1965). See also *American Motors Corp.*, 206 NLRB 287 (1973); and *Fisher Controls Co*., supra. See also *Siemens Corp*., 224 NLRB 1579 (1976), in which the Board permitted a self-determination election in which office clerical employees could vote for inclusion in a technical unit.

19-510 Technical Employees—Health Care

470-3300

Technical employees are an appropriate unit in acute care hospitals under the Rule, 284 NLRB 1515, 1553. For a discussion of technical units under the health care Rule see *Park Manor Care Center*, 305 NLRB 872 (1991); *Meriter Hospital*, 306 NLRB 598 (1992); and *Faribault Clinic*, 308 NLRB 131 (1992). See also *San Juan Regional Medical Center*, 307 NLRB 117 (1992), in which a divided panel found biomedical technicians not to be technical employees. Accord: *Mercy Health Services North*, 311 NLRB 1091 (1993).

In *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994), the Board found a diet technician to be a technical employee. Citing *Sheffield*, supra, for the need to make "pragmatic judgments," the Board included that technician is a unit that included, inter alia, all dietary employees.

In *Virtua Health, Inc.,* 344 NLRB 604 (2005), the Board found that a unit of the employer's paramedics was too limited and that the paramedics should be included in a technical unit. The employer was a health care institution and the employer contended that it was an acute care

facility and, thus, within the Board's Health Care Unit Rule. The Board found it unnecessary to decide coverage under the Rule because even under the broader standard of *Park Manor Care Center,* 305 NLRB 872 (1991), the community-of-interest test, a paramedic unit was not appropriate.

For a discussion of a technical employees' unit in a psychiatric hospital, see *Brattleboro Retreat*, 310 NLRB 615 (1993).

Whether or not technical employees will be included in a nontechnical unit depends on the facts of the case. In *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995), the Board excluded technicals from an overall nonprofessional unit distinguishing a contrary holding in *Brattleboro Retreat*, supra. Accord: *Lincoln Park Nursing Home*, supra.

19-600 Quality Control Employees

401-7500

440-1760-0500 et seq.

Quality control employees are generally included in a production and maintenance unit based on traditional community-of-interest standards. *Blue Grass Industries*, 287 NLRB 274 (1987). See also *Lundy Packing Co*., supra, where a divided Board excluded those employees from a production and maintenance unit.

20. EFFECT OF STATUS OR TENURE ON UNIT PLACEMENT AND ELIGIBILITY TO VOTE

In both unit placement and eligibility to vote, the status of employees and their tenure are major considerations. The job classifications of employees do not always determine whether or not they will be included in a unit. Treated here are questions which pertain to (1) part-time employees; (2) temporary employees; (3) seasonal employees; (4) student workers; (5) dual-function employees; and (6) probationary employees, including trainees and clients in rehabilitation settings.

20-100 Part-Time Employees

20-110 Generally

362-6712

460-5067-4200

Part-time employees are included in a unit with full-time employees whenever the 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 interest in the wages, hours, and working conditions of the full-time employees in the unit. *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004); *Arlington Masonry Supply, Inc.,* 339 NLRB 817 (2003); and *Fleming Foods*, 313 NLRB 948 (1994). *Pat's Blue Ribbons*, 286 NLRB 918 (1987); and *Farmers Insurance Group*, 143 NLRB 240, 245 (1979). Such part-time employees are described as "regular part-time employees."

In *Arlington Masonry Supply, Inc*., supra at 819, the Board described its policy for determining part-time eligibility:

> The test to determine whether one is a regular part-time employee versus a casual employee "takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions." *Muncie Newspapers, Inc.,* 246 NLRB 1088, 1089 (1979). "In short, the individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Pat's Blue Ribbons*, 286 NLRB 918 (1987).
>
> The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the quarter preceding the eligibility date. See *Davison-Paxon* [*Co.,* 185 NLRB 21 (1970), infra at sec. 20-120].

The last quarter preceding the eligibility date refers to the "13-week period immediately before the eligibility date" not the last calendar quarter. *Woodward Detroit CVS, LLC*, 355 NLRB 1129 (2010).

Where the number and identity of drivers and other employees fluctuated from week to week but a substantial number reported and worked fairly regularly over a period of several months, and during an 8-month period 70 of approximately 120 to 125 drivers worked in three or more consecutive weekly pay periods, with many more working in 10 or more consecutive weeks, the Board concluded that this "is scarcely the pattern of a temporary, part-time or casual work force." *Fresno Auto Auction*, 167 NLRB 878 (1967). The brevity of the employee's tenure may be a factor in determining part-time status, but it is not dispositve. In *New York Display & Die Cutting Corp.*, supra, the Board found regular part-time status for an employee who was hired 9 days before the election.

The Board in this case made the further comment that "[i]n determining the relative regularity or permanence of the employment in the proposed unit, we believe this fact outweighs those considerations having to do with the individual's freedom to determine his own work schedule or to report for work intermittently." The fact that they were carried on the payroll as part-time workers did not "alter the character of the work force as a cohesive group of individuals with a strong mutual interest in their working conditions." Id. See also *Henry Lee Co*., 194 NLRB 1107 (1972).

Following this principle, part-time employees who worked principally on weekends performing the same work as full-time workers were included in a unit of full-time employees. *Bob's Ambulance Service*, 178 NLRB 1 (1969). And where for a representative 2-week payroll period each employee averaged 33 hours of work, they were found to be regular part-time employees. *Shannon & Luchs*, 166 NLRB 1011 (1967).

As has been noted, the similarity of interests between full-time and part-time employees is a determinative factor. *Newburgh Mfg. Co*., 151 NLRB 763 (1965); *Berea Publishing Co*., 140 NLRB 516 (1963); and *Great Atlantic & Pacific Tea Co*., 119 NLRB 603 (1957). In evaluating the part-time status of employees, consideration is given to regularity and continuity of employment, the similarity of duties and functions to those of full-time employees, the similarity of wages, benefits, and other working conditions, and the supervision of the part-time employees. *V.I.P. Movers*, 232 NLRB 14 (1977); *L & A Investment Corp*., 221 NLRB 1206, 1207 (1975); *Lancaster Welded Products*, 130 NLRB 1478 (1961); and *Mensh Corp*., 159 NLRB 156, 158 (1966). The work history of the employees in question is also considered (*Columbus Plaza Hotel*, 148 NLRB 1053 (1964)), as is the turnover rate among that classification of employees (*Lewis & Coker Supermarkets*, 145 NLRB 970 (1964); and *Vindicator Printing Co*., 146 NLRB 871 (1964)).

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 a part-time employee is regular or casual. *Davison-Paxon Co*., 185 NLRB 21, 23–24 (1970); *C. T. L. Testing Laboratories*, 150 NLRB 982 (1965); and *Motor Transport Labor Relations*, 139 NLRB 70 (1962).

Examples of such determinations follow:

In retail department stores, part-time employees who worked a minimum of 15 days in the calendar quarter before the eligibility date were considered regular part time. *Scoa, Inc*., 140 NLRB 1379 (1963).

Part-time taxi drivers working 1 or 2 days a week were included in the unit found appropriate. *Jat Transportation Corp*., 128 NLRB 780 (1960); *Cab Operating Corp.*, 153 NLRB 878 (1965); and *Checker Cab Co*., 141 NLRB 583 (1963).

All part-time employees who worked at least 8 hours per week were included (*Chester County Beer Distributors*, 133 NLRB 771 (1961)), as were employees who worked 20 hours per week. (*Farmers Insurance Group*, supra.)

Part-time blood collectors who work an average of 5 to 25 hours per week and whose hours are scheduled in advance were included in the unit. *St. Luke's Episcopal Hospital*, 222 NLRB 674, 678 (1976). See also *Leaders Nameoki, Inc.*, 237 NLRB 1269 (1978) (4 hours for department store personnel).

Employees who regularly averaged 4 hours a week for the last quarter prior to the eligibility date were regarded as having a sufficient community of interest to warrant inclusion. *V.I.P. Movers*, supra; *Allied Stores of Ohio*, 175 NLRB 966 (1969).

Part-time employees working approximately one-quarter of the available workdays in the quarter of a year preceding an election were included in a production and maintenance unit of a newspaper printer and publisher. *Suburban Newspaper Group*, 195 NLRB 438 (1972).

An annuitant working regularly but limited in hours and pay so as not to decrease his annuity was included in the unit. *Consolidated Supply Co.*, 192 NLRB 982, 986 (1971).

Where there is a wide disparity in the numbers of hours worked by part-time employees, the Board may fashion an appropriate standard to assure an equitable formula. Compare *Marquette General Hospital*, 218 NLRB 713 (1975), with *Sisters of Mercy Health Corp*., 298 NLRB 483 (1990), and *Northern California Nurses Assn*., 299 NLRB 980 (1990). See also *Beverly Manor Nursing Home*, 310 NLRB 538 (1993).

Regular part-time employees are characteristically included in a retail store unit. Where all part-time selling employees worked a regular and substantial amount of time and had a sufficient community of interest with full-time employees, the Board dismissed a petition for a proposed unit which was restricted to so-called regular sales employees. *Sears, Roebuck & Co.*, 172 NLRB 1266 (1968).

The fact that an employee has a regular full-time position elsewhere does not destroy his community of interest with employees at his part-time employment if the other criteria are met. *Tri-State Transportation Co.*, 289 NLRB 356 (1988); and *Joclin Mfg. Co*., 144 NLRB 778 (1963). But where such an employee will only work at his part-time job as his full-time position allows, and there is therefore no established working pattern, the employee may be considered irregular and casual. *Haag Drug Co.*, 146 NLRB 798 (1964). Compare *V.I.P. Radio*, 128 NLRB 113 (1960).

See also section 20-120 and 140.

20-120 "On-Call" Employees

362-6734

460-5067-8200

"On-call" employees may or may not be considered regular part-time employees, depending on the specific nature of their employment. Where they are employed sporadically, with no established pattern of regular continuing employment, they are excluded from the unit. *Piggly Wiggly El Dorado Co*., 154 NLRB 445, 451 (1965); and *G. C. Murphy Co.*, 128 NLRB 908 (1960).

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 Board, they are considered regular part-time employees. *Davison-Paxon Co*., supra; *Wadsworth Theater Management,* 349 NLRB 122 (2007); and *Steppenwolf Theatre Co.,* 342 NLRB 69 (2004), applying the *Davison–Paxon* formula and distinguishing the *Julliard School*, 208 NLRB 153 (1974), formula; *Berlitz School of Languages*, 231 NLRB 766 (1977); *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975); *Columbus Plaza Motor Hotel*, supra; and *Bailey Department Stores Co*., 120 NLRB 1239 (1958). See also *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994).

The Board applies the *Davison-Paxon* formula in determining eligibility of part-time employees absent special circumstances. See *Columbus Symphony Orchestra, Inc.,* 350 NLRB 523 (2007), where the Board reaffirmed and described the "special circumstances" test.

In *Kansas City Repertory Theatre, Inc.,* 356 NLRB No. 28 (2010), a Board majority rejected a contention that musicians are temporary/intermittent workers. The Board noted that all the employees in the unit work intermittently and share a community of interest.

The Board used "dual-function" analysis in determining whether employees were eligible to vote in an election of parking lot employees where the individuals worked full time for the employer in other positions. The Board rejected the "on-call" analysis of the Regional Director. *Syracuse University*, 325 NLRB 162 (1997).

When a contract specifically covered in one bargaining unit all the employer's film servicing locations, the on-call technicians performed the same work as the full-time technicians, and the

contract also specifically provided for the employment of on-call technicians and for their remuneration on a flight-serviced basis, the on-call technicians were included in the unit. *Bell & Howell Airline Service Co*., 185 NLRB 67 (1970).

In determining the number of working hours, the Board counted time spent by home health care workers in completing paperwork and in delivering mandatory paperwork to the office. It did not count time spent consulting with other personnel. *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997).

For related discussion see Irregular Part-Time Employees, section 20-140 below.

For a discussion of "on-call" nurses, see the health care cross listed in section 20-110 above.

For a related discussion of "on-call employees," see section 23-450.

20-130 Part-Time Faculty Members

460-5067-4200

The Board determined in *New York University*, 205 NLRB 4 (1973), that the differences between members of the full-time and members of the part-time faculty are so substantial in most colleges and universities that it would no longer adhere to the principle announced in *University of New Haven*, 190 NLRB 478 (1971), of including regular, part-time faculty in the same unit with full-time faculty. Thus, the Board now "excludes adjunct professors and part-time faculty members who are not employed in 'tenure track' positions." Also see *Catholic University of America*, 205 NLRB 130 (1973). However, the Board has found a separate unit of part-time faculty members to be appropriate when the employees sought to share a community of interest. *University of San Francisco*, 265 NLRB 1221 (1982). Cf. *Goddard College*, 216 NLRB 457 (1975).

20-140 Irregular Part-Time Employees

362-6730

460-5067-7700

We turn now to part-time employees whose work periods are sporadic or casual. These are normally termed "irregular part-time employees." Within the framework of the basic rationale which delineates the dichotomy between "regular" and "irregular," close cases often arise. The absence of the required factors for finding regular part-time status inevitably leads to a finding of "casual" status. *Royal Hearth Restaurant*, 153 NLRB 1331 (1965). Considerations such as the ability of an employee to accept or reject employment or to vary the number of hours worked according to personal choice are relevant to the determination. Thus, the option of employees on a list subject to call to reject or accept employment is relevant to but not determinative of casual employment. *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Tri-State Transportation Co*., 289 NLRB 356, 357 (1988); and *Manncraft Exhibitors Services*, 212 NLRB 923 (1974). Infrequent employment also leads to such a finding. *Callahan-Cleveland, Inc*., 120 NLRB 1355, 1357 (1958); and *Colombia Music & Electronics*, 196 NLRB 388 (1972).

In *Mercury Distribution Carriers*, 312 NLRB 840 (1993), the Board held that an employee's option to turn down work and the fact that the employee did not call in every day does not preclude a finding of regular part-time employee.

For related discussion, see On-Call Employees, section 20-120 above.

20-200 Temporary Employees

362-6718

460-7000

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted

to vote. *Personal Products Corp*., 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433 (1958); *United States Aluminum Corp*., 305 NLRB 719 (1991); and *NLRB v. New England Lithographic Co*., 589 F.2d 29 (1st Cir. 1978). On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries. *Indiana Bottled Gas Co*., 128 NLRB 1441 fn. 4 (1960); *Owens-Corning Fiberglas Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc*., 125 NLRB 619 (1959); and *E. F. Drew & Co.*, 133 NLRB 155 (1961).

A permanent and regular nonunit employee who is temporarily transferred to a unit position is not eligible to vote if the assignment is finite and reasonably ascertainable. *Marian Medical Center,* supra.

Temporary employees who have achieved permanent status prior to the eligibility date are eligible to vote. *Gulf States Telephone Co*., 118 NLRB 1039, 1041 (1957). Thus, where employees were hired to fill full-time or part-time jobs with the understanding that their employment may be terminated at any time but remained in continuous service for a period longer than 1 year and under company policy achieved permanent status, they were found eligible to vote. It is the employee's status as of the eligibility date that is determinative. Events occurring after the eligibility date are irrelevant to such a determination. *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982); and *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992). See also *Apex Paper Box*, 302 NLRB 67 (1991), concerning laid-off employees recalled after the eligibility date but prior to the election, and *WDAF Fox 4*, 328 NLRB 3 (1999) , where a divided Board found that the employer changed what had been a fixed termination date.

Where the employer calls back a substantial number of the same employees, even though they are described as "temporary," each year, they are included in the unit. *Tol-Pac, Inc*., 128 NLRB 1439 (1960). Compare *Recipe Foods*, 145 NLRB 924 (1964); and *LaRonde Bar & Restaurant*, 145 NLRB 270 (1963).

Temporary employees, who, despite that characterization, are retained beyond their original term of employment, and whose employment is thereafter for an indefinite period, are included in the unit. *MJM Studios of New York*, 336 NLRB 1255 (2001); and *Orchard Industries*, 118 NLRB 798 (1957). Also included are so-called temporary employees who have worked for substantial periods where there is no likelihood that their employment will end in the immediate foreseeable future. *Horizon House 1, Inc*., 151 NLRB 766 (1965). See also *Textile Workers UTWA*, 138 NLRB 269 fn. 3 (1962); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433 (1958); and *Personal Products Corp*., 114 NLRB 959 (1955). Even when an employee knows that a replacement is being sought, the employee remains eligible to vote if no definite date is set for the termination of employment. *NLRB v. New England Lithographic*, supra.

Temporary employees drawn from the same labor force each year, employed every year in substantial numbers for substantial periods of time, composed primarily of former employees, and working with and doing the same kind of work as the permanent employees have a sufficient interest in the conditions of employment to be included despite difference in working conditions, remuneration, and the temporary nature of the work. *F. A. Bartlett Tree Expert Co*., 137 NLRB 501 (1962).

Employees in a labor pool who are hired out to employer's customers on a day-to-day basis are casual laborers similar to stevedores and are entitled to the protection of the Act even though the employer does not exercise control over the entire employment relationship. *All-Work, Inc*., 193 NLRB 918 (1971). Eligibility, however, was limited to employees who had worked at least 7 days in the 90-day period preceding the Board's decision and direction of election at least 1 of which days was in the 30-day period preceding the decision.

In *Evergreen Legal Services*, 246 NLRB 964 (1979), the Board found that employees working under Comprehensive Employment and Training Act programs (CETA) were not

temporary and should be included in a unit with regular full-time employees. See section 20-620 for a discussion of Trainees.

In one post-*M.B. Sturgis* case (see sec. 14-600) (*M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000)) (the Board included the contingent employees supplied by a staffing agency in the unit of user employees. In doing so the Board found a "strong" community of interest. The Board did not however analyze the case under traditional temporary analysis even though the employees worked for a maximum of 15 months. *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001). Although *Sturgis* has been overruled by *Oakwood Care Center,* 343 NLRB 659 (2004), on the issue of consent for inclusion in multiemployer units, presumably, community-of-interest standards apply where that consent is given.

There are situations where temporary employees may be eligible for collective bargaining under the Act.

In *Kansas City Repertory Theatre, Inc.,* 356 NLRB No. 28 (2010), a Board majority rejected a contention that musicians who work intermittently were temporary employees ineligible to vote. The Board majority concluded that they were eligible noting that there are many industries (acting and construction were given as examples) in which employees work intermittently with no expectation of continued employment with a particular employer and that there is successful and stable collective bargaining in such industries. The Board majority noted that where temporary employees were excluded, it was because they lacked a community of interest with the unit employees. The Board then commented on the absence of any case in which a petition was dismissed solely because the unit sought was composed of temporary employees. Accordingly, the Board found the unit of musicians to be appropriate and applied the *Julliard* formula for eligibility. See *Julliard School*, 208 NLRB 153 (1975).

For a discussion of students or temporary employees, see section 20-400, infra.

20-300 Seasonal Employees

460-5067-5600

Regular seasonal employees are those who have a reasonable expectation of reemployment in the foreseeable future; they are included in the bargaining unit. *Flat Rate Movers Ltd.,* 357 NLRB No. 112 (2011); *L & B Cooling*, 267 NLRB 1 (1983); *P. G. Gray*, 128 NLRB 1026 (1960); *Musgrave Mfg. Co*., 124 NLRB 258 (1959); *California Vegetable Concentrate*, 137 NLRB 1779 (1962); *Baumer Foods*, 190 NLRB 690 (1971); and *Knapp-Sherrill Co*., 196 NLRB 1072 fn. 2 (1972).

For discussion of students or temporary employees, see section 20-400, infra.

Temporary or casual seasonal employees are excluded. *L & B Cooling*, supra; *Post Houses*, 161 NLRB 1159, 1172–1173 (1966); *Root Dry Goods Co*., 126 NLRB 953 fn. 10 (1960); and *F. W. Woolworth Co.*, 119 NLRB 480 (1957).

It is Board policy that unit placement and voting eligibility are inseparable issues; any employee who may be represented as the result of an election has the right to vote in the election. This policy, restated in *Post Houses*, supra; *Sears, Roebuck & Co*., 112 NLRB 559 fn. 28 (1955), is applicable not only to seasonal employees but to all employees who are entitled to be included in the bargaining unit.

Factors which militate in favor of finding employees regular seasonal employees warranting inclusion are:

20-310 Same Labor Force

460-5067-5600

The employer draws from the same labor force each season. *Seneca Foods Corp*., 248 NLRB 1119 (1980); *Maine Apple Growers, Inc*., 254 NLRB 501 (1981); *Kelly Bros. Nurseries*, 140

NLRB 82 (1962); *Carol Management Corp*., 133 NLRB 1126 (1961); and *Baumer Foods*, supra. Compare *Flat Rate Movers Ltd*., 357 NLRB No. 112 (2011).

20-320 Former Employees

460-5067-5600

Former employees are given preference in rehiring or recall, whether the employer uses a preferential hiring list or not. *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974); *Aspen Skiing Corp*., 143 NLRB 707 (1963); *Brown Cigar Co*., 124 NLRB 1435 (1959); and *Micro Metalizing Co*., 134 NLRB 293 (1962).

20-330 Similarity of Duties, etc.

460-5067-5600

Duties, working conditions, supervision, and/or benefits are substantially similar for both permanent and seasonal employees. *Kelly Bros. Nurseries*, supra; *California Vegetable Concentrate*, supra.

20-340 Transition

460-5067-5600

The ability to go from seasonal to permanent employment. *California Vegetable Concentrates*, supra; *Micro Metalizing*, supra. Where there is a relatively stabilized demand for, and dependence on, such employees by the employer, and there is likewise reliance by a substantial number of the employees on a return to the employer each year, the employees in question have a sufficient community of interest with the permanent employees to be included in the unit. *Maine Apple Growers*, supra; *Kelly Bros. Nurseries*, supra; *California Vegetable Concentrates*, supra.

Factors which militate *against* finding employees regular seasonal employees may be found in the following cases:

Where there is a high turnover rate among seasonal employees, the employer does not follow a recall policy, and the seasonals rarely become permanent employees and do not share in the benefits received by the permanent employees, the employees are temporary or irregular seasonal employees without sufficient interests to be included in the unit. *Freeman Loader Corp*., 127 NLRB 514 (1960).

"Christmas extras," who do not generally return each year and have no expectation of continued employment, are excluded from the unit. *Root Dry Goods Co*., supra at fn. 10.

Similarly college students, many of whom were exchange students who work in order to pay school costs, were considered to have little likelihood of becoming permanent employees *Flat Rate Movers Ltd.,* 357 NLRB No. 112 (2011).

Where at the time of the hearing there had been only 1 recall of laid-off employees and a total of 75 temporary seasonal employees were hired, but there was no precise evidence as to what percentage of this number was returning from prior layoffs, the Board could not, on the basis of the 1 recall alone, find that "a sufficiently large number of temporary seasonal employees has a demonstrable expectation of being rehired." They were therefore excluded from the unit and deemed ineligible to vote in the election. *Maine Sugar Industries*, 169 NLRB 186 (1968).

Where employees hired during a seasonal peak are uncertain of reemployment, receive no fringe benefits, receive less pay than the regular employees in the unit, and have permanent full-time employment elsewhere, they are excluded from the unit. *Georgia Highway Express*, 150 NLRB 1649 fn. 4 (1965). See also *Candy Shops*, 202 NLRB 538 (1973), and *L & B Cooling*, supra.

Where a year-round operation had a fluctuating need for extra or on-call employees in a seasonal pattern, and the timing of the election may tend to exclude employees with substantial records of employment during peak periods, the Board included in the unit employees who

worked a minimum of 15 days in either of the two 3-month periods immediately preceding the date of issuance of the direction of election. *Daniel Ornamental Iron Co*., 195 NLRB 334 (1972).

As the Board will not give controlling weight to bargaining history to the extent that it departs from clearly established Board policy, seasonal employees were included in the bargaining unit where they worked for a substantial portion of the year, had a near certain expectation of reemployment from year to year, worked alongside year-round employees under the same supervision, and where the employer under its new owners had undertaken new policies tending to eliminate distinctions previously existing between seasonal and year-round employees. *William J. Keller, Inc*., 198 NLRB 1144 (1972).

20-350 Timing of Seasonal Elections

370-0750-4900

Board policy is to direct elections involving seasonal employees at as near the peak of the season in order to provide as many voters as possible with the opportunity to cast their ballots. *Libby, McNeill & Libby*, 90 NLRB 279, 281 (1950); *Brooksville Citrus Growers Assn*., 112 NLRB 707 (1955); and *Bogus Basin Recreation Assn*., supra. On the other hand, circumstances may be such that the *highest* peak is not required. *Elsa Canning Co*., 154 NLRB 1810 (1965); and *Fall River Dyeing Corp*., 272 NLRB 839 (1984), enfd. 775 F.2d 435 (1st Cir. 1985), affd. 482 U.S. 27 (1987). See also *Saltwater, Inc.*, 324 NLRB 343 (1997).

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 an immediate election directed. *Aspen Skiing Corp*., supra; *Baugh Chemical Co*., 150 NLRB 1034 (1965); See *Candy Shops*, supra.

The delay in conducting the election will not require a new showing of interest. *Bogus Basin Recreation Assn.*, supra.

20-400 Student Workers

362-6736

460-5067-4500

The voting eligibility of students presents a number of issues. In *St. Clare's Hospital*, 229 NLRB 1000 (1977), the Board described four categories of cases in which the issue of student eligibility to vote is presented:

1. Students employed by a commercial employer in a capacity unrelated to the student's course of study are eligible to vote if they otherwise meet the community-of-interest test.

2. Students employed by their own educational institution in a capacity unrelated to their course of study are generally excluded from voting on the view that their relationship to the unit is normally viewed as transitory. But they will be included if they share a community of interest with the unit employees. *University of West Los Angeles*, 321 NLRB 61 (1996).

3. Students employed by a commercial employer in a capacity that is related to the student's course of study are excluded from the unit because the students' relationship is primarily educational.

4. Students who perform services at their educational institution that are directly related to their educational program. Examples of this kind of relationship are medical interns and residents. In *Boston Medical Center*, 330 NLRB 152 (1999), the Board overruled *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), and held that interns and residents are employees under the Act. In *Brown University,* 342 NLRB 483 (2004), the Board found that graduate assistants are not employees who are eligible for collective bargaining. In *St. Barnabas Hospital*, 355 NLRB 233 (2010), the Board reaffirmed its *Boston Medical Center* decision and rejected a request that it reconsider *Boston Medical* in light of *Brown University*.

Similar tests are applied to students employed on a part-time or temporary basis as are applied to all nonpermanent employees. Thus, for example, students who worked for a constant number of hours each weekend as night telephone operators, performing duties regularly required by the employer during these hours, were held to be regular part-time employees and included in the unit. *Fairfax Family Fund*, 195 NLRB 306 (1972). See also *Mount Sinai Hospital*, 233 NLRB 507, 508 (1977), and *System Auto Park & Garage*, 248 NLRB 948 (1980).

Student firefighters were excluded from a craft-type unit sought because they did not possess the skills or exercise the responsibility typically associated with firefighters. *Leland Stanford Jr. University*, 194 NLRB 1210 (1972).

Although the Board generally excludes summer employees from the appropriate unit, such employees nonetheless are deemed eligible to vote if, upon returning to school, their employment evidences regular part-time status. This should be distinguished from "a pattern of intermittent, sporadic employment." *Crest Wine & Spirits, Ltd*., 168 NLRB 754 (1968). See also *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993).

In another case, a student who continued to work on Saturdays on a regular part-time basis when school began was found to be a regular part-time employee, but another student, as to whom there was no evidence that he continued his employment after resuming school on a full-time basis, was excluded from the unit. *Sandy's Stores*, 163 NLRB 728, 729 (1967). See also *Giordano Lumber Co*., 133 NLRB 205, 207 (1961).

Where summer students were hired to fill seasonal vacancies, did not enjoy the same fringe benefits, and had no commitment for rehire during subsequent summers, they were held to be temporary employees and excluded from the unit. *J. K. Pulley Co.,* 338 NLRB 1152 (2003); and *Fisher Controls Co*., 192 NLRB 514 (1971). See also *Walgreen Louisiana Co.*, 186 NLRB 129, 130 (1970); *Hygeia Coca-Cola Bottling Co*., 192 NLRB 1127 (1971); and *Georgia-Pacific Corp*., 201 NLRB 831 (1973).

In *Saga Food Service*, 212 NLRB 786 fn. 9 (1974), the Board declined to find appropriate a separate unit of student cafeteria employees.

20-500 Dual-Function Employees

177-8501-7000

362-6790

460-5067-4900

For the most part, the same community-of-interest tests are applied to dual-function employees as are applied to part-time employees. *Berea Publishing Co*., 140 NLRB 516 (1963); and *Wilson Engraving Co*., 257 NLRB 333 (1980).

In enunciating this policy, the Board pointed out that the policies of the Act are best effectuated by according to each employee the same rights and privileges in the selection of the majority representative for the unit in which he works. It would perceive "no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer." (140 NLRB at 519.) Thus, employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, 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 working conditions in the unit. See *Harold J. Becker Co.,* 343 NLRB 51 (2004); *Medlar Electric, Inc.,* 337 NLRB 796 (2003); *Ansted Center*, 326 NLRB 1208 (1998); and *Air Liquide America Corp*., 324 NLRB 661 (1997). *Continental Cablevision*, 298 NLRB 973 (1990); *Alpha School Bus Co*., 287 NLRB 698 (1987); and *Oxford Chemicals*, 286 NLRB 187 (1987); but see *Benson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), in which the circuit court denied enforcement of a Board Order inasmuch as Board determination that dual-function employees were entitled to vote in two separate units would require such employees to

join two different unions to maintain their employment with the employer. Berea was reaffirmed in *Avco Corp*., 308 NLRB 1045 (1992). In *KCAL-TV*, 331 NLRB 323 (2000), the Board concluded that the dual-function employee there had sufficient interest in each of the two units in which she worked as to permit her to vote in both elections.

In *Columbia College,* 346 NLRB 690 (2006), the Board stated:

> . . . the touchstone of dual-function employee status is the fact that a single employee performs multiple job functions covered by one or more of the employer's job classifications.

However, in a situation where alleged dual-function employees had only 3 percent or less of their time devoted to the type of work done by the employees in the unit, they had no such community of interest with them that would warrant their inclusion in the unit. They did not spend a substantial period of their time performing "identical" functions. *Davis Transport*, 169 NLRB 557 (1968). Moreover, where an employee, who was primarily involved in running a parts department and performing mechanic's duties, did some truck driving on all or part of only 20 days in a year but without regularity, pattern, or consistent schedule, the Board found that he did not perform a sufficient amount of work in the truckdriver unit to demonstrate that he had a substantial interest in the unit to warrant inclusion. *Mc-Mor-Han Trucking Co*., 166 NLRB 700, 702 (1967). See also *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003); *Martin Enterprises*, 325 NLRB 714 (1998); *W. C. Hargis & Sons, Inc*., 164 NLRB 1042 (1967); *Continental Cablevision of St. Louis*, supra; *Landing Construction Co*., 273 NLRB 1288 (1984); and *U.S. Pollution Control*, 278 NLRB 274 (1986). In *Pacific Lincoln-Mercury*, 312 NLRB 901 fn. 4 (1993), the Board noted that 5 to 10 percent of an employee's time doing unit work was insufficient to include him in the unit under the *Berea* standard. Compare *Medlar Electric*, supra (25 to 30 percent of time sufficient for dual-function status). See also *WLVI Inc.,* 349 NLRB 683 fn. 5 (2007), noting that there is no bright line rule but suggesting a 25-percent guideline, and *Bredero Shaw,* 345 NLRB 782, 786 (2005) ("sufficient periods of time to demonstrate substantial interest").

The inclusion of a dual-function employee within a particular unit does not require a showing of community-of-interest factors in addition to the regular performance of a substantial amount of unit work. *Fleming Industries*, 282 NLRB 1030 fn. 1 (1987). The Board has stated that dual-function analysis is a variant of the community-of-interest test and is not applied where the parties agree on exclusion. *Halsted Communications,* 347 NLRB 225 (2006).

Historical note: The *Berea* decision overruled *Denver-Colorado Spring-Pueblo Motor Way*, 129 NLRB 1184 (1961), which required that an employee spend over 50 percent of his time in unit work to be included in the unit, and restored the "sufficient interest" test and the equation of dual-function and part-time employees initially used in *Ocala Star Banner*, 97 NLRB 384 (1951). While *Grocers Supply Co*., 160 NLRB 485 fn. 2 (1966), cited the *Denver* case, the result reached was consistent with the *Berea* rule.

The dual-function issue is also presented in situations where the employees have out-of-unit supervisory responsibilities. In *Adelphi University*, 195 NLRB 639 (1972), the Board included an individual in a unit of faculty members even though he had supervisory authority over his secretary. See also *New York University*, 221 NLRB 1148, 1156 (1975).

Later in *Detroit College of Business*, 296 NLRB 318 (1989), the Board rejected what had become the 50-percent rule—"any individual who supervises nonunit employees less than 50 percent of his time is not a supervisor." Instead, the Board stated that determinations of supervisory status would be made on the basis of a "complete examination of all the factors present to determine the nature of the individual's alliance with management." See also *Rite Aid Corp*., 325 NLRB 717 (1998), and *Legal Aid Society of Alameda County*, 324 NLRB 796 (1997).

Note—*Contract bar*—In *Otasco, Inc*., 278 NLRB 376 (1986), the Board held that contract-bar principles preclude the inclusion of dual-function employees in a petitioned-for unit where

they are already included in a unit covered by the contract. Similarly, the *Berea* principle cannot work to result in two units where otherwise there would be one. *Sunray Ltd*., 258 NLRB 517 (1981).

In *Meadow Valley Contractors*, 314 NLRB 217 (1994), the Board rejected a dual-function analysis where the employee had ceased performing nonunit work by the election eligibility date.

20-600 Probationary Employees, Trainees, and Clients (Rehabilitation)

20-610 Probationary Employees

460-5067-2100

"Probationary employees . . . receive and hold their employment with a contemplation of permanent tenure, subject only to the satisfactory completion of an initial trial period." *National Torch Tip Co*., 107 NLRB 1271, 1273 (1954); *Vogue Art Ware & China Co*., 129 NLRB 1253 (1961); and *Johnson Auto Spring Service*, 221 NLRB 809 (1975). Where their general conditions of work and their employment interests are like those of the regular employees (*Rust Engineering Co*., 195 NLRB 815 (1972)), and they have a reasonable expectation of continued employment (*Afro Jobbing & Mfg. Corp*., 186 NLRB 19 (1970)), probationary employees are included in the unit. The requirement of the completion of a probationary period does not militate against a finding that the employees are permanent. *Pacific Tile & Porcelain Co*., 137 NLRB 1358 (1962); and *Sheffield Corp*., 123 NLRB 1454 (1959).

20-620 Trainees

460-5067-1400

Trainees may or may not be included in the bargaining unit, depending on an evaluation of the interests of such employees compared to those of the regular employees. Present duties and interests are determinative, not future assignments. *Heckett Engineering Co*., 117 NLRB 1395 (1957). Thus, an employee who was engaged in a training program which might lead to a supervisory position at some indefinite time in the future was included in the bargaining unit. *Cumberland Shoe Corp*., 144 NLRB 1268 (1963). See also *Big "N," Department Store No. 307*, 200 NLRB 935 (1972); and *Johnson Auto Spring Service*, 221 NLRB 809 (1975), and discussion of "management trainees" in chapter on Statutory Exclusions (supervisors), section 17-506.

Beginners with a reasonable expectancy of permanent employment, having a community of interest with other employees, are likewise eligible. *Gulf States Telephone Co*., 118 NLRB 1039 (1957); see also *Data Technology Corp*., 281 NLRB 1005, 1006 fn. 3 (1986). However, where trainees have different backgrounds from the employee in the unit and have a good probability of achieving supervisory status, their interests are different from production and maintenance employees and they are excluded from such a unit. *Cherokee Textile Mills*, 117 NLRB 350 (1957); and *WTOP, Inc*., 115 NLRB 758 (1956). See also *M. O'Neil Co*., 175 NLRB 514, 517 (1969).

Even where the Board would exclude a group of trainees from the unit if it were making the unit determination, the parties may agree to their inclusion. *Montgomery Ward & Co*., 123 NLRB 135 (1959).

Where "sales trainees" were paid 12 percent more than the beginning rate for warehouse employees, received bonuses for which the latter were not eligible, did not punch the clock, if successful as "sales trainees" were to become inside salesmen, and, if unsuccessful, terminated, but under no circumstances were they to become permanent warehouse employees, they were excluded from the unit. *Garrett Supply Co*., 165 NLRB 561, 562 (1967).

Similarly, where a former shop employee had become a sales trainee and his current duties and conditions of employment indicated that his community of interest lay with the sales engineers rather than with the rank-and-file employees in the bargaining unit, he was excluded from the unit. *East Dayton Tool* Co., 194 NLRB 266 (1972).

But where the purpose of a training program was to train employees to become capable of performing a variety of functions throughout the plant and many of them, although not all, are assigned to production classifications on completion of the program, they were included in the unit. *UTD Corp*., 165 NLRB 346 (1967). See also *General Electric Co*., 131 NLRB 100, 104–105 (1961).

See section 20-200 in this chapter concerning employees working under Comprehensive Employment and Training Act (CETA) programs.

20-630 Clients (Rehabilitation)

177-2478

460-5067-9500

Handicapped individuals who perform services for a social service organization as part of a rehabilitation program are not statutory employees. See *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991), and cases cited therein. As the Board indicated in *Goodwill*, the touchstone for this determination is the nature of the relationship between the employer and the individual. If it is a typical industrial relationship, Section 2(3) employee status is found. Alternatively, a rehabilitative relationship with working conditions that are not typical of the private sector will not result in a finding of employee status.

Where the Board has found that client/trainees and client/employees are not statutory employees and therefore excluded from the unit, it has held that the remaining nonhandicapped individuals, employed under conditions typical of the private sector, are employees and directed an election limited to these employees. *Goodwill Industries of Denver*, 304 NLRB 764 (1991).

In *Brevard Achievement Center*, 342 NLRB 982 (2004), the Board (3 to 2) reaffirmed "the primarily rehabilitative standard" applied in *Goodwill Industries of Denver* and *Goodwill Industries of Tidewater*. The burden of establishing a "primarily rehabilitative" relationship rests with the employer and in *Goodwill Industries of North Georgia,* 350 NLRB 32 (2007), the Board found that the employer did not meet its burden.

In *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995), the Board found that a group of handicapped workers are employees as their relationship with the employer "is characterized by business considerations more typical of service employment in the private sectors." Accord: *Huckleberry Youth Programs*, 326 NLRB 1272 (1998).

For a discussion of jurisdiction over these facilities generally, see section 1-319.

21. SELF-DETERMINATION ELECTIONS

355-2201-5000

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

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

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

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

21-100 Several Units Equally Appropriate

355-2201

355-2220-8000

420-7360 et seq.

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

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

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

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

21-200 Craft and Traditional Departmental Severance

355-2240

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

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

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

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

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

355-2201 et seq.

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

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

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

21-400 Professional Employees

355-2260 et seq.

440-1760-4300

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

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

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

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

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

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

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

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

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

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

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

21-500 Inclusion of Unrepresented Groups

355-2220

420-7384

440-1780-4000 et seq.

When the incumbent union seeks to add a group of previously unrepresented employees to its existing unit, and no other labor organization is involved, the Board conducts another type of self-determination election. In such an election, if a majority of the employees vote against representation, they are considered as indicating a desire to remain unrepresented, but if a majority vote for the petitioner they are deemed to have indicated their desire to become part of the existing unit, represented by the incumbent union. *Warner-Lambert Co.*, 298 NLRB 993 (1990); and *Mount Sinai Hospital*, 233 NLRB 507 (1977) (regular part-time employees). See also *St. John's Hospital*, 307 NLRB 767 (1992). In these circumstances the voting group may be one employee, inasmuch as the certified bargaining unit would be more than a one employee unit. See e.g., *Unisys Corp*., 354 NLRB 825 (2009) (two Member decision).

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

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

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

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

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

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

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

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

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

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

employees who are in a separate plant, and therefore not a fringe group, and the incumbent is willing to go on the ballot for whatever larger unit the Board finds appropriate. *Ward Baking Co*., supra. Compare *Lydia E. Hall Hospital*, 227 NLRB 573 (1976), in which the Board rejected this procedure because of the danger of proliferating bargaining units in health care.

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

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

See also *St. Vincent Charity Medical Center*, 357 NLRB No. 79 (2011), where the Board ordered an *Armour-Globe* election for a group of phlebotomists in an acute care hospital. This case is discussed more fully at 12-410.

21-600 Pooling of Votes

355-2280

420-7396

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

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

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

22. REPRESENTATION CASE PROCEDURES AFFECTING THE ELECTION

We have seen that an election may be conducted pursuant to an agreement for consent election, stipulation for certification upon consent election, Regional Directors' decision and direction of election, Board's decision and direction of election, or an expedited election under Section 8(b)(7)(C). The arrangements and voting procedure in all elections are the same.

A summary of the normal procedures involving the election itself follows. In the interest of clarity, we list first the procedural steps seriatim without reference at this point to the substantive rulings which grow out of the procedural stages and usually are raised in objections cases. These will be discussed in the chapter on Interference With the Conduct of Elections.

See NLRB Casehandling Manual (CHM), sections 11300 through 11478, and the Board's Rules and Regulations, Sections 102.69 and 102.70. This chapter is designed to provide a general overview of representation case procedures. The user of this manual should refer to the cited provisions of CHM for guidance on specific procedural matters.

Note also that the revised Rules have deferred certain issues to the post election stage of the case. For a complete discussion of the effect of these changes see GC Memo 12-04 p. 21 et seq.

22-101 The Election Date

370-0700

The selection of the time of an election is generally left to the discretion of the Regional Director. *Manchester Knitted Fashions*, 108 NLRB 1366 (1954); *CEVA Logistics U.S., Inc*., 357 NLRB No. 60 (2011). However, an election may not be held sooner than 10 days after the Regional Director has received the list of names and addresses of the eligible voters (see CHM sec. 11302.1). The rescheduling of an election is not in and of itself grounds for setting aside the election. *Superior of Missouri, Inc.,* 338 NLRB 570 (2002). But see section 22-106, infra, concerning notice of election in cases of rescheduling.

22-102 The Ballot

370-3533-5000

370-7000

The ballots are furnished by the Agency. No one, other than a Board agent and the individual voter, is permitted to handle the ballots (see CHM sec. 11306). All elections are by secret ballot (see Rules 102.69(a)).

22-103 The Question and Choices on the Ballot

The question on the ballot accords with the consent agreement or direction of election (see CHM sec. 11306.2). Where a self-determination election is held in which professionals are involved, see discussion in chapter 21 dealing with such elections. The choices on the ballot, like the question, accord with the agreement or direction. For the choices on the ballot in a self-determination election, see chapter 21.

22-104 Withdrawal From the Ballot

332-5000

Whenever two or more labor organizations are included as choices in an election, either may on prompt request to and approval by the Regional Director have its name removed. In an RM or RD proceeding, timely written notice of such request must be given to all parties and to the Regional Director (see Rules 102.69(a)). See also chapter 8, Disclaimer of Interest and Withdrawal of Petition.

22-105 The Polling Place

370-1400

370-3567

370-7033

Elections are generally held on the employer's premises in the absence of good cause to the contrary. The decision to conduct an election on or off the employers' premises or by mail or manual ballot is within the discretion of the Regional Director. *Austal USA, LLC*, 357 NLRB No. 40 (2011); *San Diego Gas & Electric*, 325 NLRB 1143 (1998). In *Austal* and *2 Sisters Food Group, Inc.,* 357 NLRB No. 168 (2011), the Board discussed Agency policy with respect to the site of the rerun election. In *Austal*, the Board set out four factors to be considered by the Regional Director in deciding the site of a rerun election. Later, it "elaborated further" on these factors in the *2 Sister Food Group* decision. The Office of the General Counsel has since issued a memorandum concerning Regional Directors discretion as to election sites. GC Memo OM 12–50 (April 24, 2012).

If an election is held away from the employer's premises, the initial suggestion of a place is normally made by the party proposing it, but final arrangements are made by the Board agent. The size of a polling place depends on the nature of the election, with the number of voters and the length of the voting period being controlling factors. See CHM section 11316, et seq. and section 24–421.

22-106 The Notice of Election

370-2800

A standard notice of election form (NLRB-707) is used to inform eligible voters of the balloting details. The notice contains a sample ballot with the names of the parties inserted, a description of the bargaining unit, the date, place, and hours of election, and a statement of employee rights under the Act. Other relevant details are inserted whenever that is necessary. Copies of the notice must be posted in conspicuous places by the employer at least 3 working days before the election. Rules 103.20. See also CHM section 11314, et seq. and section 24-423.

In the case of rescheduled elections, the Board prefers that where applicable the notice state that the election has been rescheduled for administrative reasons beyond the control of the parties. *Builders Insulation, Inc.,* 338 NLRB 793 (2003).

22-107 Voting Eligibility

362-6708

Voting eligibility is discussed in the chapter on that subject. The *Excelsior* rule is treated in the chapter on Preelection Campaign Interference. (*Excelsior Underwear,* 156 NLRB 1236 (1966.) For other significant details, see CHM section 11312.

22-108 Observers

370-4900

Each party is permitted to be represented at the polling place by an equal predesignated number of observers, who are nonsupervisory employees of the employer. In *Pacific Coast M.S. Industries,* 355 NLRB 1422, 1426 (2010), the Board made clear that the parties must be given "a reasonable opportunity" to obtain an equal number of observers.

The privilege of having observers is extended . . . to parties, not to nonparticipating unions, nor to alleged representatives of "no union" groups. (See CHM sec. 11310; Board's Rules 102.69(a); and sec. 24-424.)

22-109 Closing of the Polls

370-9167-8800

The polls should be declared closed at the scheduled time. All in the voting line at the time scheduled for closing should be permitted to vote. At the close of the election, each observer is asked to sign the certification on the conduct of election. If a party had no observer, that fact is noted. (See CHM sec. 11324 and sec. 24-422.)

22-110 Mail Ballots

370-6300

370-6375

Voting in appropriate instances may be conducted by mail, in whole or in part. Mail balloting is used, if at all, in unusual circumstances, particularly where eligible voters are scattered either because of their duties or their work schedules or in situations where there is a strike, picketing, or lockout in progress. In these situations the Regional Director considers mail balloting taking into consideration the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of Board personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). See also *Willamette Industries*, 322 NLRB 1120 (1997); *London's Farm Dairy*, 323 NLRB 1057 (1997); and *Reynolds Wheels International*, 323 NLRB 1062 (1997).

In mixed manual-mail elections, mail ballots are sent to those eligibles who cannot vote in person. They are not sent to employees who, although eligible to vote, are ill or on vacation, or are members of the armed services. Mail ballots are not sent to employees in temporary layoff status unless all parties agree; if the parties do not agree, only the notice of election is mailed to such employees. CHM section 11336, et seq.

For a discussion of eligibility in mail-ballot elections see *Dredge Operators*, 306 NLRB 924 (1992). See also *T & L Leasing*, 318 NLRB 324 (1995), where the Board found that the Regional Director is without authority absent special circumstances to vary the terms of a Stipulated Election Agreement by conducting a mail ballot election.

Ballots received after the due date but before the ballot count should be counted. *Watkins Construction Co.,* 332 NLRB 828 (2000).

For further discussion of mail ballots, see section 24-427.

The Board does not permit absentee ballots. *Cedar Tree Press, Inc.,* 324 NLRB 26 (1997), enf. 169 F.3d 794 (3d Cir. 1999). In its early days, the Board allowed absentee ballot by military personnel, but it discontinued the practice in 1941. *Wilson & Co.,* 37 NLRB 944 (1941). The policy was reiterated in *Atlantic Refinery Co.,* 106 NLRB 1268 (1953).

22-111 Challenges

370-5600

Any observer has the right to challenge for cause. The Board agent must challenge anyone whose name is not on the eligibility list, and should challenge anyone the agent knows or has reason to believe is ineligible to vote. "The Board agent is not obligated to challenge a voter merely because this agent is aware of an eligibility dispute." *Solvent Services*, 313 NLRB 645, 646 (1994). The failure of the observor to make a timely and proper challenge is not a basis to set aside an election. *Laidlaw Transit, Inc*., 322 NLRB 895 (1997). See also *Lakewood Engineering & Mfg. Co.,* 341 NLRB 699 (2004), for a summary of Board agent challenge ballot duties.

Challenges are handled as they come up. The merit of the challenge should not be argued. Persons in job classifications specifically excluded by the decision and direction of election are refused a ballot, even under challenge unless there have been changed circumstances. See Rules 102.69(a); CHM section 11338, et seq. Occasionally, a Regional Director or the Board may direct that employees vote by challenged ballot. *Silver Cross Hospital,* 350 NLRB No. 11 (2007).

Generally postelection challenges are not permitted. The exception is where the party knows of the ineligibility, suppressed the facts, and would otherwise benefit from its actions. See *Lakewood Engineering & Mfg*., supra; *Solvent Services*, supra; and *Atlantic Industrial Constructors, Inc*., 324 NLRB 355 (1997). See also *CHS, Inc.,* 357 NLRB No. 54 (2001), discussed more fully at section 22-115 infra.

A Board agent's failure to challenge the ballot of a late arriving voter should be handled as an objection, not as a postelection challenge. *Laidlaw Transit*, *Inc.,* 327 NLRB 315 (1998).

See also section 22-115.

22-112 The Count

370-7700

For the details of the counting of ballots, see CHM section 11340, et seq.

22-113 The Tally of Ballots

370-7737

The tally of ballots is on Form NLRB-760. A sample tally of ballots is reproduced in CHM section 11340, together with instructions on how to prepare and serve it.

22-114 Runoff Elections

355-1167

362-3375

Where there are three or more choices on the ballot, and in the election none of the choices receives a majority of the valid votes cast, the results are deemed "inconclusive," and the Regional Director conducts a runoff election between the choices on the original ballot receiving the highest and the next highest number of votes. See CHM section 11350 and the examples contained therein. Note the "Exception" discussion to this policy. CHM section 11350.1, also Rules 102.70.

See also section 23-220.

22-115 Resolution of Challenges

370-7750

393-7022

393-7033, et seq.

Challenges are investigated if made before the questioned ballots were dropped into the ballot box and must have been sufficient in number to affect the results of the election. Postelection challenges are not permitted. *NLRB v. Tower Co*., 329 U.S. 324 (1946); and *Poplar Living Center*, 300 NLRB 888 (1990). There is a limited exception to this rule in situations where the party benefiting from its application knew of the ineligibility of the voter and supressed the facts. *Solvent Services*, supra, and *Atlantic Industrial Constructors, Inc*., supra.

Although the Board requires specificity in challenges, it will accept as valid a challenge that is sufficient to raise the eligibility issue and deals with the duties that prompt the challenge. See *Nichols House Nursing Home*, 332 NLRB 1428, 1429 fn. 6 (2000). A party may, however, litigate in a hearing alternative grounds for an otherwise timely challenge ballot. *CHS, Inc*., 357 NLRB No. 54 (2011), *Coca Cola Bottling of Miami*, 237 NLRB 936 (1978).

The investigation is nonadversary, insofar as the Agency is concerned. The Regional Director has the authority to conduct a hearing or to have one conducted. Resolution of the challenges by agreement is permitted. At the conclusion of the investigation, the Regional Director issues a report or decision, whichever is appropriate, setting forth fully the basis for the findings. A report is used where the election was held pursuant to a consent agreement or stipulation, and may be used where the election has been directed. A supplemental decision may be used where the

election was directed by the Regional Director or by the Board. In a consent agreement, the report contains a final determination. In a stipulation for certification, the Regional Director may either issue a report containing a recommendation to the Board or issue a notice of hearing thereby transferring the case to the Board, or a combination of these. In directed elections, the Regional Director may either issue a supplemental decision containing a determination or a report containing recommendations and transferring the case to the Board. See Rules 102.69; CHM section 11360, et seq. For a discussion of Agency guidelines for handling challenge ballots see *Paprikas Fono*, 273 NLRB 1326 (1984).

Generally, a challenged ballot envelope cannot be opened until eligibility is determined. But there are very limited circumstances in which the Board may permit opening without such a determination. Compare *Ladies Garment Workers*, 137 NLRB 1681 (1962); and *Monarch Federal Savings & Loan*, 236 NLRB 874 (1978). See also *United Insurance Co. of America*, 325 NLRB 341 (1998). For further discussion of this procedure, see section 24-426.

Review of reports on challenged ballots is obtained by filing exceptions within 14 days with the Board or by filing a request for review if the Regional Director has issued a supplemental decision Rules 102.69 (c)(2) and (c)(4). Provisions are made for decisions after hearing on challenges (CHM sec. 11376), a count of overruled challenged ballots (CHM sec. 11378), and for a revised tally of ballots (CHM sec. 11378.1).

In *Pine Shores, Inc*., 321 NLRB 1437 (1996), the petitioner filed objections and there were also determinative challenges. Consistent with its practice, the Board resolved the challenges first, holding that it would only direct a new election if the petitioner won the election. See also *Skyline Builders, Inc.,* 340 NLRB 109 (2003).

See also section 22-110.

22-116 Objections to Election–Filing Requirements

393-7011

Generally, the validity of an election may be questioned by filing objections to the conduct of an election or to conduct affecting the results of an election. Both types are discussed *seriatim* at some length in the chapters which follow. Objections may have the effect of invalidating an election. If this occurs, the election may be "rerun" and the 1-year rule of Section 9(c)(3) will not run against the invalidated election.

Objections must be filed within 7 days after the tally of ballots has been made available. Service requirements are set out at section 102.114(a) of the Rules. See also *Medtrans*, 326 NLRB 925 fn. 2 (1998). For other details, see CHM section 11392.1. Objections may be filed only by the following: the employer involved, the petitioner, or any labor organization whose name appears on the ballot as a choice. They must contain a statement of the reasons therefor, couched in specific, as distinguished from conclusionary terms. The objections must provide "meaningful notice" of the conduct alleged. *Factor Sales, Inc.,* 347 NLRB 747 (2006).

The party filing objections must furnish evidence sufficient to provide a prima facie case in support therefor before the Region is required to investigate the objections. *Howard Johnson Co.,* 242 NLRB 1284 (1979). This includes a list of the witnesses and a brief description of the testimony of each. See CHM section 11392, et seq. and Rules 102.69. See also *Heartland of Martinsburg*, 313 NLRB 655 (1994); and *Holladay Corp.*, 266 NLRB 621 (1983). This evidence must be filed within 7 days of filing objections unless the Regional Director allows additional time. *Craftmatic Comfort Mfg. Corp*., 299 NLRB 514 (1990); and *Goody's Family Clothing*, 308 NLRB 181 (1992).

In *Greenville Skilled Nursing & Rehabilitation Center*, 356 NLRB No. 138 (2011), the Board held that an employer could not fail to file objections and thereafter rely on the action of the Regional Director in issuing a certification before the 7-day period for filing objections for its failure to file. The Board noted that the employer never raised this error with the Regional Director nor sought to file objections.

In one unusual case, the Board accepted as objections unfair labor practice charges that were filed within 7 days of the election. The Board found that the employer acted consistent with an intent to file objections. *Avis Rent-A-Car*, 324 NLRB 445 (1997).

See section 24-100, et seq. for further discussion of objections procedures.

22-117 Investigation of Objections

393-7022

As part of the investigation of a representation question, the investigation of objections is nonadversarial, insofar as the Agency is concerned. Where the investigation reveals circumstances which were not alleged by the objecting party but which were or reasonably could have been within its knowledge, the objections are overruled on procedural grounds. But if, in the Regional Director's discretion, the additional circumstances reveal matters that are related to the alleged objectionable conduct (*Renco Electronics*, 325 NLRB 1196 (1998)) or which raise substantial and material issues affecting the conduct of the election, this aspect is included in the report or decision. *Rhone-Poulenc, Inc*., 271 NLRB 1008 (1984); and *Burns Security Services*, 256 NLRB 959 (1981). The Regional Director issues a report or supplemental decision, whichever is appropriate, at the conclusion of the investigation. See CHM section 11394, et seq.

22-118 Hearing on Objections

393-7033

Where an election was held either pursuant to an election agreement or direction of election, the Regional Director is authorized to conduct a hearing or to have one conducted if there are substantial and material factual issues. (Rules 102.6 9(d).) See also *Regal Dodge*, 324 NLRB 665 (1997). Just as a party is obligated to produce evidence in support of its objections (see section 22–116), so also the objecting party, in order to obtain a hearing on its objections, must establish that "it could produce evidence at a hearing that, if credited, would warrant setting aside the election." *Transcare New York, Inc.,* 355 NLRB 326 (2010).

If a hearing is held pursuant to a stipulation for certification election, the Regional Director is permitted to direct a hearing subject to special permission to appeal. Rules 102.69(i)(1); CHM section 11396.1. This preserves the right of any party to object. Special permission to appeal should be requested promptly. Objections may be adjusted by voluntary agreement of the parties.

Where, in the same case, there are determinative challenges as well as objections, the hearing generally covers both aspects. If there are objections and unfair labor practice charges, both of which cover, in whole or in part, the same grounds, the practice, except in special circumstances, generally is to consolidate both for hearing before an administrative law judge. *Framed Picture Enterprise*, 303 NLRB 722 (1991). Appropriate recommendations are then made in the decision and, except in the case of an election held pursuant to a consent-election agreement, the case is transferred to the Board. Where a consent agreement is involved, the cases are severed and the representation case is transferred to the Regional Director for further processing.

The objections/challenges hearing is conducted by a hearing officer or an administrative law judge. The Regional Director may assign an attorney as counsel for the Region at the hearing. The functions and duties of the official conducting the hearing are spelled out in CHM section 11424.3, and that of counsel for the Region, if there is one, in CHM section 11424.4. Questions of postponements are handled in CHM section 11427, and hearing procedures are detailed in CHM section 11428, et seq. Where necessary, the Board will provide interpreter services at Agency cost in representation hearings. *George Joseph Orchard Siding, Inc*., 325 NLRB 252 (1998).

For a discussion of the authority of the hearing officer to consider unalleged conduct see, *Precision Products Group*, 319 NLRB 640 (1995). Compare *Pacific Beach Hotel*, 342 NLRB 372 (2004), distinguishing *Precision Products Group.*

The hearing procedure calls for a report on objections and/or challenges. The order directing a hearing specifies, as a rule, that, within 14 days of the issuance of the report, any party may file exceptions with the Board or with the Regional Director. See CHM section 11434.

Occasionally, a refusal-to-bargain case based on a certification will be remanded to the Board by the court of appeals for the purpose of holding a hearing on a representation case issue. For a discussion of the approriate procedure in such a case, see *Salem Village I, Inc*., 263 NLRB 704 (1982).

a. Subpoenas

Subpoenas are available to the parties subject to the standards set out in Rules 102.66(c). They are available from the Regional Director or the hearing officer. Upon proper motion they may be revoked. In at least one case, the board approved the hearing officer's refusal to supply a subpoena. *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 fn. 2 (1999). See *Best Western City View Motor Inn*, 325 NLRB 1186 (1998), and 327 NLRB 468 (1999), for a discussion of service and enforcement of "R" case hearing subpoenas. In *Associated Rubber Co*., 332 NLRB 1588 (2000), a divided panel affirmed the decision of the hearing officer not to require enforcement of the subpoena.

In *Marian Manor for the Aged*, 333 NLRB 1084 (2001), the Board affirmed a hearing officer who refused to seek enforcement of a subpoena in a preelection hearing. In doing so, the Board found the evidence sought was relevant and necessary but noted that there was no showing that the information could not be obtained from the employer's own employees and that preelection hearings are investigatory, do not permit credibility resolutions, and require expeditious handling. Accord: *Skyline Builders, Inc.,* 340 NLRB 109 (2003).

b. Board agent testimony

Parties seeking the testimony of a Board agent in a representation case hearing must request General Counsel approval for the testimony. See Rules 102.118. See *Millsboro Nursing & Rehabilitation Center*, supra, fn. 2 and the cases cited there for discussion of the Board policies with respect to requests for such testimony.

c. Witness statements

Under the Board's Rules (Sec. 102.118(b)(1)), parties to a postelection hearing may request copies of witness statements for purposes of cross-examinaiton. These statements must be returned by the end of the hearing. See *Wal-Mart Stores,* 339 NLRB 64 (2003), an unfair labor practice case.

22-119 The Decision

393-7077

A decision is made by the Board, or the Regional Director, whichever is appropriate, after having considered the hearing officer's or administrative law judge's report on objections and/or challenges and the exceptions thereto.

While the matter is pending, and after briefs are filed, a party may call the Board's attention to cases that have come to the parties' attention after filing a brief. *Reliant Energy*, 339 NLRB 66 (2003).

The Board's decision may sustain or overrule the objections, in whole or in part. If the objections are sustained in any part, the original election is set aside, and the direction of a "rerun" election provides for a new election to be held at such time as the Regional Director

deems appropriate. The "eligibility period" is customarily the latest completed payroll period preceding the issuance of the notice of rerun election. See CHM section 11436.

22-120 Rerun Elections

355-1133

393-7077-6050

A rerun election is conducted when the original election is a nullity by virtue of its results or because it is set aside either by the Regional Director or by the Board. Neither the passage of time nor employee turnover between the time of the first and a rerun election are sufficient basis to withhold direction of a rerun election. *Sheraton Hotel Waterbury*, 316 NLRB 238 (1995); and *Vemco, Inc*., 315 NLRB 200 (1994), or to require a new showing of interest. *River City Elevator Co.,* 339 NLRB 616 (2003).

The timing and conditions for a rerun election are described in CHM section 11452. For a discussion of Agency policy as to the site of a rerun election, see *Austal USA, LLC*, 357 NLRB No. 40 (2011), and *2 Sisters Food Group*, 357 NLRB No. 168 (2011), discussed supra at section 22–105. The standard notice of election, where modified to explain why the original election was set aside, is found in CHM section 11452.3. For a discussion of Agency policy as to the site of a rerun election, see *Austal USA, LLC*, 357 NLRB No. 40 (2011), and *2 Sisters Food Group*, 357 NLRB No. 168 (2011), The voting procedures are the same, as are the count, tally, and other details, except that the tally indicates that the election was a rerun. There can be no "runoff" (see sec. 22–114, above) of a runoff or severance election, although otherwise the results of a rerun may call for a runoff (see CHM sec. 11456). The usual objections procedures apply.

Ordinarily, information not provided prior to the decision is not considered. See *Gannett Satellite Information Network*, 330 NLRB 315 (1999).

The Board will not permit a new party to intervene and appear on the ballot in a rerun or runoff election. *Waste Management of New York*, 326 NLRB 1126 (1998).

See also section 23-230.

22-121 The Certification

393-7077-2060

393-7077-6067

393-7077-6083

If a union receives a majority of the valid votes cast, a certification of representative is issued. If not, a certification of results is issued. A certification issued by the Regional Director has the same force and effect as one issued by the Board. In all cases of elections conducted pursuant to a consent agreement, the certification is issued by the Regional Director. CHM section 11470.

Where an election is conducted pursuant to a stipulation for certification of election, the Regional Director issues the certification where no objections are filed and challenges are not determinative of the results; the Board issues the certification where objections are filed or challenges are determinative. For an exception to the latter, see CHM section 11472.2(b).

Where an election is directed by the Regional Director or the Board, the certification is issued by the Regional Director where no objections are filed and challenges are not determinative. Where objections are filed or the challenges are determinative, a certification may be issued by the Regional Director based on the administrative investigation or hearing, or by the Board after consideration of the Regional Director's report or the report of a hearing officer or administrative law judge. See CHM section 11470, et seq. As to those cases in which a unit category was not resolved and the union was certified, see GC Memo 12–04 p. 23 for a discussion of how the certified unit will be described.

For information on post-certification proceedings see Sec. 3–900 et seq.

22-122 Expedited Elections Under Section 8(b)(7)(C)

355-5500

578-8050-6000

578-8075-6000

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

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

In short, the expedited election procedure represents a compromise which seeks to balance competing rights. This compromise extends an option to an employer faced with recognition or organizational picketing. Thus, on the commencement of such picketing, an employer may file an 8(b)(7)(C) charge and an RM petition, thereby setting in motion the proviso's expedited election machinery. Or, an employer may, if it prefers, endure 30 days of picketing and then seek injunctive relief by filing an 8(b)(7)(C) charge.

By the plain language of the first proviso to Section 8(b)(7)(C), the expedited election procedure is available *only* where a timely petition is filed, i.e., no more than 30 days after the start of picketing for an 8(b)(7)(C) object. Neither a showing of interest nor an *Excelsior* list is required for an expedited election. *Excelsior Underwear*, 156 NLRB 1236, 1242 fn. 14 (1966).

Petitions filed *after* 30 days are processed under normal "R" case procedures and do not serve as a defense to 8(b)(7)(C) picketing which has exceeded 30 days. See *Crown Cafeteria*, 135 NLRB 1153, 1185 fn. 4 (1962); and *Moore Laminating*, 137 NLRB 729, 732 fn. 6 (1962).

For other material on Expedited Elections, see sections 5-610 and 7-150.

23. VOTING ELIGIBILITY

Questions affecting the eligibility of employees to vote in a Board election arise either at the initial hearing, if one is held, or in the context of an election agreement, or, in any event, by way of challenges at the polling place at the time of the election.

We shall treat here voting eligibility in general. The rules governing eligibility are spelled out and illustrations are given of special formulas used in industries and situations that are not susceptible to the application of these rules. The subject of eligibility lists, including the *Norris-Thermador* rule (*Norris-Thermador Corp.,* 119 NLRB 1301 (1958)), is also discussed. Other eligibility questions are treated in the chapter on Categories Governed by Board Policy, because these pertain basically to unit inclusion or exclusion issues, and there is therefore no reason for repeating this subject matter here.

23-100 Eligibility in General

23-110 The General Rule

362-3312

362-6706

362-6772-6700

362-6766

Voters must be employees within the meaning of the Act. Applicants are considered employees (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)), but unpaid volunteers are not. *Seattle Opera Assn.,* 331 NLRB1072 (2000); and *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999). Aliens, whether legally or legally in the United States are eligible to vote. *Sure Tan v. NLRB*, 467 U.S. 883 (1984).

The burden of proof rests on the party asserting ineligibility to vote. *Sweetener Supply Corp.,* 349 NLRB 1122 (2007).

To be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date, which is normally during the the payroll period immediately preceding the date of the direction of election, or election agreement, *and* (2) in employee status on the date of the election. See, for example, *Plymouth Towing Co*., 178 NLRB 651 (1969); *Greenspan Engraving Corp.,* 137 NLRB 1308 (1962); *Gulf States Asphalt Co.,* 106 NLRB 1212 (1953); *Reade Mfg. Co.,* 100 NLRB 87 (1951); *Bill Heath, Inc.,* 89 NLRB 1555 (1949); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993). Individudals who were scheduled to become supervisors after the date of the election were eligible to vote because they were employees during the eligibility period. *Nichols House Nursing Home*, 332 NLRB 1428 (2000).

As a general rule, the Board does not determine eligibility based on events occurring after an election. *Dean & Deluca New York, Inc.,* 338 NLRB 1046 (2003); and *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 820 fn. 15 (2003).

The employee must be employed and working on the established eligibility date, unless absent for reasons specified in the direction of election. See, for example, *Roy N. Lotspeich Publishing Co*., 204 NLRB 517 (1973). Those reasons are illness, vacation, temporary layoff status, and military service. See also *NLRB v. Dalton Sheet Metal Co*., 472 F.2d 257 (5th Cir. 1973); *Agar Supply Co.*, 337 NLRB 1267 (2002) (transfer to light-duty work did not remove eligibility); *Amoco Oil Corp*., 289 NLRB 280 (1988); *Schick, Inc*., 114 NLRB 931 (1956); and *Barry Controls*, 113 NLRB 26 (1955). In *Jam Productions, Ltd.,* 338 NLRB 1117 (2003), the Board overruled challenges to voters based on loss of business after the elibility date. The Board rejected the employers' contention that the employees become casual and thus ineligible.

The general rule is qualified by exceptions applicable to certain classes or groups of employees and to special circumstances. These are treated under separate headings.

23-111 Newly Hired or Transferred Employees

362-6766-6000

In order to be eligible to vote, an employee must be "hired and working." Thus, employees who are hired on the eligibility date but do not report for work until a later date are ineligible to vote. *Roy N. Lotspeich Publishing Co.,* 204 NLRB 517 (1973); and *Greenspan Engraving Corp*., 137 NLRB 1308, 1311 (1962). Similarly, employees who have been hired and are participating in "training, orientation, and other preliminaries" are not considered to be working and are ineligible. *NLRB v. Tom Wood Datsun*, 767 F.2d 350 (7th Cir. 1985); *Speedway Petroleum*, 269 NLRB 926 fn. 1 (1984); and *F & M Importing Co*., 237 NLRB 628 (1978). But see *CWM, Inc.,* 306 NLRB 495 (1992). But employees doing unit work on "on-the-job training" are eligible to vote. *Sweetener Supply Corp.,* supra.

An employer who is transferred from nonunit work to unit work prior to the eligibility date is eligible to vote. *Meadow Valley Contractors*, 314 NLRB 217 (1994). But an employee transferred out of the unit before the election and who has no reasonable expectancy of returning to the unit is not eligible. *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997).

See *Dynacorp/Dynair Services*, 320 NLRB 120 (1995), for a recent summary of the cases on the eligibility of recently hired employees. See also *Pep Boys–Manny, Moe & Jack*, 339 NLRB 421 (2003).

An employee hired to work at facility A but being trained at facility B was not included in the unit at facility B. *Renal Care of Buffalo, Inc.,* 347 NLRB 1284 (2006).

23-112 Voluntary Quits

362-6706

362-6772

An employee employed on the date of the election is eligible to vote despite an intention to quit after the election. *St. Elizabeth Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983); *NLRB v. Hillview Health Care Center*, 705 F.2d 1461, 1471 (7th Cir. 1983); *Harold M. Pitman Co*., 303 NLRB 655 (1991); *Personal Products Corp*., 114 NLRB 959 (1955); and *Whiting Corp*., 99 NLRB 117 (1951), revd. on other grounds 200 F.2d 43 (7th Cir. 1952).

Employees who quit their employment, and stop working on a date prior to the date of the election, are not eligible to vote. *Dakota Fire Protection Inc.*, 337 NLRB 92 (2001); *Orange Blossom Manor*, 324 NLRB 846 (1997), and *Birmingham Cartage Co.,* 193 NLRB 1057 (1971). Compare *NLRB v. General Tube Co*., 331 F.2d 751 (6th Cir. 1964), in which employee eligibility was grounded on the employees actually having performed work on the day of the election. See also *Grange Debris Box & Wrecking Co.,* 344 NLRB 1004 (2005) (employee eligible who gave notice but was working on day of election).

In *Roy N. Lotspeich Publishing Co*., 204 NLRB 517 (1973), an employee who did not work on election day was held ineligible to vote, even though he was paid for the day and was considered to be on the payroll and to be employed on election day. Where an employee terminated his employment in the middle of the payroll period of eligibility, but was rehired and working before the election date, the Board found him to be an eligible voter. But see *Apex Paper Box*, 302 NLRB 67 (1991). Payroll eligibility is conferred by some work during the payroll eligibility period. *Leather by Grant*, 206 NLRB 961 (1973).

23-113 Discharged Employees

362-6766-7000

362-6766-8000

In *Choc-Ola Bottlers*, 192 NLRB 1247 (1971), an employee had been discharged for cause on the day of the election. The Board, applying the general rule described at the beginning of this chapter, found the requirements of the rule satisfied and ruled that he was eligible to vote. The Seventh Circuit disagreed, holding that on the employee's removal for cause "he was no longer sufficiently concerned with the terms and conditions of employment in the unit to warrant his participation in the representation election." *Choc-Ola Bottlers v. NLRB*, 478 F.2d 461 (7th Cir. 1973). Compare *Fairview Hospital*, 174 NLRB 924 (1969), enfd. 75 LRRM 2839 (7th Cir. 1970), in which the Board ruled ineligible an employee whose discharge was effected on the day of the election. See also *Nichols House Nursing Home*, supra at 23 (individual scheduled to be supervisor found eligible). See also *Plymouth Towing Co.,* 178 NLRB 651 (1969); compare *Ely & Walker*, 151 NLRB 636 (1965). See also *Walter Packing*, 241 NLRB 131 (1979), in which the Board applied the *Lotspeich* and *Choc-Ola* rules in a discharge case.

In *Community Action Commission,* 338 NLRB 664 (2003), the Board sustained the challenge to a ballot of an employee who was discharged after the eligibility date but before the election even though there was a "theoretical possibility" that the discharge might be reversed.

An employee whose leave had expired and was, thus, terminated pursuant to company policy was considered terminated and ineligible to vote. *J. C. Penny Corp.,* 347 NLRB 127 (2006)

Employees allegedly discharged for discriminatory reasons in violation of Section 8(a)(3) who, pursuant to an informal settlement agreement, are placed on a preferential hiring list and can be said to have a reasonable prospect of recall during the next season are eligible to vote. *Koehring Co*., 193 NLRB 513 (1971). As a general rule, a discharge is presumed to be for cause unless a charge has been filed and is pending concerning the discharge. In such a case, the employee votes under challenge. *Dura Steel Co*., 111 NLRB 590 (1955). This same policy applies with respect to pending grievances, *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962), and other litigation where reinstatement is possible. *Machinists (IAM Representatives Assn.)*, 159 NLRB 137 (1966). See also *Curtis Industries*, 310 NLRB 1212 (1993), applying this same principle in the case of strikers who the employer contends are permanently replaced but who are the subject of litigation. The Board noted in *Curtis* and reaffirmed in *Morgan Services,* 339 NLRB 463 (2003); and *Mono-Trade Co*., 323 NLRB 298 (1997), that it would wait a reasonable period of time for completion of the litigation or arbitration.

See also section 23-300.

23-114 Employees on Sick Leave

362-6766-2000 et seq.

An employee who at the time of the election had the status of an employee on sick leave was regarded as sharing and retaining a substantial interest in the terms and conditions of employment, particularly since the employer considered him an employee by accepting his health insurance premiums and by not removing his name from the payroll records and seniority list. *Delta Pine Plywood Co*., 192 NLRB 1272 fn. 1 (1971). The general rule regarding employees on sick leave is that they are presumed to remain in that status until recovery, and a party seeking to overcome that presumption must make an affirmative showing that the employee has resigned or been discharged. *Edward Waters College*, 307 NLRB 1321 (1992); *Atlantic Dairies Cooperative*, 283 NLRB 327 (1987); *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Sylvania Electric Products*, 119 NLRB 824 (1958); and *Wright Mfg. Co*., 106 NLRB 1234 (1953). Recently in a series of cases, a divided Board reaffirmed the general rule. *Home Care Networks, Inc.,* 347 NLRB 859 (2006); *Agar Supply Co.,* 337 NLRB 1267 (2002); *Super Valu, Inc*., 328 NLRB 52 (1999); *Pepsi-Cola Co*., 315 NLRB 1322 (1995); *Associated Constructors*, 315 NLRB 1255

(1995); *Vanalco, Inc*., 315 NLRB 618 (1994); and *Thorn Americas, Inc.,* 314 NLRB 943 (1994). See also *A & J Cartage*, 309 NLRB 263 (1992), which requires that the employee have done unit work before going on sick leave and *Abbott Ambulance of Illinois v. NLRB*, 522 F.3d 447 (CADC 2008) affirming the Boards Red Arrow policy.

23-115 Laid-Off Employees

The test applicable to the eligibility of laid-off employees is "whether there exists a reasonable expectancy of employment in the near future." *Pavilion at Crossing Pointe,* 344 NLRB 582 (2005); *Higgins, Inc*., 111 NLRB 797 (1955); and *Madison Industries*, 311 NLRB 865 (1993). Thus, although an employee's termination notice stated that the layoff was temporary and the employee considered herself subject to recall, an absence of objective evidence in support of a finding of temporary layoff and the presence of countervailing evidence resulted in a finding that the employee had no reasonable expectancy of returning to work and was therefore ineligible to vote in the election. *Sierra Lingerie Co.,* 191 NLRB 844 (1971). In *Apex Paper Box*, , supra, the Board sustained the challenges to ballots of three employees who were laid off prior to the payroll eligibility date and were recalled after that date but prior to the election. Note that this case summarizes the case law on the laid-off issue. See also *MJM Studios of New York*, 338 NLRB 980 (2003); and *Dredge Operators*, 306 NLRB 924 (1992), where the temporary layoff rule was applied in the context of a mail ballot election.

Eligibility is assessed based on the facts existing on or before the eligibility date, not on the date of the election. Thus, employees who had been recalled before the election were considered ineligible because as of the eligibility date, the Board found that they did not have a reasonable expectancy of recall. *Osram Sylvania, Inc.,* 325 NLRB 758 (1998).

A mere assertion of permanent layoff, in the absence of any supporting evidence or a specific offer of proof, and especially in the face of subsequent recall, may be insufficient to rebut the presumption that layoffs are temporary. *Intercontinental Mfg. Co*., 192 NLRB 590 (1971).

See *Nordam, Inc.,* 173 NLRB 1153 (1969), for a factual analysis of evidence in determining whether at the time of layoff the employees in question "had a reasonable expectancy of reemployment in the near future." See also *D. H. Farms Co*., 206 NLRB 111 (1973); and *Tomadur, Inc*., 196 NLRB 706 (1972).

23-116 Retirees/Social Security Annuitants

Retired employees are not employees within the meaning of the Act. See *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), and *Mississippi Power Co*., 332 NLRB 530 (2000). However, employees who are collecting a Social Security annuity and limit their working term so as not to decrease that annuity are not, solely for that reason, ineligible to vote in an election. *Holiday Inns of America*, 176 NLRB 939 (1969).

23-120 Economic Strikers, Locked Out Employees, and Replacements

362-6766-4500

362-6778-6700

362-6780

362-6784-6700

Section 2(3) of the Act provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he or she has not obtained regular and substantially equivalent employment. That cessation must be in concert with other employees. *Lin Rogers Electrical Contractors*, 323 NLRB 988 (1997). The status of economic strikers as eligible voters was dealt with in the 1959 amendments to the Act by adding the following provision to Section 9(c)(3):

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

The effect of this amendment was to eliminate the former voting disability of economic strikers and, at the same time, to preserve the concurrent eligibility of permanent replacements for such strikers. *W. W. Wilton Wood, Inc.,* 127 NLRB 1675 (1960); and *Kingsport Press*, 146 NLRB 1111 (1964); see also 105 Cong.Rec. 6396 (1959). The Board may expedite the processing of the petition in order to conduct the election within the 12 months. *Kingsport Press*, supra; *Northshore Fabricators & Erectors*, 230 NLRB 346 (1977).

The rules with respect to the voting rights of economic strikers may be summarized as follows:

a. Strikers are presumed to be "economic strikers" unless they are found by the Board to be on strike because of unfair labor practices on the part of the employer. *Bright Foods*, 126 NLRB 553 (1960); see also *Times Square Stores Corp.,* 79 NLRB 361 (1948).

b. Economic strikers are presumed to continue in that status and thus are eligible to vote under Section 9(c)(3). To rebut the presumption of eligibility, the party challenging must affirmatively show by objective evidence that the economic strikers have abandoned their interest in their struck jobs. *Pacific Tile & Porcelain Co.,* 137 NLRB 1358 (1962). The nature of the evidence which might rebut the presumption, said the Board in that case, would he determined on a case-by-case basis, but it cautioned that "acceptance of other employment, even without informing the new employer that only temporary employment is sought, would not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote." See also *National Gypsum Co.,* 133 NLRB 1492 (1961). See also *Omahaline Hydraulics Co*., 340 NLRB 916 (2003) (employer bears burden of establishing that jobs have been eliminated and did not do so here).

In *Globe Molded Plastics Co*., 200 NLRB 377 (1972), economic strikers had been engaged in their strike for 3 months before the election. Notwithstanding an alleged depressed condition in the plastics industry, there was no contention or evidence that their work had been permanently abolished or that they had abandoned interest in their jobs. The fact that the employer had lost certain work or that obtaining new customers was difficult, possibly because of the effectiveness of the strike, was not the type of permanent abolition or elimination of jobs for economic reasons which warranted disenfranchising strikers otherwise eligible to vote. Compare *Lamb-Grays Harbor Co*., 295 NLRB 355 (1989), in which the elimination of jobs was predicated on valid substantial nonstrike-related economic reasons. In these circumstances the affected strikers were found ineligible. See also *St. Joe Minerals Corp*., 295 NLRB 517 (1989).

In *Roylyn, Inc*., 178 NLRB 197 (1969), the issue was whether the action of certain employees in signing a quit slip in order to obtain vacation pay was sufficient to show that economic strikers abandoned their interest in their struck jobs and thus lost their status of economic strikers for purposes of eligibility. The Board found on the facts in the case that the strikers did not abandon their employee status and did not sign the quit slips with that intent, and the presumption that an economic striker remains in that status had therefore not been rebutted. See also *P.B.R. Co*., 216 NLRB 602 (1975); and *Virginia Concrete Co.,* 316 NLRB 261 (1995).

Mere acceptance of a job with better benefits does not establish that a striker has forfeited his eligibility. *Akron Engraving Co.*, 170 NLRB 232 (1968); and *Pacific Tile & Porcelain Co*., , supra at 1362–1363.

For thorough treatment of individual issues revolving around the question whether the presumption of eligibility has or has not been rebutted in the light of the principles here under discussion, see *Q-T Tool Co.*, 199 NLRB 500 (1972). See also *NLRB v. Woodview Calabasa Hospital*, 702 F.2d 184 (9th Cir. 1983).

c. Replaced strikers are not eligible to vote in an election held more than 12 months after the commencement of an economic strike. Conversely, if they have not been replaced they are eligible to vote. *Erman Corp.,* 330 NLRB 95 (1999). Similarly, where the election directed will be conducted more than a year from the commencement of the economic strike, only those replaced former economic strikers who are actually reinstated by the eligibility date of the election are entitled to vote. *Wahl Clipper Corp*., 195 NLRB 634 (1972); and *Gulf States Paper Corp*., 219 NLRB 634 (1975). *Wahl Clipper* was reaffirmed by a divided Board in *Thoreson-McCosh*, *Inc*., 329 NLRB 630 (1999). But, if the election is a rerun, the replaced strikers may vote even if it is being conducted more than 12 months after the strike began. *Jeld-Wen of Everett, Inc.,* 285 NLRB 118 (1987).

In *Brooks Research & Mfg,, Inc.,* 202 NLRB 634 (1973), the Board rejected a contention that economic strikers should be equated with laid-off employees. "The reinstatement rights of economic strikers under [*NLRB v.*] *Fleetwood Trailer* [*Co*., 389 U.S. 375 (1967)], and *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), are statutory as distinguished from the rights of laid-off employees. A layoff constitutes a discontinuance of work for an employer which does not rise to the level of a lawful economic strike, participation in which is protected under Sections 7 and 13 of the Act." Distinguishing *Wahl Clipper*, supra, the Board pointed out that there it held only that economic strikers were not eligible to vote in a Board election after 1 year from the commencement of an economic strike and its decision was grounded on a "construction of specific language in Section 9(c)(3) concerning the voting eligibility of economic strikers." Making this distinction, the Board declined to place a time limit on the reinstatement rights of economic strikers.

In *Curtis Industries*, 310 NLRB 1212 (1993), the Board held that strikers who are permanently replaced but who are contesting that action in litigation, shall vote by challenge ballot. For a related discussion, see section 23-113, supra.

d. The Board frequently does not resolve eligibility questions of this type unless the ballots are determinative. *Universal Mfg. Co*., 197 NLRB 618 (1972).

e. Replaced former economic strikers are eligible to vote in an election conducted within 12 months of the commencement of the strike whether or not the strike has terminated. *Tractor Supply Co*., 235 NLRB 269 (1978).

f. The Board presumes that replacements hired for strikers are temporary employees in all Board cases—representation and unfair labor practice. *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995). Employees hired subsequent to a strike and who are told by the employer when hired that his job is "permanent" are permanent replacements unless the presumption of permanence is rebutted. *Akron Engraving Co.,* supra; *Pacific Tile & Porcelain Co.*, supra.

g. Permanent replacements are eligible to vote where a strike is called after the eligibility date and they are employed on the date of the election. *Macy's Missouri-Kansas Division*, 173 NLRB 1500 (1969).

In *St. Joe Minerals Corp*., 295 NLRB 517 (1989), the Board found that "cross overs" (former strikers who return to work) are considered permanent replacements if they are returned to positions other than those they held prior to the strike.

Note—Temporary replacements are not eligible to vote. See *Harter Equipment*, 293 NLRB 647 (1989), involving replacements for locked out employees.

Permanent replacements hired subsequent to the eligibility period to replace economic strikers who have gone on strike *after* the direction of the election are eligible to vote. *Tampa Sand & Material Co*., 129 NLRB 1273 (1961). However, permanent replacements who are hired subsequent to the eligibility period to replace economic strikers who have gone on strike *prior* to the direction of election are not eligible to vote. *Greenspan Engraving Corp*., 137 NLRB 1308 (1962). In both cases, the Board emphasized that the "timing of the strike" was the controlling factor in determining whether permanent replacements for economic strikers were entitled to vote in an election. See also *Famous Industries*, 220 NLRB 484 (1975).

h. Issues as to voting eligibility of strikers and replacements are normally deferred until the election for disposition by way of challenges. *Bright Foods*, 126 NLRB 553 (1960); and *Pipe Machinery Co*., 76 NLRB 247 (1948).

i. In the unique situation where economic strikers and seasonal employees are involved the Board approved bifurcated election which assured that the strikers could vote before the 12-month period expired and the seasonal employees could vote later. *Diamond Walnut Growers*, 308 NLRB 933 (1992). Note also that the Board will bypass the blocking charge rule in order to hold an election within 12 months of the onset of an economic strike so as not to exclude strikers. *American Metal Products*, 139 NLRB 601 (1962).

j. The 12-month restriction also applies in union deauthorization (UD) elections. *Carol Cable Co. West*, 309 NLRB 326 (1992).

23-125 Prisoners and Work Release Inmates

Jailed prisoners on work release programs have been found to share a sufficient community of interest with employees in the bargaining unit to vote. *Winsett-Simmonds Engineers, Inc*., 164 NLRB 611 (1967). See also *Speedrack Products Group Limited*, 325 NLRB 609 (1998). See also section 12-210.

23-200 Eligibility Dates

23-200

362-3312

As noted above, the general rule is that an employee must be employed both on the eligibility date and the date of the election. The eligibility date is usually described in terms of an employer's payroll period which ends on a date sometime prior to the election. In at least one case the Board has directed a second election where the eligibility date used was not the date previously established. The Board noted that the error resulted in an ineligible ballot being cast that could have affected the results. *Active Sportswear Co*., 104 NLRB 1057 (1953). In *Jam Productions, Ltd.,* 338 NLRB 1117 (2003), the Board indicated that the hearing officer in a postelection hearing on challenged ballots could consider a loss of business arising after the eligibility date in determining whether the challenged employees status had changed from part time to casual. The Board however overruled the challenge.

23-210 Initial Elections

362-3312

The eligibility period for an election being conducted pursuant to an election agreement should be for the payroll period ending before the date of approval of the election agreement or the Decision and Direction of Election. CHM sections 11086.3 and 11312.1

23-220 Runoff Elections

355-1167-2500

In a runoff election, eligibility is based on the same eligibility date as that used in the original election, but employee status is required on the date of the runoff. See Rules 102.70 and *Lane Aviation Corp*., 221 NLRB 898 (1975). Where, however, there has been a substantial increase in the employee complement since the original election was conducted, the current payroll is used for eligibility purposes. *Interlake Steamship Co*., 178 NLRB 128 (1969). Moreover, where there is a long passage of time after the payroll eligibility date used in a prior runoff election, the eligibility payroll period is the one immediately preceding the date of issuance of the latest notice of election. *Caribe General Electric*, 175 NLRB 773 (1969); and *Interlake Steamship Co*., 174 NLRB 308 (1969).

The Board holds that it is an unfair labor practice for an incumbent union to continue to accept recognition between the initial election and a runoff election where it, the incumbent, did

not garner enough votes to be on the runoff ballot. *Wayne County Legal Services*, 333 NLRB 146 (2001).

See also section 22-114, supra.

23-230 Rerun Elections

362-3362-5000

Where the Board sets aside a prior election and directs a repeat election, the eligibility period, in the absence of unusual circumstances, is the one immediately preceding the date of the repeat election and not the one established for the first election. *Wagner Electric Corp*., 127 NLRB 1082 (1960); and *Great Atlantic & Pacific Tea Co*., 121 NLRB 38 (1958).

See also section 22-120, supra.

23-240 Seasonal Operations

362-3350-2000

370-0750-4900

Where the employer's operations are seasonal, the voting franchise is made available to the largest number of eligible voters by holding the election at or near the seasonal peak among the employees who are employed during the payroll period immediately preceding the issuance of the notice of election. *Kelly Bros. Nurseries*, 140 NLRB 82 (1962); and *Toledo Marine Terminals*, 123 NLRB 583 (1959). See also *Dick Kelchner Excavating Co*., 236 NLRB 1414, 1416 (1978); and *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974). Where, however, an employer operates on a year-round basis, is not in a seasonal industry, and its business has several employment peaks, the Board weighs the advantage of an early election, the possibility that more employees may vote at a higher peak of employment, and the relative interest of those employed during the various peaks as determined by their rate of return. Accordingly, the election in such circumstances is held during "the next representative period." *Elsa Canning Co.*, 154 NLRB 1810, 1812–1813 (1965); cf. *Baugh Chemical Co*., 150 NLRB 1034 (1965). Seasonal employees must share a community of interest in order to be included in a unit of permanent employees and the mere happenstance of employment on the eligibility date is not sufficient to permit them to vote. *Seneca Foods Corp*., 248 NLRB 1119 (1980).

The Board has also deferred elections in cases involving universities and colleges until the commencement of fall classes where many unit employees would not be present on campus during the summer months. See, e.g., *Tusculum College*, 199 NLRB 28 (1972).

23-300 Alleged Discriminatees

362-6766-7000

Employees who are the subject of pending unfair labor practice proceedings alleging their unlawful discharge are permitted to vote subject to challenge. *Machinists (IAM Representatives Assn.)*, 159 NLRB 137 (1966); and *Tetrad Co*., 122 NLRB 203 (1959). See also *Curtis Industries*, 310 NLRB 1212 (1993), involving permanently replaced strikers who are litigating that action under another statute and sections 23-110 and -120, supra.

23-400 Special Formulas for Specific Industries

Some industries do not have the kind of steady employment that is characteristic of the mainstream of industrial enterprise. It is therefore necessary to devise an eligibility formula in those industries which will best be tailored to their special needs. Examples, by industry, of special formulas follow.

23-410 Longshore

362-3350-4000

A formula geared to the specific circumstances was evolved based not on the usual payroll period but rather on the basis of employees who worked a specific number of hours during a given year. The formula was predicated on eligibility requirements in connection with fringe benefits; i.e., entitlement to vacation pay and welfare benefits. *New York Shipping Assn*., 107 NLRB 364, 374 (1954); and *E. W. Coslett & Sons*, 122 NLRB 961 (1959).

23-420 Construction

362-3350-6000

Eligibility to vote in the construction industry elections is determined by the use of the *Daniel* formula. This formula was announced in two *Daniel Construction Co*. cases, *Daniel Construction Co.,* 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). In 1991, the Board made additional changes in the construction industry formula.

In 1992, the Board reconsidered its *Whitty* decision (*S. K. Whitty & Co.,* 304 NLRB 776 (1991)), and, with slight modification, returned to its *Daniel* policy. See *Steiny & Co.,* 308 NLRB 1323 (1992). See also *Atlantic Industrial Constructors, Inc.*, 324 NLRB 355 (1997); *Brown & Root, Inc*., 314 NLRB 19 (1994); *Delta Diversified Enterprises*, 314 NLRB 946 (1994); and *Johnson Controls, Inc*., 322 NLRB 669 (1996). The Board applied this formula where the employer did more than a de minimis amount of construction work. *Turner Industries Group, LLC,* 349 NLRB 428 (2007). See also *Cajun Co.,* 349 NLRB 1031 (2007).

As the Board noted in *Steiny*, the *Daniel* formula does not affect core employees who would be eligible to vote under traditional standards nor does it preclude the parties from a stipulation not to use the *Daniel* formula (fn. 16). *Ellis Electric*, 315 NLRB 1187 (1994). Nor is the formula used for showing-of-interest purposes. *Pike Co*., 314 NLRB 691 (1994). See also section 5-210, supra. But the formula is used in all construction industry elections unless the parties stipulate not to use it. *Signet Testing Laboratories*, 330 NLRB 1 (1999).

In *Wilson & Dean Construction Co*., 295 NLRB 484 (1989), the Board applied the *Daniel Construction* formula in the face of a contention that former employees would not be given preference for jobs under the employer's decision to no longer use the union hiring hall.

Although the Board has utilized special eligibility formulas in the construction industry, the usual requirements are used where the parties do not raise any eligibility issues and the record is insufficient concerning the work history of the employees. However, in this type of situation, former employees who do not qualify under these eligibility requirements may be permitted to vote by challenged ballots. *Queen City Railroad Construction,* 150 NLRB 1679 fn. 3 (1965).

In one unusual case the Board set aside the election because the Region had set out an incomplete *Steiny* formula prompting the employer to provide an erroneous *Excelsior* list (*Excelsior Underwear,* 156 NLRB 1236 (1966)), and resulting in two eligible employees, not voting. *Atlantic Industrial Constructors,* 324 NLRB 355 (1997).

23-430 Oil Drilling

362-3350-8000

In the oil drilling industry, a voting eligibility formula of 10 days or more work a year had formerly been used. See *Sprecher Drilling Corp.*, 139 NLRB 1009 (1962); *Trade Winds Drilling Co.*, 139 NLRB 1012 (1962); and *Fitzpatrick Drilling Co.*, 139 NLRB 1013 (1962). But in *Hondo Drilling Co.*, 164 NLRB 416, 418 (1967), eligibility was limited to all "roughnecks" who had been employed by the employer for a minimum of 10 working days during the 90-calendar-day period preceding the issuance of the direction of election. See also *Loffland Bros. Co.*, 235 NLRB 154 (1978); *Carl B. King Drilling Co*., 164 NLRB 419, 421 (1967); and *NLRB v. Rod-Ric Corp.,* 428 F.2d 948 (5th Cir. 1970).

23-440 Taxicabs

Part-time taxicab drivers who worked at least 2 or more days a week were deemed to have sufficiently substantial interests in the general working conditions of all drivers to justify their eligibility to vote in an election, but part-time drivers who worked 1 day a week or less were held essentially casual and therefore ineligible to vote. *Cab Operating Corp*., 153 NLRB 878, 883–884 (1965). Compare *Jat Transportation Corp*., 128 NLRB 780 (1960).

23-450 On-Call Employees

362-6734

On-call employees—those with no regular schedule of work—are generally considered eligible to vote if they regularly average 4 or more hours of work per week for the last quarter prior to the eligibility date. See *Davison-Paxon Co*., 185 NLRB 21 (1970); and *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994). See also *Trump Taj Mahal Casino*, 306 NLRB 86 (1992), which summarizes the case law as to on-call employees.

For a discussion of appropriate formulae for on-call nurses, see *Sisters of Mercy Health Corp*., 298 NLRB 483 (1990); and *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994).

For a related discussion of on-call employees, see section 20-120.

23-460 Entertainment Industry

362-6734

Stagehands are on-call employees and the irregular pattern of their employment in the entertainment industry prompted the Board to fashion a specific formula for those who have a reasonable expectancy of further employment with the employer. In *Kansas City Repertory Theatre, Inc*., 356 NLRB No. 28 (2010), a Board majority rejected a contention that musicians who work intermittently were temporary employees ineligible to vote. The Board majority concluded that the musicians were eligible noting that there are many industries (acting and construction were given as examples) in which employees work intermittently with no expectation of continued employment with a particular employer and that there is successful and stable collective bargaining in such industries. Accordingly, the Board found the unit of musicians to be appropriate and applied the Julliard formula for eligibility. See *Julliard School*, 208 NLRB 153 (1975). For a discussion of bargaining units of temporary employees, see Sec. 20-200 supra.

In *Medion, Inc*., 200 NLRB 1013 (1972), employees who were employed on at least two productions for a minimum of 5 working days in the year preceding the decision were deemed eligible to vote. See also *Julliard School*, 208 NLRB 153 (1974).

In *American Zoetrope Productions*, 207 NLRB 621 (1973), the Board eliminated the 5-day requirement on a showing that at that employer most unit jobs lasted only 1 or 2 days. Compare the differing approach to on-call formula to two employers in the entertainment industry—*Julliard School*, supra, an educational institution that conducts performances and *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004), a professional theater company. Accord: *Wadsworth Theatre Management,* 349 NLRB 122 (2007). The Board has a flexible approach to developing formulas suited to the conditions in different areas of the entertainment industry. See *DIC Entertainment, L.P*., 328 NLRB 660 (1999) (storyboard supervisors in television animation industry).

23-470 On-Call Teachers

362-3350-7000

362-6734

In *Berlitz School of Languages*, 231 NLRB 766 (1977), the Board devised a formula for eligibility of teachers who are called occasionally to teach foreign languages. Drawing on its

experience with stagehands, the Board set the standard as being at least 2 days' work during the preceding year.

The above examples are, of course, illustrative only, and by no means exhaustive. They are given to indicate how eligibility formulas are tailored. Different enterprises, even in the same general industry, may be the subject of different formulas. Moreover, there are special formulas for industries not mentioned here which are adapted to the special needs of those operations.

23-500 Eligibility Lists and Stipulations

23-510 Voting List (*Excelsior*)

362-6708

393-6081-6075-5000

The list of employees who are considered eligible to vote in the election is called the *Excelsior* list. This list is prepared by the employer and is given to the Regional Director within 7 days after the approval of an election agreement or issuance of a decision and direction of election. *Excelsior Underwear*, 156 NLRB 1236 (1966); and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). This list is in turn provided to all parties to the election. (CHM sec. 11312.2.) The list must include the full first and last names of the employees as well as their addresses. *North Macon Health Care Facility*, 315 NLRB 359 (1994); and *Weyerhaeuser Co.*, 315 NLRB 963 (1994).

The procedures for the production and handling of the *Excelsior* list are contained in the CHM section 11312. Failure to comply with the *Excelsior* rule is grounds for setting aside the election when proper objections are filed. A summary of the case law dealing with *Excelsior* objections is contained in section 24-324.

Lists of eligible voters, normally the same lists as constitute the *Excelsior* list, are made available to the parties for inspection and possible challenges. These do not purport to be a final list of all eligibles; challenge procedures guarantee the right of every possible voter to cast a ballot. In these circumstances, the inadvertent omission of a small number of employees from the eligibility list is not a sufficient basis for invalidating an election. *Jat Transportation Corp.,* 131 NLRB 122 (1961). The burden of checking the accuracy of the list rests with the participating union. *Kennecott Copper Corp.*, 122 NLRB 370 (1959). The mere preparation and checking of such a list does not constitute an agreement that precludes the possibility of challenges at the election, either as to names appearing on, or names omitted from, such list. It is regarded as "a guide or a tool the use of which is to facilitate the election procedure." *O. E. Szekely & Associates*, 117 NLRB 42, 44–45 (1957). See also *Cavanaugh Lakeview Farm,* 302 NLRB 921 (1991).

See also section 24-324.

23-520 Stipulated Eligibility Lists (*Norris Thermador*)

362-6703

370-3533-4000

737-7078-5000

To codify its policy, the Board, in *Norris-Thermador*, adopted the policy that parties to a representation proceeding should be permitted definitively to resolve as between themselves issues of eligibility prior to the election if they clearly evidence their intention to do so in writing. Therefore, where parties enter into a written and signed agreement which expressly provides that issues of eligibility resolved therein shall be final and binding upon the parties, "such an agreement, and only such an agreement," is considered a final determination of the eligibility issues "unless it is, in part or in whole, contrary to the Act or established Board policy." This is known as the *Norris-Thermador* rule since it was adopted in *Norris-Thermador Corp.,* 119

NLRB 1301 (1958). A list is sufficient even if the stipulation does not include an on actual unit description. *Riveredge Hospital*, 251 NLRB 196 (1980).

Thus, where the parties incorporated an eligibility list in an election agreement which met the *Norris-Thermador* requirements, the Board found that the parties intended the list as prepared to be final and binding, and it deemed irrelevant the fact that an employee had been excluded from the list through "inadvertence and not as a result of discussion and agreement on his eligibility." *Pyper Construction Co.,* 177 NLRB 707 (1969).

The *Norris-Thermador* rule has been strictly applied and the Board has only permitted one "narrow exception" to it. Thus, in *Banner Bedding*, 214 NLRB 1013 (1974), the Board announced that it will accept an oral agreement only where both parties agree to its contents. See discussion of this exception in *NLRB v. Westinghouse Broadcasting & Cable*, 849 F.2d 15 (1st Cir. 1988). Compare *Giummarra Electric*, 291 NLRB 37 (1988), in which one party to the alleged agreement denied its existence. In *St. Peters Manor Care Center,* 261 NLRB 1161 (1982), the Board rejected an oral stipulation where it came just prior to the election and was inconsistent with the election agreement.

Where, however, there was nothing in the stipulation for certification which indicated that there was an agreed-upon addition stipulated to be final and binding on the parties, the document, as it stood, did not sufficiently reveal an intent on the part of the parties to be bound within the meaning of the *Norris-Thermador* rule. *Cooper Mattress Mfg. Co*., 225 NLRB 200 (1976).

The Board does not honor stipulations, whether under *Banner Bedding* or *Norris-Thermador* as to statutory exclusions. *Rosehill Cemetery Assn.,* 262 NLRB 1289 (1982); and *Judd Valve Co*., 248 NLRB 112 fn. 3 (1980). Thus, as clearly enunciated in the statement of the *Norris-Thermador* rule itself, the election agreement is final and binding unless it is contrary to the Act or established Board policy. Where ballots were challenged on the ground of supervisory status and consequent statutory exclusion, the party was not, under *Norris-Thermador*, precluded from raising the issue as to their eligibility. It would have contravened the statutory policy "if by agreement of the parties supervisors were irrevocably rendered eligible to vote." *Fisher-New Center Co*., 184 NLRB 809 (1970).

A distinction has been drawn between the rule just stated and the one set out in *Cruis Along Boats*, 128 NLRB 1019 (1960). The policy applied in *Cruis Along* "was intended to apply to stipulations as to unit placement made at representation hearings and was not intended to modify the policy applicable to agreements as to eligibility made in consent election cases." *Lake Huron Broadcasting Corp*., 130 NLRB 908, 909–910 (1961). See also *Laymon Candy Co*., 199 NLRB 547 (1972), and in particular footnote 2 which addresses itself to the *Cruis Along* distinction and also raises a question concerning the nature of the stipulation.

Nor will the Board permit the *Norris-Thermador* agreement to permit an ex-employee to vote. In *Inacomp America, Inc.,* 281 NLRB 271 (1986), an employee whose name was included on a *Norris-Thermador* list but who resigned and left the employer before the election, was not permitted to vote. Compare *Trilco City Lumber Co*., 226 NLRB 289 (1976), in which an employee was permitted to vote who was included on the list but had not yet begun active work.

23-530 Construing Stipulations of the Parties in Representation Cases

393-6054-6750

401-5000

420-7312

737-7078-5000

The Board will accept stipulations of parties unless they are contrary to record evidence, the Act, or Board policy. *Carl's Jr.*, 285 NLRB 975 (1987). Compare *Hollywood Medical Center*, 275 NLRB 307 (1985), in which rejection of the stipulation would have resulted in a postelection challenge as to agreed-upon professional employees, and *Cabrillo Lanes*, 202 NLRB 921, 923 fn.

12 (1973), in which a stipulation that would have excluded regular part-time employees was rejected prior to the election.

In *Caesars Tahoe*, 337 NLRB 1096 (2002), the Board formally adopted the three-prong test for analyzing stipulations articulated in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999). Under this test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. See *Halsted Communications,* 347 NLRB 225 (2006); *McFarling Foods, Inc.,* 336 NLRB 1140 (2001); *South Coast Hospice*, 333 NLRB 198 (2000); and *Royal Laundry*, 277 NLRB 820, 821 (1985). A classification will be deemed to be excluded if it is not mentioned in the inclusions and "all other employees"are specifically excluded. *Bell Convalescent Hospital,* 337 NLRB 191 (2001).

If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

For a description of the Board's approach to ascertaining the parties' intent, see *Viacom Television*, 268 NLRB 633 (1984). See also *Southwest Gas Corp.,* 305 NLRB 542 (1991); *Business Records Corp*., 300 NLRB 708 (1990); and *S & I Transportation*, 306 NLRB 97 (1992). An employer who stipulates to the inclusion of a classification is later barred from raising the inclusion as a defense in a refusal-to-bargain case. *Premier Living Center*, 331 NLRB 123 (2000). In *Red Lion*, 301 NLRB 33 (1991), the Board was confronted with a hearing officer's rejection of a stipulation that had no factual basis. In light of the due-process problems surrounding the hearing officer's initial acceptance of the stipulation, the Board permitted the parties to proffer supplemental evidence.

For a discussion of policies concerning the effect of Stipulated Election Agreements, see *T & L Leasing,* 318 NLRB 324 (1995) (Regional Director cannot vary terms of agreement absent special circumstances); *Grant's Home Furnishings*, 229 NLRB 1305 (1977) (alleged breach of agreement by Regional Director because of Board agent tardiness); *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979); *Dynair Services*, 314 NLRB 161 (1994) (changed circumstances caused by intervening labor organization); and *Consolidated Print Works*, 260 NLRB 978 (1982) (consequences of failing to object to changed circumstances).

Where the intent of the parties is unclear or ambiguous, the Board will apply a community-of-interest test. *Laneco Construction Systems*, 339 NLRB 1048 (2003); and *Kalustyans*, 332 NLRB 843 (2000). If the stipulation is clear and unambiguous, the Board will not examine the intent of the parties. *South Coast Hospice*, and *Kalustyans,* supra. *Space Mark, Inc*., 325 NLRB 1140 (1998). But a stipulation cannot override a mandate of the statute. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999) (stipulation to include medical technologists cannot override mandate that Board conduct *Sonotone* elections).

In a series of cases, the Board reaffirmed its longstanding practice to follow the objective intent of stipulating parties where the stipulation does not violate Board law. *Caesars Tahoe,* supra; *G & K Services,* 340 NLRB 722 (2003); *Peirce-Phelps, Inc.,* 341 NLRB 585 (2004); *Bell Convalescent Hospital*, 337 NLRB 191 (2001); *Northwest Community Hospital*, 331 NLRB 307 (2000); *Cleveland Indians Baseball Co.,* 333 NLRB 579 (2001); *National Public Radio*, 328 NLRB 75 (1999); *Highlands Regional Medical Center*, 327 NLRB 1049 (1999); *Venture Industries*, 327 NLRB 918 (1999); *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997) (stipulated election agreement is a contract); *Pacific Lincoln-Mercury*, 312 NLRB 901 (1993); *Windham Community Memorial Hospital*, 312 NLRB 54 (1993); and *Gala Food Processing*, 310 NLRB 1193 (1993). See also *Dunham's Athleisure Corp.,* 311 NLRB 175 (1993), distinguishing *Vent Control, Inc*., 126 NLRB 1134 (1960).

The Board in *Los Angeles Water & Power Employees' Assn.,* 340 NLRB 1232 (2003), stated:

> In applying the first prong of the *Caesars Tahoe* analysis, the Board must determine whether the stipulated unit is ambiguous. In doing so, the Board compares the "express language of the stipulated unit with the disputed classifications." *Northwest Community Hospital*, 331 NLRB 307, 307 (2000) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find that the parties have "a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description." Id. Accord: *Bell Convalescent [Hospital]*, 337 NLRB 191 (2001).

Once a stipulation has been approved, a party may withdraw only by agreement or by showing unusual circumstances. *Hampton Inn & Suites*, 331 NLRB 238 (2000). Accord: *NLRB v. MEMC Electronic Materials*, *Inc.,* 363 F.3d 705 (8th Cir. 2004).

The Board does not consider itself bound by a bargaining history resulting from a stipulated unit in a consent election. See section 12-221, supra.

24. INTERFERENCE WITH ELECTIONS

Introduction

Board elections are conducted on a basis of high standards designed to make certain that the employees in the voting unit or voting group enjoy the opportunity to exercise their franchise in a free and untrammeled manner in the choice of a bargaining representative.

We have already described the procedure (ch. 22) in the handling of objections to elections. We now turn to the substantive case law which deals with preelection campaign interference. This is discussed prior to our treatment of matters that affect the actual conduct of the election because it concerns the campaign which, of course, occurs in the period preceding the election, and is therefore a type of conduct quite different from that which occurs at or near the polling place on the day of the election. There is considerable overlap between 8(a)(1) conduct and preelection campaign interference. Because this is a text on representation case law, there will be only limited discussion of unfair labor practice case law.

24-100 Objections Procedures

Before discussing the law on what is and is not objectionable conduct, it is important that we summarize the procedural rules with respect to objections. See also CHM sections 11390–11406.

24-110 Objections Period

378-0180

As a general rule, the period during which the Board will consider conduct as objectionable—often called the "critical period"—is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). It is the objecting parties burden to show that the conduct occurred during the critical period. *Accubuilt, Inc*., 340 NLRB 1337 (2003); *Gibraltar Steel Corp.*, 323 NLRB 601 (1997); and *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994). The critical period begins on the date of the petition filing and covers all conduct occurring on that date even if it occurs before the time of the day when the petition was filed. *West Texas Equipment Co*., 142 NLRB 1358, 1360 (1963). The critical period for a second election commences as of the date of the first election. *Star Kist Caribe, Inc*., 325 NLRB 304 (1998).

Prepetition conduct may be considered where it "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979), and *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004). While generally such prepetition conduct cannot, standing alone, be a basis for an objection, *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986), the Board has found clearly proscribed prepetition activity likely to have a significant impact on the election. See *Royal Packaging Corp.*, 284 NLRB 317 (1987); and *Gibson's Discount Center*, 214 NLRB 221 (1974), in which promises of benefit in violation of the *Savair Mfg Co*. doctrine—(*Savair Mfg. Co.,*414 U.S. 270 (1973))—was found to be objectionable prepetition conduct. See also *National League of Professional Baseball Clubs*, 330 NLRB 670 (2000); and *Yuma Coca-Cola Bottling Co.,* 339 NLRB 67 (2003)

In *Harborside Healthcare, Inc*., 343 NLRB 906 (2004), the Board affirmed the *Gibson Discount* exception to the *Ideal Electric Mfg. Co.* rule (134 NLRB 1275 (1961)) in the context of supervisor coercion to employees to sign union cards. The Board also commented in *Harborside*, supra at fn. 21:

> *Ideal Electric* notwithstanding, the Board will consider prepetition conduct that is sufficiently serious to have affected the results of the election.

Accord: *Madison Square Garden, Ct., LLC,* 350 NLRB 117 (2007).

In two cases the Board dealt with the appropriate objections period in cases where there are two petitions. In *R. Dakin & Co.*, 191 NLRB 343 (1971), and 207 NLRB 521 (1973), the Board held that conduct occurring prior to the operative petition was not to be considered even though it occurred after the filing of an earlier petition for the same unit, and the later withdrawal of that petition. A different result obtained, however, when the first and second petition were on file at the same time and the conduct occurred before the second petition. There, the conduct was considered as objectionable even though the first petition was withdrawn. *Monroe Tube Co*., 220 NLRB 302, 305 (1975); and *Carson International*, 259 NLRB 1073 (1982).

Postelection conduct by parties will not ordinarily be grounds for valid objections. *Mountaineer Bolt*, 300 NLRB 667 (1990).

24-120 Time for Filing Objections

393-7011

Objections to the election must be filed with the Regional Director within 7 days after the tally of ballots has been prepared. See Rule 102.69(a). Filing of objections is achieved by personal service in the Regional Office by close of business on the due date or by deposit of the objections in the mail prior to the due date. *John I. Haas, Inc*., 301 NLRB 300 (1991). However, delivery of a document to a delivery service on the due date will not excuse late delivery even where same day delivery is promised. The doctrine of "excusable neglect" can not apply in representation cases. Section 102.111(c) of the Rules.

The Regional Director is responsible for service of the objections on the other parties to the case. The objecting party is, however, required to provide the Regional Director with an original and five copies of the objections. Rule 102.69(a).

24-130 Duty to Provide Evidence of Objections

393-7011-5000

The burden is on the objecting party to provide evidence that the election should be set aside. *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982); *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); and *Consumers Energy Co.,* 337 NLRB 752 (2002).

Within 7 days of the filing of objections, the objecting party must furnish the Regional Director with the evidence available to it in support of the objections. Rule 102.69(a). *Craftmatic Comfort Mfg*., 299 NLRB 514 (1990) (within 7 days of deadline for filing objections). Although this period may be extended by the Regional Director, it is, in the absence of an extension, strictly enforced. *Star Video Entertainment L.P.*, 290 NLRB 1010 (1988); and *Goody's Family Clothing*, 308 NLRB 181 (1992). See *Public Storage*, 295 NLRB 1034 (1989), in which the Board overruled a Regional Director's decision to accept late filed evidence, and *Koons Ford of Annapolis*, 308 NLRB 1067 (1992). Compare *Kano Trucking Service*, 295 NLRB 514 (1989), in which the Board accepted the evidence after the due date on a showing of good-faith reasonable effort to comply with the rule. Evidence mailed to the Regional Office before the due date is considered timely filed. See Rules, Section 102.111(b), and *Bi-Lo Foods*, 315 NLRB 695 (1994).

The evidence must establish a prima facie case in support of its objections. See *Park Chevrolet-Geo*, 308 NLRB 1010 (1992). The Board does not, however, require that the objecting party submit signed affidavits. It is sufficient if the party submits a summary of the evidence and the names of the witnesses who can provide testimony. *Daily Grind*, 337 NLRB 655 (2002), and *Heartland of Martinsburg*, 313 NLRB 655 (1994). The submission must be in writing. Compare *Sacramento Steel & Supply*, 313 NLRB 730 (1994).

24-l40 Scope of Investigation of Objections

393-7033-1100

393-7022-1700 et seq.

393-7077-2090

Under Section 102.69(d), the Regional Director may conduct either an administrative investigation of objections or set them for hearing or both. A hearing is held only when there are substantial and material issues of fact. *Care Enterprises*, 306 NLRB 491 (1992); and *Speakman Electric Co.,* 307 NLRB 1441 (1992). See also *Kerr-McGee Chemical Corp*., 311 NLRB 447 (1993), in which a divided Board directed a hearing to "aid us in determining on which side of the line drawn by our case law this case falls."

The Board will not consider allegations of misconduct unrelated to the objections unless the "objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable." *Rhone-Poulenc, Inc*., 271 NLRB 1008 (1984). This restriction does not apply to evidence discovered by the Regional Director. In fact, the Board will permit the Regional Director to set aside an election based on evidence uncovered during the investigation by the Regional Office even though it was not the subject of a specific objection. *American Safety Equipment Corp*., 234 NLRB 501 (1978). See also *Burns Security Services,* 256 NLRB 959 (1981).

For an excellent discussion of various aspects of the problem of unalleged objections, see *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). See also *Framed Picture Enterprise*, 303 NLRB 722 (1991). The Board distinguished the authority of a hearing officer from a Regional Director in *Precision Products Group*, 319 NLRB 640 (1995). Thus, the hearing officer is constrained to consider the issues encompassed by the Regional Director's order setting matter for hearing. The Board compared *Iowa Lamb Corp*., 275 NLRB 185 (1985), with *American Safety Equipment*, supra. Accord: *Fleet Boston Pavilion*, 333 NLRB 655 (2001). *J. K. Pulley Co.,* 338 NLRB 1152 (2003), the Board applied a similar restriction to the hearing officer in a challenge ballot proceeding.

See section 22-119 for a discussion of the nature of the record on appeal to the Board from a decision of the Regional Director or hearing officer.

24-150 Estoppel in Objection Cases

A party to an election case is ordinarily estopped from relying on its own misconduct as objectionable. *B. J. Titan Service Co*., 296 NLRB 668 (1989), and *Republic Electronics*, 266 NLRB 852 (1983). The exception to this rule is the situation where the party causes an employee to miss the election, the employee's vote is determinative, there is no evidence of bad faith, and the employee is disenfranchised through no fault of his or her own. *Republic Electronics*, supra at 853.

In *Virginia Concrete Corp*., 338 NLRB 1182 (2003), the Board overruled *Ellicott Machine Corp*., 54 NLRB 732 (1944), a rather old case in which the Board had held that it would treat the withdrawal of a charge without prejudice as an automatic waiver by the petitioning union of the right to use the subject matter of that charge as a basis for objections to the election. In the *Great Atlantic & Pacific Tea Co*., 101 NLRB 1118 (1952), the Board abandoned the theory of waiver on which *Ellicott Machine* was decided holding that the policies of the Act would best be effectuated by considering on the merits any alleged interference which occurs during the crucial period before an election "whether or not charges have been filed." 101 NLRB at 1120–1121. A "request to proceed" is not a waiver of a right to file objections. *Graham Architectural Products Corp.,* 259 NLRB 1174, 1181 (1982); *Ed Chandler Ford*, 241 NLRB 1201 (1979); and *Bernel Foam Products Co.*, 146 NLRB 1277 (1964).

24-200 Legal Background of the "Free Speech" Issue

378-2885

501-2825

501-2862 et seq.

24-210 The Early Cases

The Board's early decisions, at least until 1941, were predicated on two major concepts. First, that every appeal by an employer in opposition to unions violated the Wagner Act provision against interference, restraint, and coercion because it inevitably created a fear in the minds of employees that the employer would use economic power against those who disregarded the employer's expressed desires. Second, that the choice of a bargaining representative was the exclusive concern of the employees and that the employer did not possess an interest sufficient to permit to intrusion. See Cox & Bok, *Labor Law Cases and Materials*, 170 et seq. (7th ed., 1969).

There was some conflict in the court of appeals and as is not infrequently the case when a conflict of principles becomes sharp enough in a significant area of law which by its nature is prone to a high emotional boiling point, the highest court of the land inevitably has to pass on it. This happened here. In 1941, in *NLRB v. Virginia Electric & Power Co*., 314 U.S. 469 (1941), the United States Supreme Court was presented with the opportunity. The Court decided that the National Labor Relations Act did not prohibit employers from expressing their views about labor organizations, and this, for all practical purposes, marked the death knell of the so-called neutrality or enforced-silence requirement which had prevailed during the first 6 years. "The employer in this case," said the Court, "is as free as ever to take any side it may choose on this controversial issue."

This did not come as too great a surprise, for about a year earlier in *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Supreme Court had made it clear that in the circumstances of our times "the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution" and that "labor relations are not matters of mere local or private concern." Indeed, added the Court, "free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of industrial society."

Looking deeper into *Virginia Electric*, supra, which is our principal authority in the realm of free speech under the National Labor Relations Act, we find further guidance. Free as the employer is to express his views, the Court nonetheless admonished that "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." Id. at 477.

The case itself was remanded to the Board which subsequently held that the speech, not alone, but in the context of other conduct found coercive, amounted to an unfair labor practice, a finding which was ultimately upheld. *Virginia Electric & Power Co. v. NLRB*, 132 F.2d 390 (4th Cir. 1942), affd. 319 U.S. 533 (1943).

However, although *Virginia Electric & Power Co.* v. *NLRB*, supra, effectively ruled out the neutrality per se requirement and its correlative theory that every employer appeal inevitably created fear of economic reprisal in the minds of his employees, it did not answer all the questions, and some, even at this late date, are still with us.

Following the mandate of the Supreme Court, the Second Circuit in *NLRB v. American Tube Bending Co*., 134 F.2d 993 (2d Cir. 1943), cert. denied 320 U.S. 708 (1943), formally erected a

tombstone to the memory of the "complete neutrality" doctrine. This is interesting since Judge Learned Hand wrote the opinion in *American Tube Bending* but also had given an exposition of the former rule in the earlier case of *NLRB v. Federbush Co*., 121 F.2d 954 (2d Cir. 1941), including his much quoted "words are not pebbles in alien juxtaposition" paragraph in that opinion.

The host of Board and court findings in unfair labor practice cases in the 1941–1947 period suggested that anything short of coercion, threats, or promises of economic benefits was privileged speech so long as the employer's activities did not interfere with employees' rights as guaranteed by the Act. But despite this implementation of the Supreme Court's decision, agitation during the consideration of the Taft-Hartley Amendments in 1947 was potent enough to lead to the inclusion of a new provision in the form of Section 8(c), which reads as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The experts differ both as to the necessity and the effect of this provision, although all seem to agree that the legislative history surrounding its enactment is confusing. See Cox, *Some Aspects of the Labor-Management Revisions Act*, Harv. L. Rev. 1620 (1947); Wollett & Rowen, *Employer Speech and Related Issues*, 16 Ohio State L.J. 384 (1955). The prevailing view, it would appear, is that Section 8(c) was simply a codification of the rule laid down by the Supreme Court and is supported by the statement of Senator Taft, who, in opening the debate in the Senate, declared that the provision guaranteeing free speech to employers "carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into law itself rather than to leave employers dependent on future decisions." 93 Cong.Rec. 3953 (Apr. 4, 1947). During the interval between *NLRB v. Virginia Electric & Power Co*., supra, and the Taft-Hartley Amendments, it seems clear that this was the rule followed by the Board and the courts. See Bloom, *Freedom of Communication Under the Labor Relations Act* (Proceeding of New York University Eighth Annual Conference on Labor, p. 222 (1955)).

24-220 Intervening Period and *Gissel* (*Sinclair*)

378-2835

378-2885

501-2875 et seq.

During the 22-year period that intervened between 1947, the year Section 8(c) was enacted, and the year 1969, serious questions had been posed in an area which inexorably appeared headed for a showdown: When is a statement a mere prophecy or prediction, and therefore not actionable as a basis for an 8(a)(1) violation or as ground for invalidating an election, and when is it a threat, and therefore both a statutory violation as well as objectionable preelection conduct?

Again, a crucial controversy in the "free speech" area, arriving several decades after *Virginia Electric* and its codifying statutory counterpart Section 8(c), reached the United States Supreme Court. The year was 1969 and the case was *Gissel Packing Co*., 395 U.S. 575 (1969). More specifically, it was that portion of *Gissel* which dealt with an appeal from the holding of the Board and the First Circuit in *NLRB v. Sinclair Co*., 397 F.2d 157 (1st Cir. 1968), a companion case, on first amendment grounds.

The First Circuit had enforced a Board order which, in pertinent part, was based on a finding that the employer's communications with the employees reasonably tended to convey the belief that selection of the union in a forthcoming election could lead the employer to close the plant or to transfer the weaving production, with a resultant loss of jobs. The First Circuit also affirmed

the Board's invalidation of the election because the activities in question interfered with the exercise of a free choice.

The Supreme Court, with specific reference to the "free speech" issue, stated that an employer is free to communicate views on unionism or about a specific union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. "He may even make a prediction," added the Court, "as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."

Pinpointing the distinction between a threat and a prediction, the Court went on to say (395 U.S. at 618).):

> *If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.* [Emphasis added.]

The Supreme Court found equally valid the findings by the First Circuit and the Board that the employer's statements and communications were not cast as a prediction of demonstrable economic consequences, but rather as a threat of retaliatory action. It relied on the findings that the employer's communications conveyed the following message: that the company was in a precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such case would have great difficulty finding employment elsewhere.

In these circumstances, concluded the Court (395 U.S. at 619):

> *The Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities.* [Emphasis added.]

In arriving at this conclusion, the Court pointed out that (1) the employer had no support for his basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and (2) the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints "as coercive threats rather than honest forecasts." See, for example, *Kolmar Laboratories*, 159 NLRB 805 (1966), enfd. 387 F.2d 833 (7th Cir. 1967); and *Suprenant Mfg. Co*., 144 NLRB 507 (1963), enfd. 341 F.2d 756 (6th Cir. 1965).

Significantly, in responding to the argument that the line between permitted predictions and proscribed threats is too vague to stand up under the traditional first amendment analysis and the further argument that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled, the Supreme Court (395 U.S. at 620) acknowledged, in effect, the Board's competence "to judge the impact of utterances made in the context of the employer-employee relationship," and added the pointed comment that

> *an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "`brinkmanship"' when it becomes all too easy to "overstep and tumble over the brink."* [Emphasis added.] *Wausau Steel Corp. v. NLRB*, 377 F.2d 389 (7th Cir. 1967).

24-230 The Later Cases

378-2835

378-2885

501-2875-7000

Following the Supreme Court's pronouncement on the "free speech" issue, the Board and the courts have had occasion to decide cases in which the *Gissel* (*Sinclair*) decision was the touchstone.

In *NLRB v. C. J. Pearson Co*., 420 F.2d 695 (1st Cir. 1969), the First Circuit observed that it read the Supreme Court's decision as indicating two ways in which an employer's "predictions" as to possible unhappy consequences of unionization might transgress: (1) the employer might indicate that unnecessary consequences would be deliberately inflicted, i.e., a threat of retaliation, or (2) it might indicate consequences not within its control but described as probable or likely, when in fact there was no objective evidence of any such likelihood; i.e., a threat, albeit not retaliatory, but nonetheless improper.

The Board found employer conduct actionable which conveyed the following message: It had determined the wage and benefit increases it could afford to grant; and that if the anticipated demands of the union were exorbitant, it would not only reject these demands, thus precipitating a strike, but would close its plant before giving in to the union; that it could afford to do this because it had other plants to which work had been shifted in the past and could be again, or, alternatively, that the strikers would be permanently replaced, losing their jobs. While an employer has the right to present in a rational context its views on the potential disadvantages of unionism, conjuring up the vision of a strike as inevitable, "a fact which he is certainly in the best position to appreciate," the Board reasoned, created an obvious potential for interference with free choice. Setting aside the election, the Board cited the comment of the Supreme Court in *Gissel* that an employer "can easily make his views known without engaging in brinkmanship." *Unitec Industries*, 180 NLRB 51 (1970). And, critically, the statements or predictions of the possible adverse consequences of union organization must be based on objective facts. *Southern Labor Services,* 336 NLRB 710 (2001), and *AP Automotive Systems,* 333 NLRB 581 (2001).

In a series of cases beginning with *Eagle Comtronics*, 263 NLRB 515 (1982), the Board set out the standard for assessing employer remarks about the consequences of a strike. In *Eagle* the Board found that the statement that a striker could be replaced by applicants on file was not a threat of job loss. But, where employees are told "you could lose your job to a permanent replacement" the Board found a threat of reprisal. *Larson Tool & Stamping Co*., 296 NLRB 895 (1989). See also *Warren Manor Nursing Home*, 329 NLRB 3 (1999); *Baddour, Inc*., 303 NLRB 275 (1991); and *Fiber-Lam, Inc.*, 301 NLRB 94 (1991). See also *Warren Manor Nursing Home*, supra. Compare *Novi American, Inc.,* 309 NLRB 544 (1992).

Remarks about high labor costs in the context of earlier distributed literature pertaining to the removal of the parent company's operations to Mexico were found veiled threats to close this plant should the union be selected. *Sprague Ponce Co*., 181 NLRB 281 (1970). See also *Penland Paper Converting Corp*., 167 NLRB 868 (1967).

On the other hand, "in the total context of the Employer's noncoercive conduct during the election campaign," the Board found no actionable threat in a Spanish letter to voters, which varied from the English version, and which contained the following:

> These organizers will invite you to meetings, meals and perhaps even to have a drink, they will make promises which they will never keep, they will hurt your Employer, they will go on strike, etc. etc. And this will affect you, since you will lose days of work and will risk your stable position out of irresponsibility, and it will affect you also in an economic sense, since you will be paying your dues minus your regular wages, that is to say money will be missing as it always is during these demonstrations and absences from work.

The Board concluded that the above paragraph of the Spanish version was no more than a statement of opinion predicting events that might occur should the union win the election. *Desert Laundry*, 192 NLRB 1032 (1971). For a discussion of employer statements concerning strikes as a consequence of unionism, see *Fred Wilkinson Associates*, 297 NLRB 737 (1990). Compare *Novi American, Inc.*, supra.

The Board's test regarding statements is whether a remark can reasonably be interpreted by an employee as a threat. The test is not the actual effect on the listener. *Smithers Tire*, 308 NLRB 72 (1992), and *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 fn. 2 (1999).

The Ninth Circuit, in *NLRB v. Electric Co*., 438 F.2d 1102 (1971), recapitulated the Supreme Court's holding by stating that "an employer may not impliedly threaten retaliatory consequences within his control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact." But, contrary to the Board, the court found nothing in expressions by a company supervisor which would constitute either an express or implied threat of retaliatory action. The statements, said the Ninth Circuit, must be considered "in the context of the factual background in which they were made, and in view of the totality of employer conduct." Thus, the statements were, at most, "predictions of possible disadvantages which might arise from economic necessity or because of union demands or union policies." Moreover, added the court, there was a factual basis for all the predictions made. Compare *NLRB v. Raytheon Co*., 445 F.2d 272 (9th Cir. 1971). See also *Boaz Spinning Co. v. NLRB*, 439 F.2d 876 (6th Cir. 1971). *Churchill's Restaurant*, 276 NLRB 775 (1985).

However, in *NLRB v. Taber Instruments*, 421 F.2d 642 (2d Cir. 1970), the Second Circuit enforced a Board order predicated, inter alia, on statements such as these: "The men don't realize what they could lose in this election. If Teledyne chooses to, they could phase out these operations throughout their other plants"; and "there was a possibility that in the event that the union was successful that the Company, if they thought it in their best interest, could move some of the departments into other plants of the Teledyne Corporation." *Roskin Bros., Inc.,* 274 NLRB 413 (1985); and *Southwire Co*., 277 NLRB 377 (1985), enfd. 820 F.2d 453 (D.C. Cir. 1987).

In *Mohawk Bedding Co*., 204 NLRB 277 (1973), the Board found that the employer's campaign speeches and literature, as well as certain statements, taken as a whole, created "an atmosphere of apprehension in the minds of the voters." Among the statements found objectionable was one, couched in the language of a disclaimer, which, the Board found, underscored the threat: "Well, I don't want to threaten you, but it's very important for you to understand something. If the union wins the election tomorrow, and if in bargaining with us they really try to make good on the fantastic figures mentioned in the leaflets, then we could all be in for serious trouble." He continued by stating that "there would be a question as to whether the company could remain in business here." Moreover, it was the Board's view that, by the employer's repeated reference to the union causing other plants to close and the high unemployment situation locally, the employees could reasonably infer that their employment would be jeopardized if they supported the union. See also *General Electric Wiring Devices*, 182 NLRB 876 (1970). Compare *Kawasaki Motors Mfg. Corp*., 280 NLRB 491 (1986), finding protected 8(c) speech.

In *Renton Issaquah Freightlines*, 311 NLRB 178 (1993), the Board found as objectionable an employer's statement that the question of whether the plant would reopen depended on whether the employees voted to decertify the union. The Board adopted the Regional Director's finding that the prediction of dire consequences if the employees did not decertify the union interfered with the election. See also *Madison Industries*, 290 NLRB 1226 (1988), cited by the Board in *Renton* as well as the cases cited by the Regional Director in *Renton*. See also two recent plant closure threat cases *Dominion Engineered Textiles*, 314 NLRB 571 (1994); *Shelby Tissue, Inc.*, 316 NLRB 646 (1995); and a case involving a threat of loss of a 401(k) plan. *Hertz C*orp., 316

NLRB 672 (1995). Compare *TCI Cablevision of Washington,* 329 NLRB 700 (1999) (statement that represented employees do not get 401(k) plan was not objectionable), and *CPP Pinkerton*, 309 NLRB 723 (1992), where a caution that jobs could be lost if the employer did not remain competitive was found unobjectionable.

In *Glasgow Industries*, 204 NLRB 625 (1973), despite a general manager's avowal that he wanted to win the election but to run "a clean campaign that was entirely within the law," and the use of a "checklist" of "do's and dont's" to guide supervisory conduct, statements were made which required the Board to invalidate the election. Thus, a foreman told an employee that "if the Union comes in, the order will be cancelled and you will have no work"; another foreman stated that "if you all vote this Union in, this plant could move to Mexico." The Seventh Circuit, in *NLRB v. Roselyn Bakeries*, 471 F.2d 165 (7th Cir. 1972), summarized this area of the law in the following statement of principles:

> If there is any implication that employer may or may not take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on available facts, but is a threat of retaliation based on misrepresentation and coercion and, as such, without the protection of the First Amendment. *Gissel*, supra, p. 618. Any balancing of the rights of the employees under §7, as protected by §8(a)(1) and the proviso in §8(c), must take into account the economic dependence of the employees on the employers and the necessary tendency of the former, because of that relationship, to be alerted to intended implications of the latter that might be more promptly dismissed by one who was entirely disinterested. Beyond question, employees are particularly sensitive to rumors of plant closing and view such rumors as coercive threats, rather than honest forecasts.

In *SPX Corp*., 320 NLRB 219 (1995), the Board rejected the employer's contention that its statement that its customers would not use union contractors was unobjectionable. The Board relied on the absence of any record support for the employer's statement.

In *Georgia-Pacific Corp.*, 325 NLRB 867 (1998), a divided Board found objectionable an employer preelection announcement that being represented by the Union would make the employees ineligible for the bonus plan. Accord: *Cooper Tire & Rubber Co.,* 340 NLRB 958 (2003).

In the *Levy Co.*, 351 NLRB 1237 (2007), the Board found that an employer's statements to striker replacements that the union "wants all striker replacements out" was not objectionable. In doing so, the Board relied on the fact that the union was seeking return of the replaced strikers and the absence of any employer threats of reprisal or promise of benefit.

For an analysis of the views of two circuits which have rejected Board positions and found conduct to be predictions based on objective facts, see *NLRB v. Shenanigans*, 723 F.2d 1360 (7th Cir. 1983); and *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981). Compare *Zim's Foodliner v. NLRB*, 495 F.2d 1131 (7th Cir. 1974).

24-300 Preelection Campaign Interference

378-2862

In an area characterized by a myriad of different factual situations, involving all kinds of nuances and shades of difference, any attempt at a ready-reference primer is doomed to failure. Nonetheless, it is possible to cull general principles from specific cases and to attempt to extract the reasons which brought these principles into being. Moreover, despite the large number of variations, it is also reasonably possible to group areas which have much in common under separate headings. Thus, for example, preelection campaign interference may be the subject both of unfair labor practice proceedings and objections to the election; it may consist of conduct of the *General Shoe Corp*., 77 NLRB 124 (1948), type which does not, for one reason or another, also violate the unfair labor practice provisions of the Act; it may be conduct attributable to a

third party; or it may involve the infringement of a per se rule. With the exception of conduct which is an unfair labor practice (see sec. 24-310), all of these areas are considered in this chapter.

In *Taylor Wharton Division*, 336 NLRB 157 (2001), the Board stated:

> [The] proper test for evaluating conduct of a party is an objective one—whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. [Co.],* 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car System*, 280 NLRB 580, 581 (1986).

Accord: *Cedars-Sinai Medical Center,* 342 NLRB 596 (2004).

24-310 Interference Which may also Violate the Unfair Labor Practice Provisions

378-1401-2500 et seq.

378-2862

Conduct which by statutory proscription constitutes unfair labor practice violations may also be, as we shall soon see, the basis for invalidating an election, if merit is found in the objections in which they are alleged. As the Board commented in *Playskool Mfg. Co*., 140 NLRB 1417 (1963), "conduct of this nature which is violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." See also *IRIS U.S.A., Inc*., 336 NLRB 1013 (2001); and *Diamond Walnut Growers, Inc*., 326 NLRB 28 (1998). This is so "because the test of conduct which may interfere with the "laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). See also *Overnite Transportation Co*., 158 NLRB 879 (1966); and *Excelsior Underwear*, 156 NLRB 1236 (1966).

Earlier editions of this text included considerable discussion of unfair labor practice cases which arose during election campaigns and thus became the basis for election objections. This material duplicated unfair labor practice texts and did not add significantly to a study of representation case law. Accordingly, the material has not been included in this edition and the researcher is directed to those research tools which index unfair labor practice case law.

It is important, however, to add a caveat to the a fortiori statements cited above. That caveat is that not all unfair labor practice conduct will warrant setting aside an election. In *Caron International,* 246 NLRB 1120 (1979), the Board rejected a per se approach to the a fortiori language of *Playskool*. Instead, the Board announced that it would examine the unfair labor practice conduct to determine whether it was extensive enough to interfere with the election. See also *Video Tape Co*., 288 NLRB 646 (1989); *Metz Metallurgical Corp*., 270 NLRB 889 (1984); and *General Felt*, 269 NLRB 474 (1984). See also *Recycle America*, 310 NLRB 629 (1993), in which the Board found that the unfair labor practices were not sufficient to set aside the election.

The test is an objective one—whether the conduct has a tendency to interfere with employee free choice. *Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

In one interesting case, the Board found that an assertion by a union that employees would lose their jobs if they voted against the union was not objectionable. The Board likened this statement to that in *Janler Plastic Mold Corp*., 186 NLRB 540 (1970), and characterized it as illogical. The Board compared that situation with that in *NLRB v. Valley Bakery*, 1 F.3d 769 (9th Cir. 1993); and *Underwriters Laboratories*, 323 NLRB 300 (1997).

In addition, the Board has held that certain unfair labor practice conduct does not pose a threat of restraint and coercion of employees and therefore is not a fortiori objectionable conduct. Thus, in *Holt Bros*., 146 NLRB 383 (1964), the Board found that the entering into of a contract which contained a clause prohibited by Section 8(e) of the Act was not objectionable. See also *ARA Living Centers*, 300 NLRB 888 (1990), in which the Board reached a similar result with respect to picketing in violation of Section 8(g) of the Act which occurred at another facility of the employer and which was publicized to the employees by the employer. Compare *Curtin Matheson Scientific*, 310 NLRB 1090 (1993), finding an unlawful no-solicitation rule to be objectionable.

In *Columbus Transit, LLC,* 357 NLRB No. 146 (2011), the Board concluded that the employer's refusal to bargain with the Intervenor did not affect the results of the election. The Intervenor had been voluntarily recognized by the employer and the election was conducted pursuant to a petition filed by the Union during the 45-day Dana period. The Board found that the request to bargain was made only 1 week before the election and thus it was "unlikely that the Intervenor had been deprived of a possible campaign platform." The Board also noted that the petitioning union had won the election by a considerable margin over the Intervenor.

24-311 De Minimis or Isolated Conduct

As discussed more fully in section 24-310, supra, the Board does not find that any unfair labor practice conduct warrants setting aside an election. It goes without saying, therefore, that not all otherwise unlawful conduct will set aside the election.

As the Board noted in *Airstream, Inc.,* 304 NLRB 151, 152 (1991):

> A violation of Section 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." *Enola Super Thrift*, 233 NLRB 409 (1977).

The Board has applied the "virtually impossible" standard in consolidated unfair labor practice and representation cases in which conduct found to violate Section 8(a)(1) is also alleged in election objections. That standard does not apply in representation proceeding where there are no unfair labor practice allegation or finding. *NYES Corp.,* 343 NLRB 791 fn. 2 (2004). Instead the Board applies the standard set forth in *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995), viz., whether the misconduct, taken as a whole, warrants a new election because it has "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Metaldyne Corp.,* 339 NLRB 443 (2003). See also *Waste Management of Pennsylvania*, 314 NLRB 376 (1994). See also *Mercy General Hospital*, 334 NLRB 100 (2001).

In *Bon Appetit Management Co*., 334 NLRB 1042 (2001), the Board described the test for determining whether conduct is de minimis. See also *Sir Francis Drake Hotel,* 330 NLRB 638 (2000) (margin of election results can be a factor); and *Chicagoland Television News*, 330 NLRB 630 (2000).

In *Double J. Services,* 347 NLRB No. 58 (2006) (not reported in Board volumes), a divided Board overruled the hearing officer who had found certain changes in work policies to be de minimus. The Board noted that these changes were announced without explanation shortly before the election and that they had a greater effect on the unit than the hearing officer found.

See also *Rivers Casino*, 356 NLRB No. 142 (2011) (four instances of objectionable conduct not de minimus).

24-312 Litigation of Unfair Labor Practice Issues in Representation Cases

The general rule is that the Board will not permit the litigation of unfair labor practice cases in representation proceedings. See section 3-920 of this text.

This does not mean of course that the Board will not consider unfair labor practice findings in deciding objection cases. Rather, as discussed more fully, supra (sec. 24-310), unfair labor practice conduct that is litigated in an unfair labor practice case can also be found to be objectionable conduct.

But, in the absence of a complaint, the Board will not consider some unfair labor practice issues in objections or challenge proceedings especially those involving Section 8(a)(3). *Texas Meat Packers*, 130 NLRB 279 (1961), and *McLean Roofing Co*., 276 NLRB 830 fn. 1 (1985). On the other hand, conduct which amounts to interference and might otherwise constitute 8(a)(1) conduct will generally be considered in an objection proceeding. See section 24-310, supra. The fact that an unfair labor practice charge alleging the same conduct as in the objections was dismissed does not require pro forma dismissal of the objections *ADIA Personnel Services*, 322 NLRB 994 fn. 2 (1997). See section 14-700 for discussion of alter ego litigation.

In *Gaylord Bag Co*., 313 NLRB 306 (1993), the Board rejected an employer's contention that settlement of unfair labor practice charges against a union precluded its ability to establish that a petition should be dismissed. The Board, in doing so, noted that these are independent matters.

24-313 Narrowness of the Election Results

As indicated, the narrowness of the vote in an election is a relevant consideration. *Jurys Boston Hotel,* 356 NLRB No. 114 (2011); *Robert Orr–Sysco Food Services*, 338 NLRB 614 (2002). It is not, however, dispositive and as the Board noted in *Accubuilt, Inc*., 340 NLRB 1337 (2003), it will assess the general atmosphere at the location "rather than comparing the number of employees subject to any sort of the threats against the vote margin." See also *Lamar Advertising of Janesville,* 340 NLRB 979 (2003).

24-314 Dissemination

In assessing whether conduct interfered with the election "the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit and other revelant factors," *Archer Services*, 298 NLRB 312 (1990). See also *Gold Shield Security & Investigations*, 306 NLRB 20 (1992); and *Peppermill Hotel Casino*, 325 NLRB 1202 fn. 2 (1998) (dissemination to even one voter could have affected results of election that ended in a tie vote).

In *Crown Bolt, Inc.,* 343 NLRB 776 (2004), a divided full Board reversed *Springs Industries*, 332 NLRB 40 (2000), and "all other decisions in which the Board has presumed dissemination of plant-closure threats or other kinds of coercive statements." The Board stated that such threats are "very severe" but that "severity of a threat is one factor, among several, to be considered in deciding whether to set aside an election. See *Caron International*, supra (noting the factors the Board considers in deciding whether misconduct affected the results of an election; factors include the number of violations, their severity, the extent of dissemination and the size of the unit)." (Supra at 779.) See also *MB Consultants, Ltd*., 328 NLRB 1089 (1999); *Eric Brush & Mfg. Corp*., 338 NLRB 1100 (2003); and *Hollingsworth Management Service*, 342 NLRB 556 (2004).

In *Freund Baking Co*., 336 NLRB 847 (2001), a divided panel concluded that a security/confidential information provision in an employee handbook was both unlawful and objectionable. The provision limited discussion among employees of inter alia, wages, hours, and conditions of employment. See also *Jurys Boston Hotel*, 356 NLRB No. 114 (2011). Compare *Safeway, Inc.,* 338 NLRB 528 (2003).

24-320 Types of Interference Under the *General Shoe* Doctrine

378-1401-5000

1401-6700

We turn now to conduct, often the relevant basis for setting aside an election, which is not also violative of any of the unfair labor practice provisions of the Act. Broadly speaking, the areas of interference with elections we shall now consider stem out of the *General Shoe* doctrine, formulated by the Board in 1948 (*General Shoe Corp*., 77 NLRB 124 (1948)). Enunciated shortly after the 1947 amendments when Section 8(c) was already on the books, it suggests itself as a good beginning for a phase of preelection campaign interference which, being confined to representation proceedings, merits even more emphasis in a volume such as this.

The *General Shoe* doctrine holds that conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. In adopting this rule, the Board rejected the contention that the criteria applied by the Board in a representation case to decide whether an election was interfered with need necessarily be identical to those used to determine whether an unfair labor practice had been committed.

In *General Shoe* itself, a consolidated complaint and representation proceeding, although the respondent's activities immediately before the election were not held to constitute unfair labor practices, certain of these activities were nonetheless found to have created "an atmosphere calculated to prevent a free and untrammeled choice by the employees."

The Board summarized the doctrine in the following language:

> In election proceedings, it is *the Board's function to provide a laboratory in which an experiment* may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. [77 NLRB at 127.]

At the same time, the Board noted that Congress only applied what was then the new Section 8(c) to unfair labor practice cases.

Years later, when this dichotomy was again examined by the Board, it reaffirmed its original view by stating that "Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases," reversing specifically several of its decisions during an intervening period which suggested the contrary. The Board added, however, that the "strictures of the first amendment, to be sure, must be considered in all cases." *Dal-Tex Optical Co*., 137 NLRB 1782 fn. 11 (1962).

Under the *General Shoe* heading, it is also important to again emphasize what we have done before—that the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct amounting to interference, restraint, or coercion which violates Section 8(a)(1). See, for example, the decision in *Edward J. DeBartolo Corp*., 313 NLRB 382 (1993), where the Board found that the refusal of the union to leave the employer's premise did not interfere with the election distinguishing the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), relied on by the employer.

A "laboratory conditions" theory of objectionable conduct does not have to be specifically alleged in a parties objections. It is sufficient if it is "reasonably encompassed by and sufficiently related to" another alleged objection. *Fred Meyer Stores, Inc.,* 355 NLRB 555 (2010).

In that same case, the Board overruled an objection that the employer interfered with the election in making a change to employees' paychecks. Nonetheless the Board set aside the

election because the effect of the change was "one of those rare cases where the requisite laboratory conditions were so disturbed" as to warrant a new election. *Fred Meyer,* slip op. p.3.

An Exception—In *Showell Poultry Co*., 105 NLRB 580 (1953), the Board decided against setting aside an election where the employer engaged in objectionable conduct as to two unions, one of whom won the election. See also *Flat River Glass Co*., 234 NLRB 1307 (1978), *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2003); and *Randall Rents of Indiana*, 327 NLRB 867 fn. 6 (1999), and section 24-325 of this chapter. Compare *President Container, Inc*., 328 NLRB 1277 (1999) (misconduct directed at only one union).

For a summary of the factors which the Board evaluates in deciding whether the employees could freely and fairly exercise free choice in the election. See *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). Compare *Station Operators*, 307 NLRB 263 (1992); and *Champaign Residential Services*, 325 NLRB 687 (1998), distinguishing *Phillips*. See also *Yale Industries*, 324 NLRB 848 (1997) (timing of announcement of benefit increase objectionable), and *American Freightways*, 327 NLRB 832 (1999) (single instance does not establish past practice of soliciting grievances).

A few cases reflect the Board's policy on types of objectionable conduct. See, for example, *Sun Mart Foods,* 341 NLRB 161 (2004) (promises to remodel store); *Deaconess Medical Center*, 341 NLRB 589 (2004) (promise to restore wages); *STAR, Inc*., 337 NLRB 962 (2002) (grant of wage increase); *Petrochem Insulation, Inc.,* 341 NLRB 473 (2004) (threat of reduced wages); *Waste Management, Inc.,* 330 NLRB 634 (2000) (discriminatory bulletin board policy); *Network Ambulance Services*, 329 NLRB 1 (1999) (holiday benefits granted during critical period, not objectionable); *United Methodist Home of New Jersey*, 314 NLRB 687 (1994); *Kauai Coconut Beach Resort*, 317 NLRB 996 (1995) (timing of pay raises); *Steeltech Mfg*., 315 NLRB 213 (1994) (promulagation of rules during critical period); *Lutheran Retirement Village*, 315 NLRB 103 (1994); *ADIA Personnel Services*, supra (promise of benefits); *Ameraglass Co*., 323 NLRB 701 (1997) (acceleration of benefits); *Comet Electric*, 314 NLRB 1215 (1994) (failure to pay employees for attendance at captive audience speech); *JTJ Trucking*, 313 NLRB 1240 (1994) (union statement of no health coverage if employees vote against union found not objectionable); *Lalique N.A., Inc*., 338 NLRB 986 (2003) (union promise of medical benefits if it won election not objectionable); and *Nestle Dairy Systems*, 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995) (filing RICO lawsuit, not objectionable). *Washington National Hilton Hotel*, 323 NLRB 222 (1997), offering to put employees in contact with a news reporter who was doing a story on organizing, not objectionable. *MacDonald Machinery Co*., 335 NLRB 319 (2001). Compare *Majestic Star Casino, LLC*, 335 NLRB 407 (2001). For an extensive discussion of whether or not an employer breach of its own no-solicitation rule is objectionable, see *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335 (1998).

In two other cases, the Board found that added security measures after the filing of the petition including an additional armed guard on the day of the election was not objectionable─*Quest International*, 338 NLRB 856 (2003); Compare *Mental Health Assn.*, 356 NLRB No. 151 (2011). An employer memorandum to employees indicating the possible loss of benefits in negotiations if the union won the election was found not a basis for setting aside the election. *Manhattan Crowne Plaza Town Park Hotel Corp*., 341 NLRB 619 (2004).

In one interesting case, the Board found that the employer did not engage in objectionable conduct when it posted a letter from a customer indicating that unionization by the employees might occasion the customer making other business arrangements. *Eagle Transport Corp*., 327 NLRB 1210 (1999).

Frequently the issue is the timing of the grant of benefit. The general rule is that "the employer is required to proceed with projected wage or benefit improvements as if the union were not on the scene." *Niblock Excavating, Inc.,* 337 NLRB 53 (2001); *Network Ambulance Services*, 329 NLRB 1 (1999); and *Waste Management of Palm Beach*, 329 NLRB 198 (1999). Compare *Tinius Olsen Testing Machine Co*., 329 NLRB 351 (1999) (change required by contract

not objectionable). See also *Onan Corp.,* 338 NLRB 913 (2003); and *Mercy Hospital Mercy Southwest Hospital*, supra.

As the Board explained more fully in *United Airlines Services Corp.*, 290 NLRB 954 (1988):

> It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a; type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin*, [*& Co.,* 284 NLRB 98, 98 (1987)], quoting *Reds Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco, Inc*., 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.,* 199 NLRB 1195 (1972). [Footnote omitted.]

In 2011, the Board decided three interesting "promise of benefit" objections cases. They are:

1) *Newburg Eggs, Inc*., 357 NLRB No. 171 (2011) – employer interfered with election by announcing the hiring of a bilingual human resources manager. The Board found that in the circumstances of the case, "employees would reasonably construe [the employer's announcement] as an announcement of improved working conditions."
2) *Sweetwater Paperboard*, 357 NLRB No. 142 (2011) – promise that employer would remedy employee concerns about a manager who was the source of employee discontent.
3) *G & K Services Inc*., 357 NLRB No. 109 (2011) – linking enhanced benefits at another employer facility to that facility's decertification of the union there.

The Board will permit an employer to describe and make a comparison of its benefits for its unrepresented employees provided that this is not accompanied by an implied promise of benefit. *Langdale Forest Products Co.,* 335 NLRB 602 (2001); *Suburban Journals of Greater St. Louis,* 343 NLRB 157 (2004), distinguishing *Etna Equipment & Supply Co.,* 243 NLRB 596 (1979).

With respect to union promises of benefit, the Board has held that "[e]mployees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises . . . are easily recognized by employees to be dependent on contingencies beyond the union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits." *Smith Co.,* 192 NLRB 1098, 1101 (1971). See also *Lalique N.A., Inc*., supra.

Alyeska Pipeline Service Co., 261 NLRB 125 (1982), represents a limited exception to this general rule. In *Alyeska*, the union controlled "all access to construction jobs in Alaska for the employees participating in the election. Therefore, when the union suggested that the only way employees could obtain a union card was by voting for the union in the upcoming election and that "those fortunate enough to possess a Local 1547 membership card would be in an extremely favorable priority position [when it came to hiring] compared with those lacking a card, it was clear not only that the union was promising to grant members an advantage over nonmembers in obtaining jobs, but also that the union had the power to effectuate that promise." In *Station*

Operators, 307 NLRB 263 fn. 1 (1992), the Board made clear that the holding in *Alyeska* was tied to its special facts.

For discussion of supervisory prounion conduct, see section 24-328.

24-321 Assembly of Employees at a Focal Point of Authority and Home Visitations

378-2816

378-4242

Among the issues that the Board has had to determine in this area of law is the one that deals with the assembly of employees by the employer at a focal point of authority. Indeed, in *General Shoe* itself this was a question for the Board to decide.

On the day before the election the employer had the employees brought to his office in 25 groups of 20 to 25 and, in the language of that decision, "in the very room which each employee must have regarded as the locus of final authority in the plant, read every small group the same intemperate anti-union address." In the same case, the employer instructed his supervisors "to propagandize employees in their homes." The Board found that this went "so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes." These were not unfair labor practice findings. They were determinations based on the policy that matters which may not be available to prove a violation, but may still be pertinent, "if extreme enough"—to borrow a Board phrase—in deciding whether an election satisfies the Board's own administrative standards.

In *Economic Machinery Co*., 111 NLRB 947 (1955), "the technique of calling the employees into the Employer's office individually to urge them to reject the Union," the Board held, "is, in itself, conduct calculated to interfere with their free choice in the election." The employer had privately interviewed all employees in his office. In some instances the interviews were as long as 3 hours. The Board reasoned that this was interference with the election "regardless of the non-coercive tenor of an employer's actual remarks."

Where company officials and supervisors called at employees' homes, the Board found that the cumulative effect of the interviews in these circumstances, which admittedly established the company's disapproval of the petitioning union, interfered with their free choice. In this posture, too, the election was set aside despite the absence of actual coercion. The Board reiterated the rule which consistently condemns the technique of calling all or a majority of the employees in the unit into the employer's office individually or calling on them at their homes to urge them to reject a union as their bargaining representative. *Peoria Plastic Co*., 117 NLRB 545 (1957); see also *Hurley Co*., 130 NLRB 282 (1961).

In *NVF Co*., 210 NLRB 663 (1974), the Board concluded that cases involving the technique of calling employees either individually or in small groups into private areas to urge them to vote against the union was not per se objectionable. Rather, each case will be considered on its facts to determine whether the election represents the employee's wishes. See also *Flex Products*, 280 NLRB 1117 (1986).

"The unique effectiveness of speeches addressed to employees assembled during working hours at the locus of their employment," the Board noted, "has received congressional and judicial recognition and has been substantiated by research studies." See *H. W. Elson Bottling Co*., 155 NLRB 714, 716 fn. 7 (1965); also *NLRB v. United Aircraft Corp*., 324 F.2d 128 (2d Cir. 1963), cert. denied 376 U.S. 951 (1964). It would seem that a vital factor in the Board's reasoning is that when individual employees are taken from their workplaces and subjected to antiunion propaganda at the hands of a supervisor in the privacy of a company office or in an isolated area away from other employees, there is a "likelihood that outright fear or uneasiness tinged with fear as to the consequences of unionism will be created in the mind of the employee thus singled out for special attention." *Great Atlantic & Pacific Tea Co*., 140 NLRB 133, 134 (1963).

The rationale for invalidating elections involving the assembly of employees is not unlike the rationale in cases involving home visitations by officials and supervisors of the employer. In the latter situation the Board has made it clear that, whether or not the remarks during such visitations were coercive in character, the technique of visiting employees at their homes to urge them to reject the union as their bargaining representative is a ground for setting aside an election. See, for example, *F. N. Calderwood, Inc*., 124 NLRB 1211 (1959). The crux of that rationale is in the fact that the employer has "the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews" that it conducts. *Plant City Welding & Tank Co*., 119 NLRB 131, 133–134 (1957).

The Board does not use a mechanistic approach but gives full consideration to all the circumstances. Thus, where 2 days before an election, several nurses aides were appealed to for a no-vote in noncoercive terms by the employer's executive director at a meeting in the nursing director's office, this incident was held not to justify setting aside the election under the *General Shoe Corp*., 77 NLRB 124 (1948), "locus of managerial authority" doctrine, since the office was the regular place of work of the admissions nurse and had been used for training sessions. *Three Oaks, Inc*., 178 NLRB 534 (1969).

A significant exception to the rule relating to employee interviews at the plant is found in *Mall Tool Co*., 112 NLRB 1313 (1955). In that case, the employer spoke to about half of its employees at their workbenches. The interviews lasted no more than 3 minutes. In these circumstances, the interviews were distinguished from the *Economic Machinery Co*., 111 NLRB 947 (1955), type and found not to constitute a basis for upsetting the election. See also *Frito Lay, Inc.,* 341 NLRB 515 (2004) (use of "ride-alongs"─management representatives who rode with unit drivers to discuss working conditions─not objectionable).

Before leaving this line of cases, it should be explained that the Board has not drawn an analogy between home visitations by union representatives in the preelection period and home visitations by supervisors. "There is a substantial difference," the Board pointed out, "between the employment of the technique of individual interviews by employers on the one hand and by the union on the other. Unlike employers, unions often do not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews conducted by employers. Thus, not only do unions have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representatives thereby." *Plant City Welding*, supra at 133–134. See also *Teamsters Local 705 (K-Mart),* 347 NLRB 439 (2006).

24-322 Misrepresentation

378-2885

In 1982, the Board decided to abandon its policy of regulating misrepresentations in election campaigns. Thus, in *Midland National Life Insurance Co*., 263 NLRB 127, 130 (1982), the Board held that it would "no longer probe into the truth or falsity of the parties' campaign statements." This decision ended the debate of many years as to what role the Board should take as to misleading campaign statements. Compare *Hollywood Ceramics*, 140 NLRB 222 (1962); and *Shopping Kart Food Market*, 228 NLRB 1311 (1977). In *Phoenix Mechanical*, 303 NLRB 888 (1991), a Board majority found no basis for setting aside elections on the basis of misrepresentations by third parties. Accord: *Carry Cos. of Illinois*, 310 NLRB 860 (1993); and *Nestle Dairy Systems*, 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995) (alleged misrepresentation by union in RICO lawsuit, not objectionable). See also *Gormac Custom Mfg*., 324 NLRB 423 (1997), and *Champaign Residential Services*, 325 NLRB 687 (1998) (union flyer with photocopied signatures of employees supporting the union).

The Sixth Circuit has a somewhat modified view of the Board's *Midland* policy. See *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984). The Board has continued to

apply its *Midland* policy but will often analyze a case using the Sixth Circuit test where the case arises in that circuit. See, e.g., *UNISERV*, 340 NLRB 199 (2003); and *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004).

Midland National did, however, indicate a continued Board concern over "forged documents which render the voters unable to recognize propaganda for what it is." Thus, if the deceptive manner used renders it unlikely that the voters will be able to assess the documents as forgeries, the Board will set aside the election. *Mt. Carmel Medical Center*, 306 NLRB 1060 (1992). See also *United Aircraft Corp*., 103 NLRB 102 (1953).

Similarly, the Board will set aside elections where Board documents are altered in a way that indicates Board endorsement of a party to the election. See *Allied Electric Products*, 109 NLRB 1270 (1954). For a complete discussion of the altered Board document policy in light of *Midland National Life Insurance Co*., 263 NLRB 127 (1982), see *Ryder Memorial Hospital,* 351 NLRB 214 (2007), and *SDC Investment*, 274 NLRB 556 (1985), and sections 24-423 and -441.

In *Goffstown Truck Center, Inc*., 356 NLRB No. 33 (2010), the Board set aside an election based on union organizer's preelection statement that she was there "on behalf of the NLRB" to determine how employees were voting. The Board found this conduct would mislead voters as to Board neutrality and "went beyond the realm of typical campaign propaganda which employees are capable of recognizing for what it is."

In *AWB Metal, Inc.*, 306 NLRB 109 (1992), the Board distinguished between a document that allegedly misrepresented wage rates and forgery. See also *Care Enterprises,* 306 NLRB 491 (1992). Compare *Riveredge Hospital*, 264 NLRB 1094 (1982), in which the Board applied the *Midland* rule to misrepresentations about Board actions. The Board distinguished *Riveredge* in a case involving a flyer saying that the NLRB wants workers to have a union. *TEG/LVI Environmental Services*, 326 NLRB 1469 (1998).

In *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011), a Union's distribution of a flyer purporting to quote employees as saying they were going to vote for the union, when in fact they had not done so, was held not to amount to misrepresentation within the meaning of *Midland*. Accord: *Enterprise Leasing Co. –Southeast, LLC*, 357 NLRB No. 159 (2011).

But in *Humane Society for Seattle/King County*, 356 NLRB No. 13 (2010), a Board majority found sufficient confusion over the identity of the organization seeking representation to warrant setting aside election if revised tally shows that that organization received a majority of the votes. The Board majority found the facts warranted finding of confusion but not of misrepresentation under *Midland*.

A misstatement of the law is not objectionable conduct. Thus, in *John W. Galbreath & Co*., 288 NLRB 876 (1988), the Board overruled objections to an election where an employer stated that an employee who is expelled from the union could be fired here is a union-security agreement in effect. Accord: *Seven-Up/Royal Crown Bottling Cos*., 323 NLRB 579 (1997). See also *Virginia Concrete Corp.,* 338 NLRB 1182 (2003).

See *Pacific Southwest Container*, 283 NLRB 79 (1987), in which the Board, distinguishing *Midland National* set aside an election because of confusion over the identity of the union. *Nevada Security Innovations,* 337 NLRB 1108 (2002).

24-323 Racial Appeals

378-2885-8000

Campaign propaganda calculated to inflame racial prejudice of employees, deliberately seeking to overemphasize and exacerbate racial feeling by irrevelant, inflammatory appeals, is a basis for setting aside an election. *Sewell Mfg. Co.,* 138 NLRB 66 (1962); and *YKK (USA) Inc*., 269 NLRB 82 (1984). For further background, see *P. D. Gwaltney, Jr., & Co*., 74 NLRB 371 (1947); *Bibb Mfg. Co*., 82 NLRB 338 (1949); *Empire Mfg. Corp*., 120 NLRB 1300, 1317 (1958); *Petroleum Carrier Corp*., 126 NLRB 1031 (1958); and cf. *Sharnay Hosiery Mills*, 120 NLRB

750 (1958). See also Sovern, *The National Labor Relations Board and Racial Discrimination*, 62 Columbia Law Review 563, 626 (1962).

This rule was applied in *Sewell Mfg*. in these factual circumstances.

An election was scheduled at two small Georgia towns. Two weeks before the election, the employer mailed to its employees a picture showing a closeup of an unidentified black man dancing with an unidentified white woman, and a caption underneath in bold letters: "The C.I.O. Strongly Pushes and Endorses the F.E.P.C." The employer included a reprint from a Mississippi newspaper with a picture captioned: *"Union Leader James B. Carey Dances With A Lady Friend,"* and a story headed: *"Race Mixing Is An Issue as Vickers Workers Ballot"* This mailing was followed by a letter calling attention to the union's support of NAACP and CORE. During the 4 months preceding the election, the employer distributed to its employees copies of "Militant Truth," a South Carolina monthly, containing statements of which the following is a fairly representative sampling: "It isn't in the interest of our wage earners to tie themselves to organizations that demand racial integration, socialistic legislation, and free range of communist conspirators." The Board concluded that the employer's propaganda directed to race "so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility," and therefore overstepped the bounds of permissible campaigning by so lowering the standards that the uninhibited desires of the employees could not be determined in the election. The Board acknowledged that "standards must be high, but they cannot be that high that for practical purposes elections could not effectively be conducted." It continued, however, by stating that:

> [A]ppeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feeling of voters in the election.
>
> That is not to say that a relevant campaign statement is to be condemned because it may have racial overtones. [138 NLRB at 71.]

On the same day the Board decided *Sewell Mfg. Co*., 138 NLRB 66 (1962), case, it also decided *Allen-Morrison Sign Co*., 138 NLRB 73 (1962), which arose in another region and in which the injection of "the extraneous issue of race hatred" in the context of a Board election was also raised. In that case, the Board concluded that the employer's letter was "temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation," adding that it was "not able to say that the Employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters." The election was upheld. From both decisions the following standard for determination emerges.

So long as a party limits itself to setting forth truthfully another party's position on racial matters and does not deliberately seek to exacerbate racial feelings by irrelevant, inflammatory appeals, the election will stand, but the burden is on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against the party.

For example, the Board applied the *Sewell* rule where it found handbill references, which may have satisfied the standard of truthfulness, but were "irrelevant to any aspect of the IBEW's campaign." It also took into consideration the coupling of the irrelevant statement with a cartoon which appeared on the front page of the two area newspapers under the headline of an IBEW publication, depicting Blacks and Whites marching together with arms linked and carrying a banner entitled "We Shall Overcome." Captions under the cartoon read "Where did the above slogan originate?" and "Just a Reminder!" The Board concluded that the employees were inhibited by appeals to their sentiments as civic minded individuals, by the injection of the fear of personal economic loss, and by playing on racial prejudice, the full-page ads, the editorials, the

cartoon, and the handbills were calculated to convince them that a vote for the union meant the betrayal of the community's best interests. While there was no evidence that the employer was responsible for this propaganda, the result achieved was nonetheless the same. *Universal Mfg. Corp*., 156 NLRB 1459 (1966). The *Sewell* rule, as this case illustrates, is therefore also applicable where the objectionable conduct is engaged in by third parties. Compare *El Fenix Corp*., 234 NLRB 1212, 1213 (1978), where a single ethnic slur by an employee nonagent was not considered objectionable. See also *Benjamin Coal Co*., 294 NLRB 572 (1989), in which the Board found that the union was not responsible for the racial and ethnic statements of some of its committee members when the union discouraged such statements. See also *Brightview Care Center*, 292 NLRB 352 (1989), where isolated remarks by an unidentified employee were not objectionable; and *S. Lichtenberg & Co*., 296 NLRB 1302 (1989).

In *NLRB v. Schapiro & Whitehouse, Inc*., 356 F.2d 675 (4th Cir. 1966), the Fourth Circuit applied *Sewell* to union propaganda. The court found that campaign literature distributed by a union on two occasions shortly before a consent election which urged employees, most of whom were Blacks, to consider and act on race as a factor in the election was so irrelevant and inflammatory as to invalidate the election. In doing so, the court specifically approved the *Sewell* standards (at 679).

As in the case of employer inflammatory racial appeals (for example, *Allen-Morrison Sign Co*., 138 NLRB 73 (1962)), so in union inflammatory appeals, factual distinctions may call for a different result. Thus, while the theme in *Archer Laundry Co*., 150 NLRB 1427 (1965), was admittedly based on a racial issue, distinguishing implications were found. Instead of racial appeals designed to engender race hatred, the appeals in *Archer* were regarded as designed to engender "racial self-consciousness." For further discussion of the distinction between "consciouness raising" and racial prejudice see *NLRB v. Sumter Plywood*, 535 F.2d 917 (5th Cir. 1977), concerted action aimed at addressing themselves to the larger issue of the advantages and disadvantages of a union for the *Archer* laundry workers who were predominantly Black, and concerted action in the form of a union was another way by which the Blacks could strive to achieve equality in American society. The racial appeals in that context were therefore not considered irrelevant within the meaning of the criteria under discussion here. See also *Aristocrat Linen Supply Co*., 150 NLRB 1448 (1965); *Coca-Cola Bottling Co. of Memphis,* 273 NLRB 444 (1984); and *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458 (1998).

This distinction was also emphasized in another case in which the Board stressed the fact that in *Sewell* the campaign arguments were inflammatory in character, "setting race against race," an appeal to animosity rather than to consideration of "economic and social conditions and of possible actions to deal with them." This constrasts with the situation in which the union argument is not unreasonable, or irrelevant, or intemperately presented to the electorate. *Baltimore Luggage Co*., 162 NLRB 1230 (1967) (which includes a thorough rationale of the principles which govern this phase of the law). See also *Hobco Mfg. Co*., 164 NLRB 862 (1967).

Although in another case a racial appeal, as such, was not made in the preelection campaign, a rumor had been circulated throughout the plant 5 days before the election to the effect that the company's president had stated at a laundry association meeting that if the union lost the election he would discharge the Black employees. However, the Board found that the impact of the rumor was sufficiently neutralized and dissipated before the election by repeated disclaimers by both the union and the company. The union disassociated itself from the rumor and urged the employees to disregard it at two union meetings, and the company in oral denials and in a letter to all employees denounced the rumor as "poisonous." Thus, in the Board's view, the combined disclaimers were sufficient to transform it into the type of propaganda which the employees were capable of evaluating. *Staub Cleaners*, 171 NLRB 332 (1968). See also *Kresge-Newark, Inc*., 112 NLRB 869, 871 (1955).

In *Foxwoods Resort Casino*, 356 NLRB No. 111 (2011), an election at Indian gaming casino, statements that tribal members received job preference were found not objectionable. The Board

found that "the statements did not contain any reference to a negative stereotype of Native Americans."

The *Sewell* rule requires that race or ethnicity must be a significant and sustained aspect of the campaign for the Board to find objectionable conduct. In *Honeyville Grain, Inc. v. NLRB,* 444 F.3d 1269 (10th Cir. 2006), the court agreed with the Board that it was not. See also *Beatrice Grocery Products*, 287 NLRB 302 (1987); *Brightview Care Center*, 292 NLRB 352 (1989); *Zartic, Inc*., 315 NLRB 495 (1994); and *Dai-Ichi Hotel Saipan Beach*, supra. Compare *Catherine's, Inc*., 316 NLRB 186 (1995). See also *Singer Co*., 191 NLRB 179 (1979) (limited remark found not objectionable).

The Board reached a similar result in *KI (USA) Corp*., 309 NLRB 1063 (1992), where in a divided opinion the Board found that the union's reproduction of letter from a Japanese official concerning American workers was not objectionable.

24-324 The *Excelsior* Rule

378-2878

a. Submission of the list

The *Excelsior* rule requires the employer to file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters within 7 days after approval by the Regional Director of an election agreement or after a direction of election, and this information must be made available by the Regional Director to all parties in the election proceeding. *Excelsior Underwear*, 156 NLRB 1236 (1966). See also *J. P. Phillips, Inc.,* 336 NLRB 1279 (2001) (duty to send *Excelsior* list to the parties lies squarely with the Region).

Even timely submission of the list to the Regional Director, may not satisfy the purposes of the Excelsior rule. For example, in *Ridgewood Country Club*, 357 NLRB No. 181 (2012), an election was set aside by a Board majority where the union did not receive the *Excelsior* list until 4 days before the election. The Employer had timely submitted the list to the Regional Office but the Region failed to provide the list on a timely basis to the union. A Board majority held that the election should be set aside even without proof of prejudice to the Union.

A showing of prejudice is required, if the regional office fails to immediately make a timely submitted list available to the Union but does so in sufficient time that the union has the list at least 10 days before the election. See *CEVA Logistics*, 357 NLRB No. 60 (2011).

In *Trustees of Columbia University,* 350 NLRB 574 (2007), the Board declined to require that the employer provide the e-mail addresses of the unit employees in compliance with the *Excelsior* rule. The Board majority stated that it was unwilling to extend *Excelsior* "without the benefit of amicus briefing and a fully developed record."

Compliance requires that the employer provide the *full* first and last name of the employees. *Laidlaw Waste Systems*, 321 NLRB 760 (1996); *North Macon Health Care Facility*, 315 NLRB 359 (1994); and *Weyerhaeuser Co*., 315 NLRB 963 (1994).

To be timely, the eligibility list must be received by the Regional Director within the required time; no extension of time is granted except in extraordinary circumstances. The filing of a petition for review does not stay this requirement. If the payroll period for eligibility purposes is subsequent to the election agreement or direction of election, the list must be filed within 7 days after the close of the determinative eligibility period. Failure to comply with this rule is deemed interference with the election and a ground, on proper objection, for invalidating the election.

Where the employer filed the list 11 days late without offering any reason for the delay other than that it was due to an "unintentional oversight," the Board held that the employer had not complied with the *Excelsior* requirement and set the election aside. *Rockwell Mfg. Co*., 201 NLRB 356 (1973). In doing so, it distinguished *U.S. Consumer Products*, 164 NLRB 1187 (1967), in which the delay was due to the parties' negotiations in attempting to resolve the representation issue so as to make the *Excelsior* list unnecessary. Compare also, *Taylor*

Publishing Co., 167 NLRB 228 (1967), where the unit was large and the list only 1 day late. See also *Wedgewood Industries*, 243 NLRB 1190 (1979); and *Red Carpet Building Maintenance Corp*., 263 NLRB 1285 (1982). See also *Alcohol & Drug Dependency Services,* 326 NLRB 519 (1998).

More recently, the Board had occasion to discuss late filings of the list and reach different conclusions where the list was late and incomplete, *Special Citizens Futures Unlimited*, 331 NLRB 160 (2000) (election set aside), and where it was only 1 day late but was complete, *Bon Appetit Management Co*., 334 NLRB 1042 (2001) (election not set aside). See also *Mod Interiors*, 324 NLRB 164 (1997).

In *Teamsters Local 705 (K-Mart),* 347 NLRB 439 (2006), the Board overruled the objection of an RD petitioner who received the list 17 hours after the union.

Even in situations where the employer has fully complied with *Excelsior*, there may be a basis for rerunning the election because the touchstone is "the degree of prejudice to the channels of communication." See, e.g., *Avon Products*, 262 NLRB 46 (1982), in which a grant of a request for review expanded the unit and *Coca-Cola Co. Foods Division*, 202 NLRB 910 (1973), where the Regional Office misaddressed the envelope sending the list to the union. See also *American Laundry Machinery Division*, 234 NLRB 630 (1978). Compare *Red Carpet Building Maintenance Corp*., 263 NLRB 1285 (1982). In *J. P. Phillips, Inc.*, supra, the Board found predjudice to one of the two unions because it received an incomplete copy from the Region.

The *Excelsior* rule applies to all election cases, including decertification and revocation of union-security authorization, consented to or directed, but it does not apply to expedited elections held pursuant to Section 8(b)(7)(C) of the Act. In *Gerland's Food Fair*, 272 NLRB 294 (1984), the Board set aside the election where the Regional Office failed to provide the RD petitioner with a copy of the list.

In adopting the *Excelsior* rule, the Board noted that disclosure under it will maximize the likelihood that all voters will be exposed to arguments for, as well as against, union representation; that it will permit the employees to make a more fully informed and reasoned choice; that it will tend to eliminate challenges to voters based solely on lack of knowledge of their identity; that many objections to elections will be settled well in advance of the election; and that the public interest will be furthered in obtaining more prompt resolutions of questions of representation.

In *Fenfrock Motor Sales*, 203 NLRB 541 (1973), the Board found that providing the *Excelsior* list to a third party under court order was not objectionable where there was no evidence that extensive questioning of employees before and after the election had an effect on employee free choice.

The *Excelsior* case was decided at the same time as *General Electric Co*., 161 NLRB 618 (1966); and *McCulloch Corp*., 156 NLRB 1247 (1966), in which it was urged that the Board should overrule *Livingston Shirt Corp*., 107 NLRB 400 (1954), and return to *Bonwit Teller, Inc*., 96 NLRB 608 (1951) (citation omitted). In *Bonwit Teller*, the Board held that, regardless of the breadth of an employer's no-solicitation rule, an antiunion speech on company time and premises, combined with a denial of a union request to reply, is a basis for setting aside a subsequent representation election and finding an unfair labor practice. In *General Electric* and *McCulloch*, supra at 1251, the Board declined to overrule *Livingston Shirt* and return to *Bonwit Teller*. The assumptions made on behalf of a policy change were not valid, said the Board, because under *Excelsior* in all elections, except an expedited election under Section 8(b)(7), all parties will have available to them, within a few days the names and addresses of all eligible voters.

b. Erroneous or incomplete lists

As noted earlier, compliance requires that the employer provide the *full* first and last name of the employees. *Laidlaw Waste Systems*, 321 NLRB 760 (1996), and an employer is estopped,

absent unusual circumstances from relying on its own failure to comply with *Excelsior*. *George Washington University,* 346 NLRB 155 (2005).

In the period following the adoption of the *Excelsior* rule, the Board has had occasion to consider a variety of fact situations in which employers have made some attempt, but failed, to comply strictly with the requirements of that rule. In deciding whether the noncompliance was sufficient to warrant another election, the Board stated that there is "nothing in *Excelsior* which would require the rule stated therein to be mechanically applied." *Telonic Instruments*, 173 NLRB 588 (1969). See also *General Time Corp*., 195 NLRB 343 (1972); *Program Aids Co*., 163 NLRB 145 (1967); and *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

Thus, although the submission of an inaccurate, incomplete, or late list may provide a basis for invalidating an election, it nonetheless depends on the specific factual circumstances. In *Telonic*, for example, the omissions were confined to 4 of about 111 eligible voters and the employer acted with alacrity in informing the Region and the union that the list was incomplete. The Board found substantial compliance with the rule. "Generally, the Board will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule if the employer has not been grossly negligent and has acted in good faith." *Lobster House*, 186 NLRB 148 (1970). See also *Fountainebleu Hotel Corp*., 181 NLRB 1134 (1970); *Gamble Robinson Co*., 180 NLRB 532 (1970); *Program Aids Co*., supra; and *Valley Die Cast Corp*., 160 NLRB 1881 (1966). Where the employer obtained the addresses from W-4 forms but omitted one name because he thought the employee was not in the unit and left the name of another off because he was on temporary leave of absence and believed to be ineligible to vote, the Board held that these mistakes did not constitute gross negligence or indicate bad faith. *West Coast Meat Packing Co*., 195 NLRB 37 (1972). See also *Women in Crisis Counseling*, 312 NLRB 589 (1993), where a divided Board found the number of inaccuracies not to be substantial.

The Board takes more seriously the omission of names than inaccuracies in addressees. *Women in Crisis Counseling*, supra. See also *Washington Fruit & Produce Co.,* 343 NLRB 1215 (2004). This distinction is grounded in the fact that an employee's name provides "a key piece of information which can be used to identify and communicate with the person by means other than mail." *Women in Crisis Counseling*, supra at 589.

In *Washington Fruit & Produce Co.,* supra, the Board declined to set aside the election where the union was given a list that had inaccurate addresses for 28 percent of the unit. Because the union was able to obtain correct addresses from other souces for 90 percent of the unit, the Board, relying on *Women in Crisis Counseling,* supra, found substantial compliance with the *Excelsior* rule.

Note that even where the employer provides the union with the only addresses it has, it will be found to have been grossly negligent in supplying the list where it knew that many of its addresses were incorrect and, as a result, had even ceased mailing W-2 forms to its employees. *Merchants Transfer Co*., 330 NLRB 1165 (2000).

In *Meadow Valley Contractors*, 314 NLRB 217 (1994), the Board rejected an attempt to set a permissible omission rate of 9.5 percent. And in *Fountainview Care Center*, 323 NLRB 990 (1997), the Board concluded that an employer's decision not to exclude the names of a little more than 5 percent of the unit was not a good-faith mistake and was therefore not in substantial compliance with the *Excelsior* rule. The Board further noted that evidence of bad faith or gross negligence is not a required element in finding a failure to comply with *Excelsior* but either can be a relevant consideration.

In one unusual case the Board found noncompliance with *Excelsior* when the employer provided the union with a list that contained 81 names of ineligible voters in a unit of 146 employees. *Idaho Supreme Potatoes*, 218 NLRB 38 (1975).

In *Nathan's Famous of Yonkers*, 186 NLRB 131 (1970), an exception was made because of an unusual factual situation: The exception was grounded on the employer's flagrant unfair labor practices which were designed to defeat the winning union. There was no evidence that any union

was prejudiced more than another by the withholding of the *Excelsior* list. It was therefore concluded that a literal application of the *Excelsior* rule would permit the employer to benefit from its illegal actions by providing it, with another opportunity to defeat the winning union. But, as the Board pointed out, this was an unusual situation. See also *Thiele Industries*, 325 NLRB 1122 (1998) (Board rejected employer objections based on its falure to provide *Excelsior* list).

Clearly, where the employer furnished a list which omitted the names and addresses of nearly half of the eligible voters, supplied a supplemental list itself deficient by the continued omission of the names and addresses of certain eligibles, and furnished it at a time when its use in the campaign was limited to only 6 days before the election, the election was invalidated. *Blue Onion*, 175 NLRB 9 (1969).

While the Board stated in *Telonic Instruments*, supra, that nothing in *Excelsior* would require a mechanical application of the rule, it stated later in *Ponce Television Corp*., 192 NLRB 115, 116 (1971), that it is not its policy "to vest the Employer with unlimited discretion with respect to the content of the eligibility list." Thus, elections were set aside where the employer omitted the names of five eligible employees from the list, as a failure of substantial compliance (*Sonfarrel, Inc*., 188 NLRB 969 (1971)); where 22 percent of the electorate was omitted from the list (*Ponce Television Corp*., supra); where more than 11 percent of the eligible voters had been omitted (*Gamble Robinson Co*., supra); and where there had been a failure to supply addresses of employees in addition to names (*British Auto Parts*, 160 NLRB 239 (1966)). Compare *LeMaster Steel Erectors*, 271 NLRB 1391 (1984), where a deletion of 9 percent of the voters was held insufficient to set aside the election with *Thrifty Auto Parts*, supra, where 9.5 percent was considered sufficient. See also *Mod Interiors,* 324 NLRB 164 (1997), where the employer immediately corrected errors brought to its attention but the union did not have the fully corrected list for the full 10 days, and *Bear Truss, Inc*., 325 NLRB 1162 (1998), where the Board overruled objections finding that the employer acted in good faith in preparing and transmitting the list to the Region.

While the percentage of errors remains a factor in deciding *Excelsior* compliance matters, the Board in *Woodman's Food Markets*, 332 NLRB 503, 504–505 (2000), specifically eschewed the percentage of error as the only factor to be considered:

> We find that this approach—which focuses solely on the percentage of omissions relative to the number of employees in the unit—fails to adequately effectuate the purposes of the *Excelsior* rule. Accordingly, while we will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions.
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> . . . .
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> With respect to the employer's explanation for the omissions, we note that omissions may occur, notwithstanding an employer's reasonable good-faith efforts to comply, due to uncertainties about who is an eligible unit employee or other factors. Thus, we will consider the employer's explanation for the omissions.

For a more recent application and analysis of the Woodman's test see *Automotive Fire Systems*, 357 NLRB No. 190 (2012), where the Board set aside the election because of a 28 percent omission rate and evidence of bad faith.

It follows that, where the employer submitted no list at all, even though the union received only 8 out of the 215 ballots cast, the election should be set aside since "to make the election results the controlling factor in determining whether to excuse the lack of compliance with the rule subverts one of its very purposes, viz, 'to provide the Union [or unions as the case may be] with the opportunity to inform the employees of its position in order that the employees may intelligently exercise their right to vote.'" *Fuchs Baking Co*., 174 NLRB 720 (1969).

The issues of a union's actual access to employees, or the extent to which employees omitted from the *Excelsior* list are aware of the election issues and arguments, are not litigable matters in applying the *Excelsior* rule. *Sonfarrel, Inc.*, supra. "To look beyond the question of substantial completeness of the lists," said the Board in that case, "and into the further question of whether employees were actually 'informed' about the election issues despite their omission from the list, would spawn an administrative monstrosity."

The Board has rejected the contention that the petitioner did not need the list and therefore was not entitled to a complete and correct one. *Rite-Care Poultry Co*., 185 NLRB 41 (1970). This was discussed in detail in *Murphy Bonded Warehouse*, 180 NLRB 463 (1970), in which the Board affirmed a hearing officer's ruling at the initial representation case hearing, declining to permit an inquiry concerning the necessity of requiring submission of the list.

In invalidating the election in *Rite-Care*, the Board distinguished its rulings in *Singer Co*., 175 NLRB 211 (1969), and in *Telonic Instruments*, supra, in which it upheld the elections. In *Singer*, the list provided only surname and forename initials, and other inadvertent omissions but had correct addresses, and in *Telonic* the employer had inadvertently omitted four eligibles, but supplied them before the election.

Procedural note: In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the United States Supreme Court upheld the substantive validity of the *Excelsior* rule, stating that the "objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its *Excelsior* decision." Thus, as in *Wyman-Gordon*, the employer himself is specifically directed by the Board to submit a list of names and addresses of his employees for use by the union in connection with the election, this direction is "unquestionably valid." The Court held further, however, that, insofar as the Board purported to promulgate a new rule applicable to future cases, it violated the rulemaking processes of the Administrative Procedure Act.

After the Supreme Court's decision in *Wyman-Gordon*, a case arose in which the employer argued that the parties by executing an election agreement waived an "adjudicatory proceeding" pursuant to which the *Excelsior* list may be validly directed. But the Board, rejecting this contention, explained that the election agreements expedite elections by obviating the need for formal hearings and directions of election. The parties' waiver of these statutory requirements is itself statutorily permitted by Section 9(c)(4) of the Act and does not render inapplicable other statutory obligations and Board policies, "nor does it denude the representation proceeding of its adjudicatory nature." *Formfit Rogers Co. v. NLRB*, 71 LRRM 2456 (D.C.Tenn. 1969). Thus, where an election agreement is involved, the procedure is essentially similar to that followed in *NLRB v. Wyman-Gordon Co*., supra, except that the parties are able to stipulate to certain facts and execute an election agreement instead of pursuing the more formal route to a direction of election. As in *Wyman-Gordon*, the employer is specifically directed to furnish the *Excelsior* list. The fact that the direction is made by a Regional Director in a separate letter accompanying the copy of the agreement does not make the direction less valid. "To hold otherwise," concluded the Board, "would be to invite unnecessary litigation in situations where the parties would otherwise stipulate to the relevant facts." *Bishop-Hansel Ford Sales*, 180 NLRB 987 (1970).

See also section 23-510.

24-325 The *Peerless* Rule

378-2100

378-4242

378-8420

378-8480

a. Speeches

The *Peerless Plywood* rule, applicable to employers and unions alike, forbids election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for an election. Violation of this prohibition is a ground for setting aside the election whenever valid objections are filed. *Peerless Plywood Co*., 107 NLRB 427, 429 (1954).

"Such a speech," said the Board in its rationale, "because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word." The Board adverted to its longstanding rule prohibiting electioneering by either party at or near the polling place. "We have previously prescribed space limitations," said the Board, "now we prescribe time limitations as well."

The *Peerless Plywood* rule was held inapplicable in the case of a casual solicitation of three employees, only one of whom was eligible to vote, the night before the election by a union agent. This, said the Board, cannot be characterized as a "speech" to a "massed assembly of employees." "That rule was not intended to nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." The election was sustained. *Business Aviation, Inc*., 202 NLRB 1025 (1973). See also *Electro Wire Products*, 242 NLRB 960 (1979), where the employer president spoke individually to each employee on the day of the election asking them to vote "no"; *Associated Milk Producers*, 237 NLRB 879 (1978), and *Comcast Cablevision of New Haven*, 325 NLRB 833 (1998) (brief remarks by union to a noncaptive audience did not violate rule). Neither does distribution of propaganda with paychecks immediately before the election fall within the prohibition of the rule. *Conroe Creosoting Co*., 149 NLRB 1174 (1964). Where an election extends over 2 days, with employees voting at separate sites, the rule requires only that no speeches be given on company time to massed assemblies of employees who are scheduled to vote within 24 hours. Thus, where there was no evidence of any speech made to employees at one site within 24 hours of the scheduled polling time for the employees at that site, the election was upheld. *Shop Rite Foods*, 195 NLRB 133 (1972). See also *Dixie Drive-It-Yourself System Nashville Co*., 120 NLRB 1608 (1958).

This rule does not interfere with the rights of unions and employers to circulate campaign literature on or off the premises at any time prior to an election (see *General Electric Co*., 161 NLRB 618 (1966), and *Andel Jewelry Corp.*, 326 NLRB 507 (1998)), nor does it prohibit the use of any other legitimate campaign propaganda or media. It forbids speeches, whether coercive or not (see *Excelsior Laundry Co*., 186 NLRB 914 (1970)), during the prescribed 24-hour period on company time and property, but it does not "prohibit an employer from making (without granting the union an opportunity to reply) campaign speeches on company time prior to the 24-hour period, provided, of course, such speeches are not otherwise violative of Section 8(a)(1)." The Board added that the rule does not prohibit employers and unions from making campaign speeches on or off company premises during the 24-hour period "if employee attendance is voluntary and on the employees' own time." *Peerless Plywood Co*., supra at 430. See also *Nebraska Consolidated Mills*, 165 NLRB 639 (1967).

The rule can be violated by the use of sound trucks, broadcasting short messages or union songs to employees during a change in shifts. *U.S. Gypsum Co*., 115 NLRB 734 (1956). See also *Purolite*, 330 NLRB 37 (1999), overruling *Bro-Tech Corp*., 315 NLRB 1014 (1994), where the

Board found that broadcast of union songs from a sound truck was not conduct proscribed by the *Peerless* rule.

The *Peerless Plywood* rule is not limited to "a formal speech in the usual sense," but is designed to bar, for example, a question and answer session. *Montgomery Ward & Co*., 124 NLRB 343, 344 (1959). "Massed assemblies," as used in *Peerless Plywood*, is not to be construed as limited to all or most of the unit employees, or to any certain percentage of them, or to an assemblage of such employees whose votes would be sufficient in number to affect the outcome of the election. *Great Atlantic & Pacific Tea Co*., 111 NLRB 623, 625–626 (1955). See also *Honeywell, Inc*., 162 NLRB 323 (1967), where the fact that only one section of the employees was involved was no warrant for an exception, nor that a relatively small percentage of employees constituted the "captive audience." Compare *Business Aviation Inc*., supra.

Where on the day before the election, company representatives addressed meetings of employees on all three shifts in the production areas of the plant during working time, and, although purportedly called for the purpose of advising employees that the election would not be postponed as told the employees in a prior letter, they nonetheless engaged in campaign speeches expressing opposition to the union, the *Peerless Plywood* rule was held violated. *Mallory Capacitator Co*., 167 NLRB 647 (1967). But it was not breached where a speech or discussion 3 hours before the election by union representatives started on the employees' own time, was extemporaneous, was voluntarily attended with no member of management present, and at best ran over into company time for no more than approximately 5 minutes. *Nebraska Consolidated Mills*, supra.

A more unusual situation was presented where meetings were called on company time with 150 to 200 employees in attendance within 24 hours of the election and, although the meetings were antipetitioner in tenor, the petitioner won the election despite the meetings. The Board cited *Showell Poultry C*o., 105 NLRB 580 (1953), and applied the rationale of that case which was that the Board will not set aside an election because of employer interference where the only union involved wins the election, because to do so would permit the wrongdoer to profit by its illegal acts. To uphold the objection of the intervenor would not only not effectuate the purposes of the *Peerless Plywood Co*., 107 NLRB 427 (1954), rule but would invite "collusion in future cases" by suggesting "to any employer who favors one competing union whose chances in the election do not appear to be bright, deliberately to violate the *Peerless Plywood* rule in the assurance that the favored minority union can successfully file objections and be given a second opportunity to woo the voters." *Packerland Packing Co*., 185 NLRB 653 (1970). See also *Flat River Glass Co*., 234 NLRB 1307 (1978).

A speech otherwise permissible by *Peerless* was found objectionable because the employees were required to attend without full compensation and without receiving their regular paychecks until after the meeting. *Comet Electric*, 314 NLRB 1215 (1994).

A prounion poster affixed to a tree not visible from the property site was found not to be a *Peerless* violation. *American Medical Response*, 339 NLRB 23 (2003). Similarly, a text message sent to drivers in their trucks was not found to violate the *Peerless* rule. *Virginia Concrete Corp.*, 338 NLRB 1182 (2003).

b. Peerless and mail-ballot elections

Where an election is conducted by mail, the Regional Director must give all parties 24 hours' notice of the date when the ballots are to be mailed. Employers and unions alike are prohibited from making speeches on company time to massed assemblies from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return. *Oregon Washington Telephone Co*., 123 NLRB 339 (1959); and *San Diego Gas & Electric*, 325 NLRB 1143 (1998). See also *Interstate Hosts*, 130 NLRB 1614 (1961). In *American Red Cross Blood Services*, 322 NLRB 401 (1996), the Board set aside an election where the employer gave two speeches after the Regional Office had mailed the mail ballots. The Board rejected the employer's

defense that the Region had failed to notify the parties of the time and date of mailing. In doing so, the Board noted that that information was contained in the stipulated election agreement.

c. Peerless and paychecks

In *Kalin Construction Co*., 321 NLRB 649 (1996), a divided Board applied the 24-hour rule to prohibit any changes in the paycheck process during this period. In the view of the majority, a paycheck

> cannot be equated to an ordinary piece of campaign literature exempt from the *Peerless Plywood rule*. An employee's paycheck is a singular document.

Accord: *United Cerebral Palsy Assn. of Niagara County,* 327 NLRB 40 (1998). See *Chicagoland Television News*, 328 NLRB 367 (1999), distinguishing a nonelectioneering party from the *Kalin* rule.

Legitimate business considerations may be a defense to a *Kalin* objection. Thus, in *Fred Meyer Stores, Inc.,* 355 NLRB 555 (2010), the Board overruled an objection based on election day paycheck deductions. Board found that the deductions were made for a legitimate business reason and were not intended to influence the election. Nonetheless the Board set aside the election finding that the size of the deduction ($73 from "relatively low paid employees") interfered with laboratory conditions. See also section 24-320.

24-326 Third-Party Conduct

378-1401

378-5625-6700

378-7000

712-5014-0190

Generally, the Board applies the common law principles of Agency including principles of apparent and actual authority in determining responsibility for misconduct. *Mar-Jam Supply Co.*, 337 NLRB 337 (2001); *Cooper Industries*, 328 NLRB 145 (1999); and *Fieldcrest Cannon, Inc*., 318 NLRB 470 (1995). See also *Culinary Foods, Inc*., 325 NLRB 664 (1998). See *Cornell Forge Co.,* 339 NLRB 733 (2003), for a summary of agency law as it relates to unit employees as agents of the union.

Elections, however, are not only invalidated because of the conduct of the parties and their agents but also because of third-party conduct which interferes with the right of employees to a free and uninhibited choice in the selection of a bargaining representative to such extent that it renders "a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *Mastec Direct TV*, 356 NLRB No. 10 (2011); *U.S. Electrical Motors*, 261 NLRB 1343 (1982); *Phoenix Mechanical*, 303 NLRB 888 (1991); and *O'Brien Memorial*, 310 NLRB 943 (1993). See also *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); and *Duralam, Inc*., 284 NLRB 1419 (1987).

Note: For analyses of third electioneering viz, conduct at or around the polls, see The *Milchem* Rule 24-442, infra. (*Milchem, Inc*., 170 NLRB 362 (1968).

For a discussion of racially or ethnically derogatory remarks by third parties, see *M & M Supermarket v. NLRB*, 818 F.2d 1567 (11th Cir. 1987).

a. Nature of conduct

The Board set out the standards for assessing the nature of third-party conduct in its *Westwood Horizons Hotel* decision, 270 NLRB 802 (1984). More recently it repeated those standards in *PPG Industries,* 350 NLRB 225 (2007):

> In assessing the seriousness of such threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat

were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election.

One of the earliest cases to establish these principles was *P. D. Gwaltney, Jr*., & Co., 74 NLRB 371 (1947). In that case, the Board enunciated fully its rationale. It pointed out that a representation proceeding is in effect an investigation to ascertain employee wishes concerning their choice of a bargaining representative. For this reason, in appraising the facts and determining the Board's duty in this context, more is involved than the mere determination of whether or not the employer was responsible for the antiunion conduct which immediately preceded the election. Rather, the issue before the Board is whether the election was held in an atmosphere conducive to the kind of free and untrammeled choice contemplated by the Act. *Cal-West Periodicals,* 330 NLRB 599 (2000), citing *Westwood Horizons Hotel*, supra. See also *Robert Orr–Sysco Food Services,* 338 NLRB 614 (2002); and *Associated Rubber Co*., 332 NLRB 1588 (2000). And as the Board stated in a later case: "The election was held in such a general atmosphere of confusion and fear of reprisal as to render impossible the rational, uncoerced selection of a bargaining representative. It is not material that the fear and disorder may have been created by individual employees and nonemployees and that their conduct cannot be attributed either to the Employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible." *Diamond State Poultry Co*., 107 NLRB 3, 6 (1954). See also *Rheem Mfg. Co*., 309 NLRB 459 (1992), which overruled an objection based on one employee campaigning outside the polls distinguishing *Pepsi-Cola Bottling Co*., 291 NLRB 578 (1988). *Lamar Advertising of Janesville*, supra. Compare *Q. B. Rebuilders*, 312 NLRB 1141 (1993), where the Board found a sufficient level of fear to set aside the election based on a third-party (employee) threat to call the INS to report any employee who voted against the union. For a discussion of third-party conduct where the Board did not set the election aside because of alleged confusion rather than fear, see *Phoenix Mechanical*, 303 NLRB 888 (1991); *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 fn. 1 (1999); *Stannah Stairlifts, Inc*., 325 NLRB 572 fn. 2 (1998); and *Culinary Foods, Inc*., supra.

The Second Circuit punctuated the principle here under consideration by pointing out that certain elements, regardless of their course, may make an impartial choice impossible, thus invalidating an election. *NLRB v. Staub Cleaners*, 357 F.2d 1 (2d Cir. 1966).

"Realistically speaking, and in order to near if not arrive at the highly desired laboratory conditions for an election, this is the most workable approach. Parties to an election and their well wishers are thus put on notice that prohibited conduct engaged in by anyone may forfeit an election. This then will serve to put a premium on proper deportment by all parties." *Teamsters Local 980 (Landis Morgan)*, 177 NLRB 579, 584 (1969).

In *Dean Industries*, 162 NLRB 1078 (1967), the company was not held responsible for certain of the conduct alleged as unfair labor practices by reason of activities on the part of persons not in its employ or management whom it did not clothe with the apparent authority to act for it. At the minimum, the employer must have acquired knowledge of the activities for which it is sought to be charged and the circumstances must have been such as to place the employer under an obligation to disavow said activities (at 1093). Nonetheless, it was concluded that much of the antiunion activities engaged in by the townspeople—spelled out in some detail in the decision—rendered impossible the rational, uncoerced selection of a bargaining representative. See also *James Lees & Sons, Co*., 130 NLRB 290 (1961).

The dichotomy between responsibility on the part of a party as a necessary element in an unfair labor practice finding and third party conduct as a ground for invalidating an election, even if the activities of the third party cannot be attributed to an actual party, was considered in *Louisburg Sportswear Co*., 173 NLRB 678, 693 (1969). Even if the activities by the local

citizenry were not attributed to the company, the election held in the face of conduct of outside persons required setting the election aside. Where, of course, responsibility on the part of a party is established, as in *General Metal Products Co*., 164 NLRB 64 (1967), the outside individuals having acted "on behalf and in the interest of the Respondent with the latter's knowledge and approval," no distinction exists between the finding in the complaint case and the result in the objections case. See also *Colson Corp. v. NLRB*, 347 F.2d 128, 137 (8th Cir. 1965).

Third-party conduct becomes actionable not only as a basis for objections filed by unions but also for those filed by employers where the latter allege conduct rendering impossible a rational, uncoerced choice in a Board election. For example: An election was conducted in the face of an often violent and emotion-filled strike. Events occurring during the critical period (between the filing of the petition and the election) included extensive property destruction, anonymous telephone threats to eligible voters, the report of a bomb threat and subsequent police investigation which compelled the automobile dealership to close down on the Saturday preceding the election, and apparently unruly conduct on the picket line which resulted in the stationing of full-time police and a police car in front of the dealership. The Board concluded that the election was held in an atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, and to prevent an uncoerced choice. The Board added: "It is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the Employer or to the Union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible." *Al Long, Inc*., 173 NLRB 447, 448 (1969).

b. Who is a third party

"Third parties," a survey of this category of cases shows, include members of the community (*James Lees & Sons Co*., 130 NLRB 290 (1961)); the mayor of the city (*Kelsey-Hayes Co*., 145 NLRB 1717 (1964)); citizens' committees (*Myrna Mills*, 133 NLRB 767 (1961)); members of the police force (*Great Atlantic & Pacific Tea Co*., 120 NLRB 765 (1958)); employees or nonemployees (*Cal-West Periodicals,* supra; *Associated Rubber Co.*, supra; *Al Long, Inc.*, supra). Compare *Culinary Foods*, supra; *Windsor House C & D*, 309 NLRB 693 (1992); and *Q. B. Rebuilders*, supra; employees from neighboring plants (*Diamond State Poultry Co*., 107 NLRB 3 (1954)); banks (*Kelsey-Hayes Co.*, supra); community leaders (*Dean Industries*, 162 NLRB 1078 (1967)); businessmen (*Benson Veneer Co*., 156 NLRB 781 (1966); editors (*Universal Mfg. Corp*., 156 NLRB 1459 (1966)); chief of police (*Lifetime Door Co*., 158 NLRB 13 (1966)); and industrial advisory committee (*Proctor-Silex Corp*., 159 NLRB 598 (1966)).

For an interesting third-party case involving a State government official and the issue of whether the voters were confused, see *Columbia Tanning Corp*., 238 NLRB 899 (1978). Compare *Ursery Cos*., 311 NLRB 399 (1993); *Saint-Gobain Abrasives, Inc.,* 337 NLRB 82 (2001); and *Chipman Union, Inc*., 316 NLRB 107 (1995) (letter from U.S. Congressman not objectionable). See also *Trump Plaza Hotel & Casino,* 352 NLRB 525 (2008), and *Affiliated Computer Services*, 355 NLRB 899 (2010).

In *Independence Residences, Inc.*, 355 NLRB 738 (2010), a case that the Board described as not "typical" and as presenting "unique questions of federalism," the employer objected to an election on grounds that New York State Labor Law limited its use of state funds to encourage or discourage employees' union activity. A divided Board found the state law was preempted by the NLRA but that the third party conduct's standard should be applied and that under that standard, the New York law did not interfere with the election.

The conduct of prounion employees who have no actual or apparent authority to act for the union is evaluated under third-party conduct standard. *Corner Furniture Discount Center*, 339 NLRB 1122 (2003). For a discussion of in-plant organizers as agents or as third parties, see *Cornell Forge Co.*, supra and *Mastec Direct TV*, 356 NLRB No. 10 (2011). See also *Tyson Fresh*

Meats, Inc., 343 NLRB 1335 (2004) (union stewards found to be agents with actual and apparent authority).

The arrest of the union's principal organizer in the presence of a number of eligible voters only minutes before they were scheduled to vote served as a meritorious objection to the election. *Great Atlantic & Pacific Tea Co*., 120 NLRB 765 (1958). But the mere presence of police during an election does not warrant its invalidation where it appeared that the police did not speak to any of the voters. *Vita Food Products*, 116 NLRB 1215, 1219 (1957).

While, as has been reiterated above, conduct not attributable to either party to an election may be grounds for setting the election aside, the Board has held that it "accords less weight to such conduct than to conduct of the parties." *Orleans Mfg. Co*., 120 NLRB 630, 633 (1958); and *Dunham's Athleisure Corp*., 315 NLRB 689 (1994). The explanation for this is that the Board believes that the conduct of third parties tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions. See *Ottenbacher Mfg*., 279 NLRB 1167 (1986).

In *Bells Trans*, 297 NLRB 280 (1989), the Board overruled objections based on a third-party threat. In doing so, it distinguished both the nature of the threat and the frequency from those in *Picoma Industries*, 296 NLRB 498 (1989).

In *Cross Baking Co*., 191 NLRB 27 (1971), despite an employee's conduct consisting of alleged "threats to and assault upon members of the electorate" and alleged assaults, the Board found that this conduct was too remote in time from the election, which was conducted 2 months later, to warrant upsetting the election on the ground of atmosphere of fear. The Board cited *Orleans*, supra, and distinguished *Diamond State Poultry Co*., 107 NLRB 3 (1954), in that in *Diamond* the threats were made on the day of the election. The First Circuit agreed with the Board's ultimate conclusion on this issue in view of the Board's finding that the employee was discharged shortly after the assault, did not return to the plant, and there were no further incidents during the 2 months remaining before the election. But the court disagreed with some of the Board's reasoning, emphasizing that the question was not the culpability of the union but whether an atmosphere of fear and coercion was created, as that "fear would be less effective if it had an unofficial origin." *Cross Baking Co. v. NLRB*, 453 F.2d 1436 (1st Cir. 1971).

To like effect, see *Owens-Corning Fiberglas Corp*., 179 NLRB 219, 223 (1969). While recognizing that some heated statements may be made by individual employees and that such conduct should be considered in determining whether employees were precluded from exercising a free choice, even absent employer or union responsibility, consideration should be given as to whether the conduct complained of was committed by the parties as distinguished from third persons, as conduct by the latter "tends to have less effect." See also *Lamar Advertising of Janesville*, 340 NLRB 979 (2003).

In this connection, in *Foremost Dairies of the South*, 172 NLRB 1242 (1968), the Board, on remand from the Fifth Circuit (*Home Town Foods, Inc. v. NLRB,* 379 F.2d 241 (1967)), interpreted the court's opinion "as dispensing with a showing of responsibility by one of the parties only where the conduct involved is of so serious a nature that it could only result in widespread confusion and fear of reprisal which would render impossible a rational, uncoerced choice by employees." In *Foremost Dairies*, the Board found (at 1247) that the incidents which exceeded permissible bounds were merely three, "of which all were very limited in nature and only one was known to two other employees." Compare *Crown Coach Corp*., 284 NLRB 1010 (1987), where threats of deportation by fellow employees warranted setting the election aside.

In *Monroe Auto Equipment Co*., 186 NLRB 90 (1970), on remand from the Fifth Circuit, the Board referred to *Foremost Dairies* (379 F.2d 241 (1967)), and summarized "as the law of the case" the frame of reference laid down by the court, as follows: (1) consideration of the objections or incidents cumulatively rather than as isolated individual incidents; (2) consideration, in addition to the objective evaluation normally employed, of subjective evidence of fear and coercion in determining whether interference sufficient to warrant setting aside the election

occurred; and (3) a determination not only whether the conduct complained of was coercive but also whether it was so related to the election as to have a probable effect on the employees' actions at the polls or created an environment of tension so as to preclude employees from exercising free choice. See *NLRB v. Monroe Auto Equipment Co.*, 406 F.2d 177 (5th Cir. 1969); and *Foremost Dairies* of the *Foremost Dairies of the South v. NLRB*, 416 F.2d 392 (5th Cir. 1969). Among the facts the Board examines in analyzing threats not attributable to a party is the person making the threats to carry them out. See *Bell Security*, 308 NLRB 80 (1992). See also *Lamar Advertising of Janesville,* supra.

Spirited campaigning, "far from constituting unlawful interference with the Board's election processes, may produce a more informed polarization of employee sentiment and therefore constitute a more accurate gauge of employees' true representation desires." *Emerson Electric Co*., 177 NLRB 75, 100 (1969). In that case, a plant unionization effort met with active opposition by other employees in the form of an "Emerson Royal Employees Club." It was not ascribable to the employer, not found improper as such, and, in the circumstances, the employer was under no obligation to disavow it or any association with it.

c. Disavowal

In terms of the necessity for "disavowal," the Board has held that an employer is not necessarily under a duty to disavow a preelection statement by an employee. *American Molded Products Co*., 134 NLRB 1446, 1448 (1962); see also *Northrop Aircraft*, 106 NLRB 23, 25 (1953). In like vein, the conduct of rank-and-file employees is not generally imputed to their organization unless there is ratification. As a rule, it is considered in the same way as conduct of a third party. But a union is held accountable for statements of its committeemen when the latter are the responsible representatives of the union in the plant and play a central role in the election campaign. *Vickers, Inc*., 152 NLRB 793 (1965). Compare *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), with *United Builders Supply Co*., 287 NLRB 1364 (1988). Conduct of union activists is not per se imputed to the union. See *Advance Products Corp*., 304 NLRB 436 (1991); and *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995). For example of conduct by a nonemployee who was not found to have apparent authority, see *Midland Processing Services*, 304 NLRB 770 (1991); and *Cornell Forge Co.*, 339 NLRB 733 (2003).

Third-party conduct which is otherwise actionable, it should be made clear, may be neutralized by an employer's specific public disavowal. For example: News stories and a statement by a development group which leased space to the employer had suggested that the firm might move if the union won the election. Nonetheless, "the Employer's specific public disavowals of any intention to relocate, coupled with the Petitioner's republication and distribution to employees of such disavowals, tended to neutralize any atmosphere of fear and confusion that otherwise might have been engendered" by third-party (the development group) conduct. *Electra Mfg. Co*., 148 NLRB 494 (1964). See also *Bristol Textile Co*., 277 NLRB 1637 (1986).

Similar preelection activity was found not to have interfered with the election in the light of the give-and-take of the campaign, the employer's disavowal of rumors about the plant's closing, the absence of any showing by the petitioner that it was dissatisfied with the disavowal, and the employer's "straight-forward assurance" to the employees that it had dealt fairly with them, hoped to do better, and intended to keep the plant going regardless of the outcome of the election. *Claymore Mfg. Co. of Arkansas*, 146 NLRB 1400 (1964).

d. Rumors

On the subject of "rumor," the Board, in *General Housing Industries*, 197 NLRB 24 (1972), found that in that case the rumors stood "revealed to the employees as nothing more than election propaganda," and the various rumors neutralized and dissipated the possible coercive effect of the others. So, too, in *Staub Cleaners*, 171 NLRB 332, 333 (1968), the various statements by both the

union and the respondent were sufficient to "neutralize and dissipate the rumor's coercive edge." The Board took into consideration the possibility that by repeating the rumor the respondent would spread it or misquote it, and thereby start a new rumor; it was therefore unnecessary for the respondent to risk quoting the rumor in order to deny it.

It is apparent, of course, that these cases we have been discussing turn on their particular facts, not on legal niceties. Thus, third party conduct not attributable to the petitioner, but actually attributed by the employees to former employees who had previously been discharged, could not possibly have had any coercive or disruptive effect on the election. *ITT Consumer Services Corp*., 202 NLRB 65 (1973).

See also *Englewood Hospital*, 318 NLRB 806 (1995), where a divided Board found unobjectionable an employer's reference to and denunciation of an anonymous bigoted letter. The Board majority found that the employer's conduct "did not rise to the level of a sustained appeal to racial prejudice of the type condemned in *Sewell* and its progeny."

e. Unidentified wrongdoers

On occasion the Board will not be able to identify the persons engaging in misconduct. In those circumstances, the Board will not routinely set aside the election until there is final tally. The reason for this policy is that the Board does not wish to benefit the wrongdoers in circumstances where the election was not in their favor. See *Pine Shores, Inc*., 321 NLRB 1437 (1996).

See also 24-442. The *Milchem* Rule for discussion of party electioneering conduct as objectionable.

24-327 Offers to Waive Union Initiation Fees

378-4270-6705

378-4284-5000

712-5042-6767

In 1973, the Supreme Court ruled that a union's offer to waive initiation fees can be grounds for setting aside an election. Such a waiver is objectionable if it is limited to employees who sign a union authorization card before the election. Where, however, the offer is not so limited and is also available to those who sign up after the election, such an offer would not be objectionable. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *L. D. McFarland Co*., 219 NLRB 575 (1975); and *Lau Industries*, 210 NLRB 182 (1974).

It is not objectionable conduct for a union to advise employees that if the union is voted in, they will continue to have an opportunity at the waiver or that employees who have paid initiation fees at other places of employment, do not have to pay again. *De Jana Industries*, 305 NLRB 294 (1991). Rather, *Savair* requires that objectionable conduct is that which requires an "outward manifestation of support" such as signing an authorization card or joining the union. Compare *Nu Skin International*, 307 NLRB 223 (1992), in which the Board found *Savair* inapplicable to the union's distribution of T-shirts conditioned on signing of a prounion petition.

Where the union's offer is ambiguous, the doubt will be resolved against the union and the statement may be held objectionable. *S.T.A.R., Inc.,* 347 NLRB 82 (2006); *Smith & Co. of California*, 215 NLRB 530 (1974); and *Town & Country Cadillac*, 267 NLRB 172 (1983).

Remarks of employee solicitors as to waiver may be attributable to the union and thus become the basis for election objections. When a union makes authorization cards available to employees as solicitors and does not publicly disavow these solicitors as agents, the union will be deemed to have authorized "a special agency relationship for the limited purpose of card solicitation." *University Towers*, 285 NLRB 199 (1987); and *Davlan Engineering*, 283 NLRB 803 (1987).

In *Hollingsworth Management Service*, 342 NLRB 556, 559 (2004), the Board repeated the "safe harbor" provisions for its *Davlan* policy:

> [A] union may avoid responsibility for the improper fee-waiver statements of its solicitors . . . by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself." [*Davlan,* supra at 805.]

In a somewhat related case, the Board concluded that a union's promise of a card which would make employees eligible for referral from the hiring hall was not objectionable because there was no showing that the employees were not otherwise qualified to receive the referral card. *Electrical Workers Local 103 (Drew Electric)*, 312 NLRB 591 (1993).

24-328 Prounion Supervisory Conduct

378-2889

Efforts of supervisors on behalf of the union may be objectionable. In *Harborside Healthcare, Inc.,* 343 NLRB 906, 909 (2004), the Board majority stated its two part test for assessing objectionable conduct:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

The alleged objectionable conduct by a supervisor in *Harborside* included prediction of job loss, advising employees that they had to attend union meetings, and soliciting employees to sign union authorization cards. In finding the solicitation objectionable, the Board noted the solicitation of a signature is more than speech. Rather it places employees in a situation where they could be reasonably concerned about giving the "right" or "wrong" response to their supervisors. Thus, the Board overruled *Millsboro Nursing & Rehabilitation Center,* 327 NLRB 879, 880 (1999), on this point.

The Board's *Harborside* decision holds that the employer's antiunion stance continues to be part of its test and may "mitigate the coercive effect of impermissible prounion supervisory conduct." See *Terry Machine Co*., 356 NLRB No. 120 (2011), where the Board found that the employers "aggressive antiunion campaign" mitigated the prounion activity of individuals the Board assumed to be supervisors.

The Board majority also noted that recent cases that suggest that prounion supervisory conduct is not objectionable unless it involves a threat or promise, "represent a departure from established precedent."

The Board applied *Harborside* to set aside elections in *Madison Square Garden, Ct., LLC,* 350 NLRB 117 (2007), and *SNE Enterprises,* 248 NLRB 1041 (2006). It overruled *Harborside* objections in two other cases, *Fidelity Healthcare & Rehab Center,* 349 NLRB 1372 (2007), and *Northeast Iowa Telephone Co.,* 346 NLRB 465 (2006).

Supervisory solicitation is not objectionable where the soliciting supervisor has no authority over the employee being solicited, *Glen's Market,* 344 NLRB 294 (2005).

24-329 Videotaping

378-4263

a. *Employer taping*

Absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act. *F. W. Woolworth Co*., 310 NLRB 1197, 1197 (1993); *Saia Motor Freight Line,* 333 NLRB 784, 785 (2001), and constitutes objectionable conduct, *Mercy General Hospital*, 334 NLRB 100, 104–105 (2001). These rules apply not only where a videotape is shot with a handheld camera, but also where the videotape is created with a rotatable security camera purposefully directed at protected concerted activity. See, e.g., *Mercy General Hospital*, supra; and *U.S. Ecology Corp*., 331 NLRB 223, 233 (2000). At the same time, however, the Board "recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business during the course of union activity." *National Steel & Shipbuilding Co.,* 324 NLRB 499, 501 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Thus, it is neither unlawful nor objectionable when a rotatable security camera, operating in its customary manner, happens to record protected concerted activity on videotape. Cf. *Mercy General Hospital*, supra at 105 (finding no justificaton for videotaping where direction security camera was pointing "did not result from the established way in which the camera was operating"). *Frontier Hotel & Casino*, 323 NLRB 815, 837 (1997) (finding no justification for videotaping where security camera focused on union activity and did not rotate to scan parking lot "as was customarily the case").

In *Saia Motor Freight Line*, supra, the Board accepted an employer's concern about traffic safety as a legitimate justification for photographing employees engaged in handbilling. But in *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001), the Board distinguished *Saia* finding no such justification.

In *Allegheny Ludlum Corp.,* 333 NLRB 734 (2001), the Board set out the standards to be followed by an employer who wishes to videotape its employees in connection with an election campaign. *Allegheny Ludlum* is an unfair labor practice proceeding but its holdings would, of course, be applicable in an election objections proceeding alleging employer polling of its employees for campaign videotaping purposes.

b. Union taping

In *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), the Board found that union videotaping of the distribution of literature to employees as they accepted or rejected the literature is not objectionable. In doing, so, a divided Board overruled *Pepsi-Cola Bottling Co*., 289 NLRB 736 (1988), and reaffirmed *Mike Yurosek & Son*, 292 NLRB 1074 (1989). *Mike Yurosek* was a case in which the photographing was accompanied by statements that "could reasonably put employees in fear that the pictures would be used for future reprisals."

Randell Warehouse was decided by the Board after oral argument with a second case that was settled prior to decision. That second case dealt with the issue of employer videotaping. The Board's *Randell* decision includes the views of the minority and concurring Members on the majority holding that it would make a distinction between union and employer videotaping.

See also *Nu Skin International*, 307 NLRB 223 (1992), in which photographing employees attending the union's picnic luncheon was not found to be objectionable.

In *Enterprise Leasing Co. – Southeast LLC,* 357 NLRB No. 159 (2011), a Board majority refused to set aside union election victory where the union solicited employees to have their photographs appear in campaign literature and that literature then included the picture of one employee who did not agree. The majority decision distinguished its holding from the Board's decision in *Allegheny Ludlum Corp.,* 333 NLRB 734 (2001), which held that the employer unlawfully polled employees to participate in a campaign video. The majority and dissent disagreed over whether *Allegheny Ludlum* should apply to unions as well as employers.

24-400 Interference with the Conduct of Elections

393-6081

393-7022

In chronological order, having dealt with preelection campaign activities in their several aspects, we come now to the issues which arise as a result of conduct at the actual time of the election. As in the case of preelection conduct, so in conduct at or near the polls, full regard is accorded to the rights of eligible voters in the exercise of their franchise. As the Board put it in *New York Telephone C*o., 109 NLRB 788, 790–791 (1954):

> The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.

This principle has been stated and restated in a countless number of cases and, in keeping with it, the Board tests the many types of procedural objections to an election which come before it. Elections may be set aside on procedural grounds or because of the conduct, deliberate or inadvertent, of the parties themselves or, as we have seen in the preceding chapter, even of third parties, of election observers or of others at the polls, or of Board agents if they fail to live up to the Agency's high standards of impartiality and fairness. Accord: *Sawyer Lumber Co*., 326 NLRB 1331 (1998).

The Regional Director has broad discretion in making election arrangements, and in the absence of objective evidence that this discretion has been abused, the election is upheld. See, for example, *Milham Products Co*., 114 NLRB 1544, 1546 (1955); and *Independent Rice Mill*, 111 NLRB 536 (1955). The Regional Director's discretion in conducting an election includes, among others, the extension of voting time (*Glauber Water Works*, 112 NLRB 1462 (1955)); determining the date of the election (*Comfort Slipper Corp*., 112 NLRB 183 (1955)); and the use of IBM voting cards as an additional means of identification of voters (*New York Shipping Assn*., 109 NLRB 310 (1954)).

Where the Regional Director's investigation of timely filed objections uncovers a matter relating to the conduct of a Board agent or the functioning of Board processes sufficient to cause the election to be set aside, the Board will consider such matter even if not within the scope of those objections. *Richard A. Glass Co*., 120 NLRB 914 (1958).

Alert attention to the proprieties and regularity of a Board election, like charity, starts at home. We will therefore begin our analysis of conduct affecting the election by turning our attention to Board agent conduct.

24-410 Board Agent Conduct

370-9100

378-9067

The conduct of Board agents must be beyond reproach and "must not tend to destroy confidence in the election process." *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967). For an extensive discussion of Board agent conduct by a divided Board, see *Sonoma Health Care Center*, 342 NLRB 933 (2004).

a. Ballot box security

Leaving an unsealed package of blank ballots unprotected during a period when access to the ballot box was possible is regarded as a serious irregularity on the part of the Board agent, even in

the absence of evidence that any ballots had been removed or that improper voting had occurred, or that any person had attempted to put more than one ballot in the ballot box. *Hook Drugs*, 117 NLRB 846 (1957); and *Tidelands Marine Services*, 116 NLRB 1222 (1956).

"We do not believe," said the Board, "that we should speculate on whether something did or did not occur while the ballot box was left wholly unattended. The Board, through its entire history, has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process; and where a situation exists, which, from its very nature, casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election." *Austill Waxed Paper Co*., 169 NLRB 1109 (1968).

In *Austill* the ballot box became unattended when an altercation which developed during the voting period outside the polling place drew attending officials away. A later case, *Anchor Coupling Co*., 171 NLRB 1196 (1968), was distinguished from *Austill* to the significant extent that "the ballot box was not left wholly unattended" and both the employer's observers—the employer was the one who filed objections to the election—certified that the ballot box was protected in the interest of a fair and secret election. See also *General Electric Co*., 119 NLRB 944 (1957), where it had been established that at no time did anyone other than a Board agent touch any blank ballots which, along with the ballot box, were in the polling area in full view of all the observers. As there was no possibility of impropriety the election was upheld.

In *Ashland Chemical Co*., 295 NLRB 1039 (1989), the Board overruled objections based on the Board agent opening the ballot box before the arrival of the observer. The Board found no evidence of a violation of the integrity of the ballot box. *Queen Kapiolani Hotel*, 316 NLRB 655 (1995).

A Board agent's leaving the polling place to notify the employees that it was time to vote, if he carries the ballot box and blank ballots with him and does not let them out of his possession and is accompanied by observers, is no ground for invalidating the election. *S. S. Kresge Co*., 121 NLRB 374 (1958). Even removal of a ballot from the box to explain to observers how a valid ballot should be marked is not objectionable if secrecy has not been impaired and the ballot is returned to the ballot box. *O. K. Van & Storage Co*., 122 NLRB 795 (1958). But see *Jakel, Inc*., 293 NLRB 615 (1989), where a ballot was retrieved from the box in order to complete a challenge. The Board found the conduct affected the integrity of the election. Compare *K. Van Bourgondien & Sons*, 294 NLRB 268 (1989); and *Rheem Mfg. Co*., 309 NLRB 459 (1992) (ballots not determinative). See also *Madera Enterprises*, 309 NLRB 774 (1992).

There are no absolute guidelines, however, as clearly stated in *Polymers, Inc*., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970):

> Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.

Thus, looking to the facts of each case, the Board will not set aside the election unless it finds a reasonable possibility of a breach in security. An objection relating to the integrity of the election process requires an assessment of whether the facts indicate that "a reasonable possibility of irregularity inhered" in the conduct of the election. *Peoples Drug Stores*, 202 NLRB 1145 (1973) (in which the Board examined the theoretical possibility as against the improbabilities of the factual circumstances); *Indeck Energy Services*, 316 NLRB 300 (1995); and *Dunham's Athleisure Corp*., 315 NLRB 689 (1994). A simple mistake in the tally of ballots, later corrected, is not a basis for a new election. *Allied Acoustics*, 300 NLRB 1183 (1990).

The Board also pointed out in *Polymers, Inc*., supra, that, in a given case, even literal compliance with all of the rules, regulations, and guidelines would not satisfy the Board that the integrity of the election was not compromised. Conversely, the failure to achieve absolute compliance with these rules does not necessarily require that a new election be ordered, "although, of course, deviation from standards formulated by experts for the guidance of those conducting elections will be given appropriate weight in our determination." In resolving issues based on allegations of security breach, the Board looks at all the facts and the inferences drawn from such facts. Thus, in *Polymers*, although the Board agent did not retain personal physical custody of the sealed ballot box and the blank ballots at all times, the facts indicated an "extreme improbability" of any violation of the ballot box. See also *Benavent & Fournier, Inc*., 208 NLRB 638 (1974), in which the Board declined to set aside the election even though the Board agent left the polling area for 5 minutes, leaving unmarked ballots and the unsealed ballot box with the observers. There was no evidence that anyone touched the ballots in his absence. See also *Kirsch Drapery Hardware*, 299 NLRB 363 (1990); *Trico Products Corp*., 238 NLRB 380 (1978); and *Niagara Wires*, 237 NLRB 1347 (1978).

b. Other conduct

Although the fact of the Board agent's drinking beer with a union representative did not affect the votes of the employees, the Board nevertheless set the election aside to protect the integrity of its processes. *Athbro Precision Engineering Corp.*, supra; principle enfd. 423 F.2d 571 (1970). Compare *Newport News Shipbuilding Co*., 239 NLRB 82, 87 (1978), where a Board agent allegedly accepted an observer's request that he come to the agent's room with liquor. As no employees were present, the Board did not set the election aside. The Board also noted that there were a large number of Board agents at this election and this was the only such incident. See also *Rheem Mfg. Co*., supra, where the Board did not set the election aside when the Board agent walked through the plant with the union observer and *Indeck Energy Services*, supra.

The Board rejected as grounds for setting aside an election the fact that the Board agent at the election had appeared as one of two counsels for the General Counsel at an unfair labor practice proceeding held more than 2 weeks prior to the election, at a location substantially distant from employer's plant, and where only rank-and-file employees were in attendance. Footnote 1 of the decision did note, however, that wherever feasible, in order to keep the conduct of elections completely separate from the investigation or trial of contemporaneous unfair labor practice charges involving the same parties, the Regional Director should designate as election agent someone other than one of the trial attorneys involved in the unfair labor practice case. *Kimco Auto Products*, 184 NLRB 599 (1970).

It was argued in another case that an election be set aside because of the Board agent's conduct in investigating unfair labor practice charges against the employer between shifts of a split election. The Board declined to do so since only three employees were interviewed, all away from the employer's premises, and there was no evidence that other employees witnessed the interviews or became aware of them. *Amax Aluminum Extrusion Products*, 172 NLRB 1401 (1968). See also *McCarty-Holman Co*., 114 NLRB 1554 (1955). The Board made the comment in *Amax*, however, that it would be "better practice for the board agent conducting an election to refrain from investigating unfair labor practices charges between shifts of the election." In *Sparta Health Care Center*, 323 NLRB 526 (1997), the Board rejected the argument that there was any impropriety in the representation case hearing officer later serving as counsel for the General Counsel in an 8(a)(5) "test of certification" proceeding. See also *S. Lichtenberg & Co*., 296 NLRB 1302 (1989), where a newspaper article quoting a Board agent concerning a pending unfair labor practice complaint was not a basis for setting the election aside.

The Board has consistently held that a primary consideration in the conduct of any election is whether the employees are given adequate notice and sufficient opportunity to vote. *Cities Service Oil Co*., 87 NLRB 324 (1949); and *Wilson Athletic Goods Mfg. Co*., 76 NLRB 315

(1948). Thus, while an election proceeding was processed with dispatch (the field examiner set the election for November 13, and mailed notices of the election to the employer on November 5), the Board agent had not acted arbitrarily in not conducting a longer investigation before issuing the notice of hearing. The Board held that as nearly 95 percent of the eligible employees voted in the election and there was no showing that any employee was foreclosed from voting because of the alleged haste in holding the hearing and the election, the objection to the election was without merit. *Arnold Stone Co*., 102 NLRB 1012 (1953). Similarly, a Board agent's inquiry as to whether two employees had voted was not considered to reflect bias where the Board agent did not know that there were two other employees similarly situated. *Pacific Grain Products*, 309 NLRB 690 (1992).

The Board found no basis for setting aside the election in *Foremost Dairies of the South*, 172 NLRB 1242 (1968), stating that the presence of challenged voters waiting to cast a ballot cannot be equated with the unjustified presence of uninterested persons, even if one of them was a former supervisor, and that the presence of a former supervisor who is no longer on the employer's payroll cannot be equated with the presence of a management representative. Compare *Harry Lunstead Designs*, 270 NLRB 1163 (1984), where the Board agent gave erroneous instructions as to the challenged ballot procedure and the Board set aside the election.

Where a Board agent permitted the union's observer, without objection from the employer's observer, to give the only Spanish-speaking employee direction on how to vote, in Spanish, but there was no evidence of electioneering, the election was upheld. *Regency Hyatt House*, 180 NLRB 489 (1969). But see *Alco Iron & Metal Co*., 269 NLRB 590 (1984).

Although it was impossible to determine whether an irregularity in the course of an election affected its outcome, the election was set aside where certain ballots were temporarily mislaid. This decision was based on the long-established principle that "the Board is responsible for assuring properly conducted elections, and its role in the conduct of elections must not be open to question" *New York Telephone Co*., supra at 790. In this case, the employer contended that the premature closing, in the presence of employees waiting to vote, gave rise to rumors that the Board agent favored the employer and created an atmosphere of confusion, bias, and prejudice against the employer which affected votes cast in the afternoon session. *Kerona Plastics Extrusion Co*., 196 NLRB 1120 (1972). See also *B & B Better Baked Foods*, 208 NLRB 493 (1974).

A Board agent's comment to other agents, "You've got yourself a winner," made after all ballots had been cast, was no basis for invalidating the election. The Board considered the choice of language "unfortunate," but interpreted it in context as indicating that, in the view of the Board agent, new colleagues were participating in an election presenting unusual complications, rather than as a prejudgment of challenged ballots yet to be resolved. *Wald Sound, Inc*., 203 NLRB 366 (1973). In a similar vein, the mere statement by a Board agent that the polls were open and the employees could, if they desired, "now vote for your union representative" was not a sufficient basis to set aside the election. *Wabash Transformer Corp*., 205 NLRB 148 (1973), enfd. 509 F.2d 647 (8th Cir. 1975). But in *Renco Electronics*, 330 NLRB 368 (1999), the Board found an unacceptable breach of neutrality when the Board interpreter asked an employee, "Do you know where to put your yes vote?"

In *Sonoma Health Care Center,* 342 NLRB 933 (2004), the Board agent, in response to a question from the union observer about the attitude of companies toward unions, said, "Companies don't like unions because they cannot fire or hire anyone and they cannot take benefits from the staff." A divided Board found the statement "intemperate and inappropriate" but not a bases for setting aside the election.

A Board agent who periodically asked voters waiting in line to stop talking was not remiss because some unspecified conversations nevertheless took place. As stated by the administrative law judge and upheld by the Board, "There never has been a rule requiring absolute silence among voters waiting to vote." *Dumas Bros. Mfg. Co*., 205 NLRB 919, 929 (1973). In *Pacific*

Grain Products, 309 NLRB 690 (1992), the Board refused to set aside an election where management representatives walked into the polling area where it was not marked. Their entrance allegedly resulted in a verbal altercation between the Board agent and the managers.

Dismantling of the election booth before the agreed upon closing time was not found objectionable where no employee was disenfranchised. *Sawyer Lumber Co*., 326 NLRB 1331 (1998).

Premature disclosure of the Regional Director's unit determination over a month before the election was not a basis for setting aside an election. *Kleen Brite Laboratories*, 292 NLRB 747 (1989).

The fact that Board agents are in a collective-bargaining unit does not affect their neutrality. *Monmouth Medical Center*, 234 NLRB 328, 331 (1978). *Monmouth* also involved an allegation that literature referring employees to the Board was objectionable. The Board rejected that contention, but enforcement was denied 604 F.2d 820 (3d Cir. 1979). The Board has since cited *Monmouth* with approval. *Dave Transportation Services,* 323 NLRB 562 (1997).

See also *Fresenius USA Mfg., Inc.,* 352 NLRB No. 86 (2008), the Board set aside election based on the Board agent's failure to display ballots for inspection during count and mistakes in ballot identification during election.

See section 22-106, Concerning content of Notice of Election in cases where election is rescheduled for administrative reasons.

24-420 Mechanics of the Election

While in a real sense the mechanics of a Board election are inextricably tied in with Board agent conduct, it seems more logical to separate the two, to the extent possible, for the sake of clarity in the analysis of conduct-of-election issues.

24-421 The Polling Place

370-1425

370-1450

370-1475

Elections are generally on the employer's premises in the absence of good cause shown to the contrary. If an election is held away from the employer's premises, the initial suggestion of a place is normally made by the party proposing it, but final arrangements are made by the Board agent. The size of a polling place depends on the nature of the election, the number of voters, and the length of the voting period being pertinent factors.

The choice of a place for holding an election is within the Regional Director's discretion, and failure to consult with the parties in this regard is not per se prejudicial. *Korber Hats, Inc*., 122 NLRB 1000 (1959). Nor is the failure to post signs designating the polling area. *Sawyer Lumber Co*., 326 NLRB 1331 (1998). Holding an election at the employer's place of business or near a place of management responsibility does not require that the election be invalidated. *Jat Transportation Corp*., 131 NLRB 122 (1961); and *Cupples-Hesse Corp*., 119 NLRB 1988 (1958). "Mere location of the polling place behind a picket line is not of itself prejudicial to the fair conduct of an election. . . . [without a showing] that the Union was in fact prejudiced or that the secrecy of the election was impaired because of the location of the polling place." *Korber Hats*, supra at 1001. For those unable to come to the polling place, balloting may be held elsewhere, if attended by appropriate safeguards and the request is timely made, although such action is discretionary with the Board agent and quite unusual. *Growers Warehouse Co*., 114 NLRB 1568 (1955).

In *Robert F. Kennedy Medical Center*, 336 NLRB 765 (2001), a divided panel overruled an objection to the election because one of two entries to the polling area became locked after the polling began.

In a series of cases decided in 2011, the Board discussed extensively its policies in connection with the site for rerun elections. These cases are discussed at section 22-105 supra.

24-422 Opening and Closing of the Polls

370-9167-4800

370-9167-8800

370-9167-9500

Where the opening of the polls is delayed and the number of employees possibly disenfranchised thereby is sufficient to affect the election, the election is set aside, whether or not those voters or any voters at all were actually disenfranchised. The test is an objective one. *Pea Ridge Iron Ore Co*., 335 NLRB 161 (2001). See also *Jim Kraut Chevrolet*, 240 NLRB 460 (1979), and *Bonita Ribbon Mills*, 87 NLRB 1115 (1949). Additional voting time provided on the day of the election does not in and of itself generally remedy the uncertainty caused by starting late. *G.H.R. Foundry Division*, 123 NLRB 1707 (1959). "Proper election procedure requires every reasonable precaution that a full opportunity to vote be given those eligible. That opportunity is best assured where the means of determining [opening and] closing time in the most accurate way available is included in the election arrangements made before the election occurs." *Repcal Brass Mfg. Co*., 109 NLRB 4 (1954). For two cases in which late opening of polls which reached different results, see *Jobbers Meat Packing Co*., 252 NLRB 41 (1980); and *Nyack Hospital*, 238 NLRB 257 (1978) (election set aside). See also *Midwest Canvas Corp*., 326 NLRB 58 (1998), and *Colgate Scaffolding & Equipment*, 354 NLRB 544 (2009), a two Member decision finding that a 22 minute delay in opening of polls could not have disenfranchised an employee "given his extensive absences from the country."

In *Arbors at New Castle,* 347 NLRB 544 (2006), the Board rejected objections to a late opening of the polls based on the parties stipulation that the five eligible employees who did not vote, had not appeared at the polls "at anytime during the scheduled polling hours."

In *Rosewood Care Center*, 315 NLRB 746 (1994), the Board refused to fault the Board agent for not making arrangements for late voters because the voters never showed up. An unscheduled mid-session closing of the polls warranted setting aside the election where the number of voters possibly disenfranchised could have affected the election results. *Wolverine Dispatch, Inc*., 321 NLRB 796 (1996).

An objection to an election was sustained where the Board agent refused to permit two eligible voters to cast their ballots after the polls had closed in view of the "special circumstances" of the case; i.e., a brief 15-minute voting period and the facts that the Board agent was aware that the two employees had tried to vote earlier and again sought to vote only minutes after the polls had closed, the ballot box had not been opened nor the tally of ballots yet started, and the addition of two valid ballots may have affected the election results. *Hanford Sentinel*, 163 NLRB 1004 (1967). Compare *Atlantic International Corp*., 228 NLRB 1308 (1977). See also *Consumers Energy Co.,* 337 NLRB 752 (2002); *Kerrville Bus Co*., 257 NLRB 176 (1981); and *American Driver Service*, 300 NLRB 754 (1990) (late mail ballots).

In *Garda World Security Corp.*, 356 NLRB No. 91 (2011), the election was set aside where Board agent closed polls early and then told three potential voters who arrived thereafter that they could either vote under challenge or return to vote at the second balloting session later in the day. The Board found the potential for disenfranchisement sufficient to warrant a second election.

An objection that the voting began after the announced time and that the polls were closed ahead of time was overruled when it appeared that the polls were only 2 or 3 minutes late in opening due to a delay in setting up the polling place, all eligible voters present cast ballots, and there were no prospective voters waiting in line to cast ballots when the polls were closed. Of the two eligible voters who did not vote, one was on leave of absence and the other absent because of illness. *Smith Co*., 192 NLRB 1098, 1102 (1971). See also *Dominguez Valley Hospital*, 251

NLRB 842 (1980). However, in *Monte Vista Disposal Co*., 307 NLRB 531 (1992), and *Pruner Health Services*, 307 NLRB 529 (1992), the Board announced a "bright-line rule terminating the balloting at the conclusion of the voting period" absent extraordinary circumstances or agreement of the parties. *Rosewood Care Center*, supra. In *Rosewood,* the Board approved an agreement permitting an early arrival to vote. Compare *Kerona Plastics Extrusion Co*., supra. See also *Argus-Press Co*., 311 NLRB 24 (1993); *Taylor Cadillac*, 310 NLRB 639 (1993); and *Visiting Nurses Assn*., 314 NLRB 404 (1994).

It is the Board agent's responsibility to challenge the ballot of a late arriving voter in the absence of agreement of the parties that the individual can vote. See *Laidlaw Transit, Inc*., 327 NLRB 315 (1998).

An election is not set aside because a voting booth is dismantled before closing time unless it is shown that this conduct deprived any eligible voter of the opportunity to vote. *O. K. Van & Storage Co*., 122 NLRB 795 (1958). Accord: *Sawyer Lumber Co*., supra.

For related discussion, see section 24-425, infra.

24-423 Notice of Election

370-2800

A standard notice of election (form NLRB-707) is used to inform eligible voters of the balloting details. The notice contains a sample ballot with the names of the parties inserted, a description of the bargaining unit, the date, place, and hours of election, and a statement of employee rights under the Act. Other relevant details are inserted where necessary. In *Penske Dedicated Logistics*, 320 NLRB 373 (1995), the Board affirmed the election results where the notices were timely posted in a place where notices were customarily maintained even though the area was locked on Saturday and Sunday pursuant to the employer's regular practice.

In 1987, the Board announced that henceforth the procedures for posting notices of election would be governed by a rule (Sec. 103.20 of the Rules). Under this rule the notice must be

(1) posted for 3 full working days in advance of the election.
(2) a party responsible for misposting is estopped from objecting to the nonposting.
(3) an employer is conclusively deemed to have received the notices unless it notifies the Regional Office at least 5 full working days before the election of its nonreceipt.

See *Club Demonstration Services*, 317 NLRB 349 (1995); and *Ruan Transport Corp*., 315 NLRB 592 (1994), holding that Saturdays, Sundays, and holidays are not working days within the meaning of the Rules. Compare *Cleveland Indians Baseball Co.*, 333 NLRB 579 (2001), where the Board refused to set aside a stipulated election where no employees were scheduled to work during most of the posting period.

(4) failure to post the notices as required is ground for a new election when objections are filed.

See also *Sugar Food*, 298 NLRB 628 (1990), for a discussion of the rule and the policy with respect to defaced notices.

The rule is strictly enforced. *Smith's Food & Drug*, 295 NLRB 983 (1989).

But in *Madison Industries*, 311 NLRB 865 (1993), the Board did not set aside an election where an amended notice was posted for a portion of the time. The Board found that the change in the notice (eligibility) did not affect the notice to employees of the election that is the purpose of the Rule. Neither was the election set aside in a two union election where the circumstances could "invite collusion" by any employer who might favor one of the competing unions. The employer's failure to post in such circumstances would provide an unsuccessful favored union with a basis to set aside the election. *Maple View Manor, Inc*., 319 NLRB 85 (1995).

Compare *Terrace Gardens Plaza*, 313 NLRB 571 (1993), where a divided panel of the Board strictly enforced the rule in a mail ballot situation even where, although the posting was not timely received by the employer, copies of the notice were sent to employees with the ballots.

See section 24-441 for discussion of policy as to defaced notices and section 22-106 concerning contest of notice in cases where election is rescheduled for administrative reasons.

24-424 Observers

370-4900

Each party is normally permitted to be represented at the polling place by an equal predesignated number of observers, usually employees of the employer who are not in the unit or in the voting group. *Best Products Co*., 269 NLRB 578 (1984). Compare *Frontier Hotel v. NLRB*, 625 F.2d 293 (9th Cir. 1980).

The use of observers at a directed election is a privilege, not a right, and the presence of observers other than Board agents is not required by the Act and may be waived. *Best Products*, supra. See *Breman Steel Co*., 115 NLRB 247, 249 (1956); and *Simplot Fertilizer Co*., 107 NLRB 1211 (1954). In a consent election, however, the use of observers, if incorporated in the agreement, is a matter of right since it is a material term of the "consent-election agreement," and, if this right is not waived, the election is subject to invalidation. *Breman Steel Co*., supra, and *Asplundh Tree Export Co*., 283 NLRB 1 (1987). See also, for example, *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388 (8th Cir. 1947), cert. denied 332 U.S. 758 (1947). In *Northern Telecom Systems*, 297 NLRB 256 (1989), the Board held that a waiver of an observer by one party cannot be an objection to the election by another party.

The standard procedure, as already indicated, is to allow the parties to use employees as observers, it being unusual to use outside observers. It is therefore no abuse of a Regional Director's discretion to decline the use of outside observers at some of several polling places. *Jat Transportation Corp*., , supra at 125–126. However, in *San Francisco Bakery Employers Assn*., 121 NLRB 1204 (1958), a nonemployee observer was used, the election was nonetheless upheld since the observer was not shown to have been guilty of any misconduct or that any prejudice resulted as a consequence. See also *Reflector Hardware Corp*., 121 NLRB 1544, 1547 (1958); and *Kelly & Huber*, 309 NLRB 578 (1992), where the use of a nonemployee who had been a supervisor was held to be a minor breach of the stipulation and not a basis for setting aside the election. No objection was filed based on the former supervisory status.

In *Embassy Suites Hotel*, 313 NLRB 302 (1993), the Board affirmed that a nonemployee can be used as an observer absent evidence of prejudice to the interests of the other party or misconduct by the observer. In doing so, the Board stated that this policy applies even when the nonemployee is an ex-employee whose discharge is not being litigated, distinguishing *Correctional Health Care Solutions*, 303 NLRB 835 (1991), where the Board held that ex-employees whose status is being litigated retain per se eligibility to act as observers.

Objections to particular persons acting as observers must be made at the preelection conference or they are waived. *Liquid Transporters, Inc*., 336 NLRB 420 (2001); *Monarch Building Supply,* 276 NLRB 116 (1985); and *St. Joseph Riverside Hospital*, 224 NLRB 721 (1976). Compare *Bosart Co*., 314 NLRB 245 (1994), where the union was unaware of the supervisory status of the observer until after the election.

And in *Browning-Ferris Industries of California*, 327 NLRB 704 (1999), the Board found objectionable a Board agent's decision to conduct an election without union observers where the union proposed to use former employees as observers. It also described the procedure that Board agents should follow when made aware of a party's intent to use an observer who may be objectionable. The agent is to advise all parties of the consequences of the choice and should do so openly. See also *Detroit East, Inc.,* 349 NLRB 935 (2007).

It is general Board policy, in the interest of free elections, that persons closely identified with management may not act as observers either for the employer, see, e.g., *First Student Inc.,* 355

NLRB 410 (2010); *Sunward Materials*, 304 NLRB 780 (1991); *Mid-Continent Spring Co*., 273 NLRB 884 (1985); *Peabody Engineering Co*., 95 NLRB 952, 953 (1951); and *Union Switch & Signal Co*., 76 NLRB 205 (1948), or the union. *Family Services Agency*, *San Francisco,* 331 NLRB 850 (2000).

The Board will not allow union officials to serve as observers in decertification proceedings. *Butera Finer Foods*, 334 NLRB 43 (2001). The Board had allowed union representatives to serve prior to *Butera*. See, e.g., *E-Z Davies Chevrolet*, 161 NLRB 1380 (1966); *Carl Simpson Buick*, 161 NLRB 1389 (1966), enfd. 395 F.2d 191 (9th Cir. 1968); and *Standby One Associates*, 274 NLRB 952 (1985). The Board in *Butera* specifically declined to rule on whether it would allow union officials in nondecertification cases. See footnote 7. But see *Fleet Boston Pavilion,* 333 NLRB 655 (2001), where the Board overruled an objection to the use of a union president as an observer, noting that he had worked for the employer, had been injured on the job, and was obtaining medical treatment that would allow him to return. The Board further noted that the observer was not involved in the referral of employees from the union's hiring hall.

Holding an election without the observers of one party present does not invalidate an election if both parties are given an equal and adequate opportunity to have observers present. *Pacific Coast M.S. Industries*, 355 NLRB 1422 (2010); *Manhattan Adhesives Corp*., 123 NLRB 1096 (1959). See also *Inland Waters Pollution Control*, 306 NLRB 342 (1992), where the Board agent did not allow late arriving observer to assume duties. Nor is an election set aside if an employer denies an employee permission to leave work to serve as an observer, where the employee had inadvertently made no arrangements for release. *San Francisco Bakery Employers Assn*., 121 NLRB 1204 (1958).

An employee whose discharge is the subject of an unfair labor practice proceeding is entitled to serve as an observer as he is considered an "employee" during the pendency of the charge. *Correctional Health Care Solutions*, 303 NLRB 835 (1991); and *Soerens Motor Co*., 106 NLRB 1388 (1953). This is equally true of persons whose eligibility to vote as employees in layoff status is still in question, even if they are later found ineligible. *Thomas Electronics*, 109 NLRB 1141 (1954).

An employer is not required to treat its own observers the same as union observers with respect to pay and leave during the election. In *American Red Cross Missouri-Illinois Blood Services Region,* 347 NLRB 347 (2006), the Board permitted the employer to compensate its own observers for time spent observing the election while requiring the union observers to use accumulated paid time off. Nor did the Board find objectionable the employer's preelection meeting with its own observers to explain the observers' role in the election process even though the union observers were not invited to the meeting.

For cases dealing with the conduct of observers at an election, see *Sir Francis Drake Hotel*, 330 NLRB 638 (2000) (innocuous comments by observer, not objectionable); compare *Brinks Inc*., 331 NLRB 46 (2000); *Tom Brown Drilling Co*., 172 NLRB 1267 (1968); *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994) (alleged to have kept a list and checked off the names of voters after they voted); and *Fibre Leather Mfg. Corp*., 167 NLRB 393 (1967) (role of observers in election involving foreign-language voters). In *Brinks, Inc*., supra, a divided Board found a union observer's "vote union" comment and thumbs up sign to be improper electioneering. Compare *U-Haul Co. of Nevada, Inc.,* 341 NLRB 195 (2004) (observer thumbs ups not linked to campaigning).

The conduct or circumstances surrounding the duties of an observer may be a basis for election objections. In *Easco Tools*, 248 NLRB 700 (1980), the payment to observers of a rate substantially in excess of their employment wage could have affected the results of the election and the election was set aside. See also *S & C Security*, 271 NLRB 1300 (1984). Compare *Young Men's Christian Assn*., 286 NLRB 1052 (1987). Note that *Young Men's* was overruled in *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995). For further discussion of *Sunrise* see section 24-

430. See also *Pacific Grain Products*, 309 NLRB 690 (1992), where the conduct of the observer involved only one employee and would not have affected the results of the election.

The wearing of insignia or buttons by observers, while discouraged, is not prohibited. See CHM section 11310; and *Larkwood Farms*, 178 NLRB 226 (1969).

More recently, the Board affirmed the importance of the observer when it refused to overrule challenges to purported ballots of employees who later testified they had not voted. The Board discussed the role of observers and indicated that overruling the challenges would undermine the role of the observers. *Monfort, Inc*., 318 NLRB 209 (1995).

Observers may not keep lists of those voting, but may keep a list of those they intend to challenge. *Cerock Wire & Cable Group*, 273 NLRB 1041 (1984). See also *Avante at Boca Raton, Inc*., 323 NLRB 555 (1997). In *Mead Southern Wood Products*, 337 NLRB 497 (2002), the Board suggested that it is preferable that a duplicate *Excelsior* list not be used as a challenge list.

The duties of an observer include making challenges for cause. The Board agent will not normally make challenges on behalf of the parties even if no observer is present. CHM section 11338; and *Solvent Services*, 313 NLRB 645 (1994). *Balfre Gear & Mfg. Co*., 115 NLRB 19, 22 (1956). Compare *Laubentein & Portz, Inc*., 226 NLRB 804 (1976), where the Board agent was held responsible to challenge in order to implement an unfair labor practice settlement. See also *H & L Distributing Co*., 206 NLRB 169 fn. 1 (1973), suggesting that there may be other circumstances in which the Board agent could challenge at the request of a party. See also *Lakewood Engineering & Mfg. Co.,* 341 NLRB 699 (2004), for a summary of Board agent's challenge duties.

For further discussion of lists by observers, see section 24-445, and for discussion of challenges and postelection challenges, see sections 22-111 and -115, supra.

24-425 Opportunity to Vote and Number of Voters

370-3533-2000 et seq.

370-7787

370-9167-6100 et seq.

The Board regards it as its responsibility to establish the proper procedure for the conduct of its elections. This procedure requires that all eligible employees be given an opportunity to vote. *Yerges Van Liners*, 162 NLRB 1259, 1260 (1967); and *Alterman-Big Apple, Inc*., 116 NLRB 1078 (1956).

Thus, where, as in *Yerges*, an employee had no opportunity to vote through no fault of his but because at the time of the election he was away from the plant in the normal course of his duties for the employer, and his vote would have been determinative of the results—the unit had only two eligible voters—the election was set aside. Accord: *Acme Bus Corp*., 316 NLRB 274 (1995). Compare *Daniel Construction Co*., 145 NLRB 1397, 1412 (1964), which involved the opportunity for voting on the part of individuals whose status as "employees" was in doubt. We have already mentioned *Hanford Sentinel*, 163 NLRB 1004 (1967), where voters were unable to vote under unusual circumstances and the election was set aside.

In *Sahuaro Petroleum & Asphalt Co*., 306 NLRB 586, 586–587 (1992), the Board summarized its policy:

> Where the conduct of a party to the election causes an employee to miss the opportunity to vote, the Board will find that to be objectionable if the employee's vote is determinative and the employee was disenfranchised through no "fault" of his own. *Versail Mfg*., 212 NLRB 592, 593 (1974). When an employee is prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of a party or the Board, the inability to vote is not a basis for setting aside the election. Id. The burden is on the objecting party, in this case, the Union, to come forward with evidence in support of its objection. *Campbell Products Dept*., 260 NLRB 1247 (1982).

See also *Glenn McClendon Trucking*, 255 NLRB 1304 (1981), and *Cal Gas Redding, Inc*., 241 NLRB 290 (1979), in which the election was set aside because the eligible voters were prevented from voting because of assignments performed in the normal course of their duties. Compare *Coast North America (Trucking) Ltd*., 325 NLRB 980 (1998), enf. 207 F.3d 994 (7th Cir. 2000) (employee on vacation was not prevented from voting by either party); and *Waste Management of Northwest Louisiana*, 326 NLRB 1389 (1998) (directive to report to work at 8 a.m. did not prevent employee from arriving earlier in order to vote).

In one rather interesting case the actions of a third party in inadvertently locking the doors of the polling area may have contributed to some employees not voting. Accordingly, the election was set aside. *Whatcom Security Agency*, 258 NLRB 985 (1981). Compare *Robert F. Kennedy Medical Center*, 336 NLRB 765 (2001), and *Coast North America,* supra.

In *Rett Electronics*, 169 NLRB 1111 (1968), an objection alleged that (1) in view of weather conditions employees who tardily presented themselves to vote should have been allowed to cast a ballot, and (2) permitting a union observer to vote under challenge after other employees not closely identified with the petitioner were denied ballots prevented a fair election. The Board held (1) there was no disfranchisement of a determinative group of eligibles, only one of whom at best appeared after the closing of the polls, and (2) even assuming, arguendo, that the observer was permitted to cast "a challenged nondeterminative ballot" after the timely closing of the polls, this occurred concededly at a time when it would not have affected the free atmosphere of the election.

Employer conduct which confuses employees, and their confusion manifests itself in their spontaneous protests as soon as they learn that the election is over and they were denied an opportunity to vote, is a basis for setting an election aside. *Wagner Electric Corp*., 125 NLRB 834, 836 (1959). The confusion was created by the doors having been locked, the employees were told no one could go to the back room, and they were under the impression they would be told as to their voting opportunity.

In the case of a stipulation for a consent election, which provides for a manual election at a designated location, if no timely request is made for other arrangements, the late request may properly be rejected and a contention based on failure to provide an opportunity to vote may be found to be without merit. *Franklin's Stores Corp*., 117 NLRB 793, 795–796 (1957); and *Red Owl Stores*, 114 NLRB 176 (1955). See also *Community Care Systems*, 284 NLRB 1147 (1987), where the Board rejected an objection based on the failure to hold an election on a training date because the parties had stipulated to the date and no party objected before the election.

The requirement that employees be given an adequate opportunity to vote may not be waived by the parties to an election. *Alterman-Big Apple, Inc*., 116 NLRB 1078 (1956); and *Active Sportswear Co*., 104 NLRB 1057 (1953).

In *Lemco Construction*, 283 NLRB 459 (1987), the Board announced that it was abandoning any analysis which was "dependent on a numerical test to determine the validity of a representation election." Thus, the Board overruled prior precedent which considered whether the number of voters actually voting in the election was a representative group. See also *Community Care Systems*, supra. Then, in *Glass Depot*, 318 NLRB 766 (1995), a Board plurality distinguished *Lemco*, supra, indicating that a different result might obtain if that lack of a representative complement was caused by an extraordinary event, e.g., severe weather.

Later, however, in *Baker Victory Services*, 331 NLRB 1068 (2000), the Board announced:

> We conclude that the proper standard to be applied to the issue here is contained in *V.I.P. Limousine* [*V.I.P. Limousine,* 274 NLRB 641 (1985)], i.e., an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. Accordingly, we reaffirm that standard today, and we reject the "representative complement" standard set forth in the plurality opinion in *Glass Depot*.

The two-Member Board reaffirmed *V.I.P. Limousine in Goffstown Truck Center*, 354 NLRB 359 (2009), when it set aside an election because of "a severe weather condition" (an ice storm). In doing so, the Board rejected the analysis of the hearing officer in considering why individual employees did not vote.

Although the number of voters voting in a Board election will not ordinarily affect the validity of a Board election, a union obtaining recognition by private means must be supported by a majority of the unit employees whether that support is shown by authorization cards or by a private election. *Autodie International, Inc.,* 321 NLRB 688, 691 (1996) (recognititon unlawful where votes cast for labor organization were not a majority of the unit); and *Komatz Construction, Inc., v. NLRB*, 458 F.2d 317, 322–323 (8th Cir. 1972) (unlawful recognition where union won majority of votes cast but not majority of total unit).

For discussion of late voters, see section 24-422, supra. See also 24-421 (The Polling Place).

24-426 Secrecy of the Ballot

370-7000

370-7750

Complete secrecy of the ballot is required by the Act and is observed in all Board-conducted elections. Conduct which tends to destroy or adversely affect such secrecy constitutes a ground for election invalidation. There must, of course, be reasonable doubt that the secrecy was affected. Bare assertions will not suffice. *American Medical Response*, 356 NLRB No. 42 (2010) aff'd mem'd. (D.C. Cir. 2012); *Avante at Boca Raton, Inc*., 323 NLRB 555 (1997).

The Board's duty to preserve the secrecy of the ballot is statutory and a matter of public concern, rather than a personal privilege subject to waiver by the individual voter. To give effect to such waivers would, as a practical matter, remove any protection of employees from pressures, originating with either employers or unions, to prove the way in which their ballots had been cast, and thereby detract from the laboratory conditions which the Board strives to maintain in representation elections. *J. Brenner & Sons, Inc*., 154 NLRB 656, 659 fn. 4 (1965). See also *Space Mark, Inc*., 325 NLRB 1140 (1998) (mail ballot completed by voter's wife was properly voided).

The Board has characterized its role in the conduct of elections as one which "must not be open to question." *New York Telephone Co*., 109 NLRB 788, 790 (1954). Thus, where, for example, improvised voting arrangements were in its opinion "entirely too open and too subject to observation to secure secrecy of the ballot," it set aside the election. *Imperial Reed Furniture Co*., 118 NLRB 911, 913 (1957). See also *Columbine Cable Co.,* 351 NLRB 1087 (2007). Where, however, the voting booths were located at one end of a warehouse, and after voting some of the eligibles went to another part of the warehouse where they remained until the polls closed, the election was upheld. The Board noted the absence of electioneering or interference with voting. *Choctaw Provision Co*., 122 NLRB 474, 475 (1958); see also, for example, *G. F. Lasater*, 118 NLRB 802, 804 (1957). See also *Sewell Plastics*, 241 NLRB 887 (1979), where the Board analyzed allegations that observers could see voters voting in terms of the effect on the election, not secrecy of the ballot.

Circumstances may be such that a voter's identity may unavoidably become known. Thus, where a single professional employee constitutes one voting group while all the other employees constitute a second voting group, in a "*Sonotone*"(*Sonotone Corp.,* 90 NLRB 1236 (1950)) (or professional employees election), and the ballot in one group is different from those of the other, the ballot of the single professional employee is, of course, distinguishable but unavoidable. *Triple J Variety Drug Co*., 168 NLRB 988, 989–990 (1967) (Hearing Officer's Report on Objections and Challenged Ballots). For similar reasons, where a ballot was challenged as invalid in that, because of a tie vote, it lacked secrecy, the Board held that the fact that "a voter's identity

may be publicly known as an unavoidable result of the challenge procedure, does not invalidate his vote in the determination of the election results." *Marie Antoinette Hotel*, 125 NLRB 207, 208 (1959). See also *De Vilbiss Co*., 115 NLRB 1164, 1169 (1956). Compare *J. C. Brock Corp*., 318 NLRB 403 (1995), where the Board found that a limited use of foreign language ballots was insufficient to destroy the secrecy of the ballot.

While secrecy of the ballot is of primary concern, the Board is also responsible for expediting questions concerning representation. In balancing these two goals, the Board has, in narrow circumstances, permitted challenged ballots to be opened and counted prior to a determination of voter eligibility. *Ladies Garment Workers*, 137 NLRB 1681 (1962). These circumstances are (1) the challenged ballots were cast by individuals who are alleged discriminatees in a pending unfair labor practice case; (2) the individuals have clearly waived their right to secrecy and requested that their ballots be opened; and (3) the circumstances are such that if some or all of the challenged ballots have been cast for the union, the union will receive a majority regardless of how the challenges are ultimately determined. See, e.g., *Garrity Oil Co*., 272 NLRB 158 (1984), and *Premium Fine Coal*, 262 NLRB 428 (1982). Compare *El Fenix Corp*., 234 NLRB 1212 (1978), in which the Board appears to suggest that all the determinative challenges must be the subject of the unfair labor practice case. See also *United Insurance Co. of America*, 325 NLRB 341 (1998), and *JCL Zigor Corp*., 274 NLRB 1477 (1985), and section 22-115 of this text.

A voter is not permitted to withdraw his ballot, once cast. *Great Eastern Color Lithographic Corp*., 131 NLRB 1139 (1961). Nor can the parties be allowed to do so. Thus, the Board rejected a stipulation by the parties that a challenged but comingled ballot be considered as cast for the petitioner. "Acceptance of such an agreement," said the Board, "is not consistent with the Board's purpose of preserving the secrecy of the ballot and providing sufficient safeguards to prevent possible abuses of the election processes." *T & G Mfg*., 173 NLRB 1503, 1504 (1969). In that case, the ballot itself was not identifiable and the choice had been recorded in the tally of votes. There was no way of ascertaining how the vote was cast. The Board added: "We will not permit solicitation of such information from the voter, nor allow the parties to stipulate how a voter exercised his franchise, for this would create the very opportunity for collusion, coercion, and election abuse the Board is committed to prevent."

In *City Stationery, Inc.*, 340 NLRB 523 (2003), the Board rejected a contention that a settlement of unfair labor practice charges waived employees' rights to have their ballots counted.

For a discussion of cases in which a ballot is returned from the ballot box, see section 24-410 of this chapter.

Where several voters enter an election booth at the same time, an election is susceptible to invalidation. *Case Egg & Poultry Co*., 293 NLRB 941 (1989). However, the Board agent may remedy the situation by destroying the ballots marked under such circumstances and allowing each employee to vote again, thus, safeguarding the secrecy of the ballot. *Deeco, Inc*., 116 NLRB 990, 991 (1956). Moreover, "where . . . the impugned votes do not appear to be more than isolated instances and are not sufficient to affect the results of the election, the Board will not set the election aside." *Machinery Overhaul Co*., 115 NLRB 1787, 1788 (1956). Accord: *St. Vincent Hospital,* 344 NLRB 586 (2005).

Ballots which have been signed or marked so that the identity of the voter would or could be revealed are invalid. Such a situation occurred, for example, in *Ebco Mfg. Co*., 88 NLRB 983 (1950). In that case, the Board agent during the counting of ballots discovered a capital "R" with a circle drawn around it outside the voting boxes on the ballot. The Board held that distinguishing or identifying markings on ballots render such ballots void because to count such ballots "clearly would open the door to the exertion of influences such as to prevent the exercise of the voter's free choice," and would be inconsistent with the principle of a secret election. It is not necessary to establish the identity of the voter who cast the disputed ballot; it is sufficient that, upon an examination of the ballot, the markings in question appear to have been made deliberately, rather than accidentally or inadvertently, and that it may serve to reveal the identity of the voter. See

also *Eagle Iron Works*, 117 NLRB 1053 (1957); and *Standard-Coosa-Thatcher Co*., 115 NLRB 1790 (1956), which hold that it is the policy of the Board to invalidate a ballot if it contains marks identifying the voter. This rule is equally applicable to invalidate ballots which might give "rise to the possibility of revealing the identity of the voter" (*Standard-Coosa-Thatcher Co.*, supra at 1792). "In the absence of evidence indicating that the ballot was deliberately marked for the purpose of identification, we will not disenfranchise a voter." *F. Strauss & Son, Inc*., 195 NLRB 583 fn. 2 (1972). See *Sorenson Lighted Controls*, 286 NLRB 969 (1987), invalidating a ballot that was shown by the voter to another voter. In *General Photo Products*, 242 NLRB 1371 (1979), the voter who revealed his ballot could not vote again.

The question of the validity of a ballot, as distinguished from a challenge to the eligibility of the person casting the ballot, may properly be raised by a timely objection after the count and is not considered a postelection challenge. *F. J. Stokes Corp*., 117 NLRB 951, 954 (1957); and *Sorenson Lighted Controls, Inc*., supra.

24-427 Mail Ballots

370-6325 et seq.

370-6350 et seq.

370-6375 et seq.

Voting in appropriate instances may be conducted by mail, in whole or in part. Mail balloting is used, if at all, generally in unusual circumstances, particularly where eligible voters are scattered because of their duties or where long distances are involved. The Regional Director has discretion to authorize balloting by mail when appropriate. *Pacific Gas & Electric Co*., 89 NLRB 938 (1950); and *Southwestern Michigan Broadcasting Co*., 94 NLRB 30 (1951). See *Shepard Convention Services*, 314 NLRB 689 (1994), finding an abuse of discretion in the failure to direct a mail ballot election. In mixed manual mail elections, mail ballots are only sent to those eligibles who cannot vote in person. They are not sent to employees who, although eligible to vote, are ill, on vacation, or members of the armed services. Nor are they sent to the in-temporary layoff status unless all parties agree, but a notice of election may nonetheless be sent to these employees. Enforcement was denied in *Shepard* by the D.C. Circuit, *Shepard Convention Services v. NLRB,* 85 F.3d 671 (D.C. Cir. 1996).

In a series of cases in 1997, the Board ruled on the appropriateness of a mail-ballot election in a series of circumstances. See *London's Farm Dairy*, 323 NLRB 1057 (1997); *Willamette Reynolds Wheels International*, 323 NLRB 1062 (1997).

Thereafter, in *San Diego Gas & Electric,* 325 NLRB 1143 (1998), the Board announced the factors it expected its Regional Directors to consider in deciding whether or not to direct a mail-ballot election:

1. Where eligible voters are "scattered" because of their job duties, over a wide geographic area;
2. Where eligible voters are "scattered" in the sense that their work schedules vary significantly so that they are not present at a common location and common times; and
3. Where there is a strike, a lockout or picketing in progress.

Since then the Board has reaffirmed the abuse of discretion standard under which it reviews decisions of Regional Directors to conduct mail, manual, or mixed elections. See *California Pacific Medical Center*, 357 NLRB No. 21 (2011); *GPS Terminal Services, Inc*., 326 NLRB 839 (1998); *North American Plastics Corp*., 326 NLRB 835 (1998); *Masiongale Electrical-Mechanical*, 326 NLRB 493 (1998); *Nouveau Elevator Industries,* 326 NLRB 470 (1998); and *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1998).

The Board does not regard mail balloting as a "general course and method by which its functions are channeled and determined" within the meaning of Section 3(a)(2) of the

Administrative Procedure Act. Consequently, a contention that an election was invalid because of the Board's alleged noncompliance with that provision was rejected. *F. W. Woolworth Co*., 96 NLRB 380, 381–382 (1951).

Illustrative of circumstances susceptible to mail balloting is where, because of the nature of their widespread over-the-road driving duties, eligible voters had places of employment and residences which were scattered throughout the United States. *National Van Lines*, 120 NLRB 1343 (1958). Mail balloting is also used at times in the maritime industry. *J. Ray McDermott v. NLRB*, 571 F.2d 852 (5th Cir. 1978). In *Pacific Maritime Assn*., 112 NLRB 1280 (1955), for example, the Regional Director described in full detail the many precautions taken to insure that a proper and secret ballot was taken, providing for the presence of delegates from each of the participating unions when the ballots were distributed. In two possible instances when the secrecy of the ballots might conceivably have been affected, the Board found that the number of ballots involved would not have been sufficient to affect the results of the election. Also, in another case involving the maritime industry, the Board held that the fact a manual election had been conducted previously does not preclude the Regional Director, in his broad discretion, from conducting an election by mail. *Shipowners' Assn. of the Pacific Coast*, 110 NLRB 479 (1954); see also *Continental Bus System*, 104 NLRB 599, 601 (1953).

See *Brink's Armored Car*, 278 NLRB 141 (1986), and *Mission Industries*, 283 NLRB 1027 (1987), in which the Board describes the precaution necessary in these cases. See also *Club Demonstration Services*, 317 NLRB 349 (1995), for discussion of the rule on election notice posting in a mail ballot election; *Daves Newcomer Elevator Co*., 315 NLRB 715 (1994), for discussion of the Regional Officer's obligation to send duplicate election kits to employees who do not sign identification stub when returning mail ballots; and *Watkins Construction Co*., 332 NLRB 828 (2000), for a discussion of the policy on late arrival of mail ballots. In *Sadler Bros. Trucking & Leasing Co*., 225 NLRB 194 (1976), the Board ordered the Regional Director to accept a stipulation to waive the due date for two ballots. In *J. C. Brock Corp*., 318 NLRB 403 (1995), the Board rejected a contention that the use of foreign language ballots for some employees, destroyed the secrecy of the ballot. See *Northwest Packing Co*., 65 NLRB 890 (1946), for an interesting case involving allegations that the procedures affected the secrecy of the ballot. In that case the Board found that the ballots could not be opened with the proper protection for secrecy.

In *Aesthetic Designs, LLC*, 339 NLRB 395 (2003), a divided Board counted as valid a sample ballot that had been in the mail-ballot election kit.

In *Human Development Assn*., 314 NLRB 821 (1994), the Board ordered the employer to pay the costs of a second election where the employer was found to have interfered with the voting process in a mail-ballot election.

In *Fessler & Bowman, Inc.,* 341 NLRB 932 (2004), the Board unanimously agreed that it is objectionable for a party to collect mail ballots for submission to the Board, but divided evenly over whether solicitation for collection is objectionable and over whether to set aside the election only if the collected ballots would be determinative.

See also section 22-110. For a discussion of mail ballot elections and *Peerless Plywood,* see section 24-325(b).

24-428 Foreign Language Voters

370-2817-6700

370-4270

370-7067-2067-3300

Due regard must be given in Board elections to the needs of foreign language voters who are unable to read English. Where there is a showing of need for a foreign language translation on the notice of election, the Board will require such translation. See *Rattan Art Gallery*, 260 NLRB 255

(1982). See also *Bally's Atlantic City*, 352 NLRB 316 (2008), affirming discretion of Regional Director to deny translation of notices into 9 foreign languages.

In *Kraft, Inc*., 273 NLRB 1484 (1985), the Board found that a ballot that attempted to indicate four languages was set up in such a way as to avoid confusion. Specifically, the Spanish and English translations which were typed seemed "lost or overshadowed" by the Vietnamese and Laotian translations. In the Board's view this created "high potential for voter confusion" and the notices of election do not cure defective ballots. Compare *Bridgeport Fittings*, 288 NLRB 124 (1988), where a ballot in three languages was laid out in such a way as avoid confusion. Moreover, the Board noted that there were only three or four voters affected by a poor Laotian translation and the election was decided by a margin of 72 votes. The Board approved the use of English on the ballot listing the name of the union.

A party who is aware of a foreign language problem among the voters is required to put the Board on notice as to the problem. See *Unibilt Industries*, 278 NLRB 825 (1986), and the cases cited therein.

It is the responsibility of the Board agent to assure that the election is conducted fairly and impartially. In *Alco Iron & Metal Co*., 269 NLRB 590 (1984), the Board set aside an election because the Board agent virtually turned over to the union observer the running of the election as it related to Spanish-speaking voters. Compare *Regency Hyatt House*, 180 NLRB 489 (1969), which is discussed at footnote 2 of *Alco*, supra, and *San Francisco Sausage Co*., 291 NLRB 384 (1988).

Board policy permits the use of foreign language notices of election and English ballots. See CHM section 11315. This policy was approved by the Seventh Circuit in *NLRB v. Precise Castings*, 915 F.2d 1160 (7th Cir. 1990). The court did so, however, noting that there was no "evidence of actual confusion." See *Flo-Tronic Metal Mfg*., 251 NLRB 1546 (1980), where the failure to include essential election information in the notice of election in Spanish was the basis for setting the election aside. In *Avante at Boca Raton, Inc*., 323 NLRB 555 (1997), the Board rejected a contention that the election should be set aside because the word "affiliated" was not translated for foreign language voters. The Board concluded that this did not affect voting decisions of the employees. See *Superior Truss & Panel, Inc*., 334 NLRB 916 (2001) (RD's refusal to provide ballots in Spanish not objectionable; Spanish translation of notice understandable).

24-429 Ballot Count

370-7700

370-7725

The Board agent conducting the election also conducts the ballot count and the parties to the election are entitled to an "opportunity to monitor the ballot count by the Board agent." *Fresenius USA Mfg., Inc*., 352 NLRB 679 (2008) (two-Member decision). The determination of the Board agent can be challenged and in that case, the ballot is segregated in a challenge envelope and counted as a challenged ballot (CHM sec. 11340.7(a)).

In *Aesthetic Designs, LLC,* 339 NLRB 395 (2003), a divided Board counted as valid a sample ballot that had been provided in the mail ballot election kit.

In making the determination as to the ballot markings, the Board agent is to give effect to the unambiguous voter intent even though it may be an irregular marking or may be on the back of the ballot. *Hydro Conduit Corp*., 260 NLRB 1352 (1982). Accord: *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 467 (11th Cir. 1982), and cases cited therein. Thus, for example, in *Horton Automatics*, 286 NLRB 1413 (1987), the Board found the proper voter intent to vote against the union when the voter wrote "non" across a ballot which was in both English and Spanish. See also *Kaufman's Bakery*, 264 NLRB 225 (1982), where the Board disregarded irregular markings made over the original "X"; and *Columbia Textile Services*, 293 NLRB 1034 fn. 4 (1989), where

the voter had punched a hole through the "yes" box. See also *Brooks Bros., Inc*., 316 NLRB 176 (1995). In *Bishop Mugavero Center*, 322 NLRB 209 (1996), a divided Board found that a ballot marked with a single diagonal line in the "yes" box and "X" in the "no" box was a void ballot. Accord: *TCI West, Inc*., 322 NLRB 928 (1997). Compare *Osram Sylvania, Inc*., 325 NLRB 758 (1998), and *Thiele Industries*, 325 NLRB 1122 (1998).

In *Daimler-Chrysler Corp.,* 338 NLRB 982 (2003), the full Board divided over a ballot marked by an X in the "yes" box that also contained a handwritten question mark (?) immediately adjacent to the "yes" square. There were no markings on the "no" box. The majority found that the markings evinced the voters' intent to vote "yes" and that the question mark did not negate this expressed preference.

24-430 Payments to Off-Duty Employees to Encourage Voting

In *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), a divided Board held that monetary payments offered to employees as a reward for coming to a Board election that exceed actual transportation expenses is objectionable. Accord: *Lutheran Welfare Services*, 321 NLRB 915 (1996); *Perdue Farms, Inc.*, 320 NLRB 805 (1996); and *Rite Aid Corp.*, 326 NLRB 924 (1998). Compare *Good Shepard Home*, 321 NLRB 426 1996), finding that the payments amounted to actual expenses. *Allen's Electric Co.,* 340 NLRB 1012 (2003). See also section 24-443 for discussion of the Board's policy of barring raffles that are in any way tied to voting in the election. *Atlantic Limousine*, 331 NLRB 1025 (2000).

The Board does not find payments for transportation or pay objectionable where the employees did not know of payments before voting. *Indiana Hospital, Inc*., 326 NLRB 1399 (1998), and *J.R.T.S. Limited, Inc*., 325 NLRB 970 (1998).

24-440 Electioneering

370-9167-5400

378-8400

The Board considers itself responsible for assuring properly conducted elections, and where irregularities concern essential conditions of the election and expose to question a number of ballots sufficient to affect the outcome of the election, there is no alternative in light of the high election standards maintained by the Board but to set aside the election. The effectuation of this principle is a serious factor in many and varied types of procedural objections to elections with which the Board is confronted.

The specific types of issues relating to this principle may either precede the date of the election or occur at or near the polls and involve conduct affecting the results of the election. Although the Board has traditionally declared its intention not to censor or police preelection campaign propaganda by parties to elections, it must, in order to preserve an atmosphere of impartiality, impose, certain limitations or methods on campaigning. *United Aircraft Corp*., 103 NLRB 102 (1953). See *Pearson Education, Inc.*, 336 NLRB 979 (2001). See *Chrill Care, Inc*., 340 NLRB 1016 (2003) (picketing at site of election, not objectionable).

For a discussion of the Board's policy with respect to electioneering and the factors to be considered in determining whether specific conduct is objectionable see *C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011), and The Milchem Rule Section 24-442 infra.

24-441 Ballot Reproduction

370-2850

378-2885-4093

378-2885-6050

378-4270-3300

4270-6775

The reproduction of a document which purports to be a copy of the Board's official secret ballot, but which in fact is altered for campaign purposes, tends to suggest to the voters, directly or indirectly, that this Agency endorses a particular choice. *Allied Electric Products*, 109 NLRB 1270 (1954).

After *Allied Electric*, the Board tended to follow a per se rule that an altered ballot or other Board material which tended to undermine the Board's neutrality would cause the election to be set aside. In *SDC Investment*, 274 NLRB 556 (1985), the Board reexamined this policy in light of its decisions in *Midland National Life Insurance Co*., 263 NLRB 127 (1982), and *Riveredge Hospital*, 264 NLRB 1094 (1982), and found that the "crucial question" in resolving issues of sample ballot alteration is whether the document "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." 274 NLRB at 557. In two cases decided recently, the Board decided that the document involved clearly indicated that it was not a government document. See *Ursery Cos*., 311 NLRB 399 (1993), involving a letter from a state representative, and *Taylor Cadillac*, 310 NLRB 639 (1993), involving a defaced sample ballot.

Thus, if the ballot or other material indicates that the source of the material is one of the parties, then the election will not be set aside. See *Comcast Cablevision of New Haven,* 325 NLRB 833 (1998); *C. J. Krehbiel Co*., 279 NLRB 855 (1986); *Worths Stores Corp*., 281 NLRB 1191 (1986); and *Baptist Home for Senior Citizens*, 290 NLRB 1059 (1988). The Board will examine extrinsic evidence to determine whether the document is misleading. See *Baptist Home*, supra at fn. 4, which implicitly overruled cases to the contrary, *3-Day Blinds, Inc*., 299 NLRB 110 (1990).

In *Archer Services*, 298 NLRB 312 (1990), and *3-Day Blinds*, supra, the Board found that the document was misleading and that there was no extrinsic evidence which indicated it was fromn a partisan source. Accordingly, the elections were set aside.

The Board has pointed out that the policy here is easily complied with by simply identifying on the document what its source is. *3-Day Blinds, Inc*., supra; *Professional Care Centers*, 279 NLRB 814 (1986); and *Rosewood Mfg. Co*., 278 NLRB 722 (1986).

Note: In *Brookville Healthcare Center*, 312 NLRB 594 (1993), the Board announced that because it has included language in its Notices of Election stating that there is no Board involvement in any defacement of notice, the *SDC Investment*, 274 NLRB 556 (1985), analysis is no longer required. Accord: *Wells Aluminum Corp*., 319 NLRB 798 (1995), and *Dakota Premium Foods*, 335 NLRB 228 (2001). *Brookville Healthcare* involved defacement of the official notice of election. Where the defacement was of a separate sample ballot, so that the *Brookville Healthcare Center* disclaimer was not readily available to the employees receiving the defaced ballot, the Board set the election aside. *Sofitel San Francisco Bay*, 343 NLRB 769 (2004).

The Board continues to experience objections based on altered ballots even after *Brookville Healthcare,* supra. See, e.g., *Oak Hill Funeral Home,* 345 NLRB 532 (2005). As a result, it announced a new policy in *Ryder Memorial Hospital,* 351 NLRB 214 (2007), whereby the disclaimer language will also be included on the ballot itself. Thus, NLRB ballots now state:

> The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

The two-Member Board reaffirmed the Ryder Memorial policy in *Foster Poultry Farms*, 352 NLRB 1147 (2008). Thereafter a three-Member panel applied the Ryder analysis to a situation where a union representative told an employee that she was visiting her at her home "on behalf of the National Labor Relations Board" and the union. The panel found this message gave the employees the impression that "the Board was not entirely neutral in the election process." *Goffstown Truck Center*, 356 NLRB No. 33 (2010).

See also section 24-423, supra, for a discussion of the requirements for posting of the Notice of Election.

24-442 The *Milchem* Rule

370-4975

370-9167-5450

378-4242

378-8420

Adverting to the fact that, in prior decisions dealing with the effects of conversations between parties to the election and employees preparing to vote, no clear standard had been enunciated against which to measure such conduct, the Board established a rule prohibiting such conduct, "without inquiry into the nature of the conversations." *Milchem, Inc*., 170 NLRB 362 (1968). In *Rheem Mfg. Co*., 309 NLRB 459 (1992), the Board reaffirmed the applicability of *Milchem* to parties only and not to third-party conduct. See also *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); *Yukon Mfg. Co*., 310 NLRB 324 (1993); and *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995).

The *Milchem* rule applies only to conduct by a party to the election, not to employee conduct. *Tyson Fresh Meats, Inc.,* 343 NLRB 1335 (2004).

The facts in *Milchem* were simple. During the voting period, a union official stood for several minutes near the line of employees waiting to vote, engaging them in conversation. While the union official said that his remarks concerned the weather and like topics, the Board found that "the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election."

Applying the *Milchem* rule, an election was set aside where an individual, acting on behalf of the union, engaged in electioneering activities in close proximity to the polls during a substantial part of the voting period, notwithstanding the Board agent's instructions, on three separate occasions, that he leave the area and the admonition that he could not electioneer within 50 feet of the polls. The Board viewed this conduct as "a serious breach" of its rule against electioneering at or near the polls. *Star Expansion Industries Corp*., 170 NLRB 364 (1968). Distinguishable were *Sewanee Coal Operators' Assn*., 146 NLRB 1145 (1964), where, among other things, there was no specification by the Board agent of a "no electioneering" area; and *Intertype Co*., 164 NLRB 770 (1967), where the electioneering consisted of but one isolated remark to an employee at the end of the voting line. See also *C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011).

Social pleasantries or chance remarks are not considered objectionable under the *Milchem* rule absent more. See *Sawyer Lumber Co*., 326 NLRB 1331 (1998), and *Dubovsky & Sons*, 324 NLRB 1071 (1997).

The *Milchem* rule was applied to a situation in which a supervisor went from person to person in the voting line, which varied from 15 to 50 employees, and engaged in conversational and handshaking activity. *Volt Technical Corp*., 176 NLRB 832 (1970).

In another case, where a single vote was determinative of the election and the conversations of petitioner's observer, already criticized by the Board agent, "culminated in his gratuitious offer of a loan to a prospective voter"; the election was set aside. *Modern Hard Chrome Service Co*., 187 NLRB 82 (1970).

Milchem is applicable to conversations between observers and voters and must be "prolonged." *Longs Drug Stores of California,* 347 NLRB 500 (2008), and *Lowe's HIW, Inc.,* 349 NLRB 478 (2007). Where the conversation is initiated by the voter or amounts to no more than mere social pleasantries, the Board has declined to set aside elections under *Milchem*, and *Modern Hard Chrome*, supra. In *Midway Hospital Medical Center*, 330 NLRB 1420 (2000), a divided panel distinguished between remarks directed at fellow voters, which are covered by the *Milchem* rule, and those directed at Board agents, union, and management officials, which were not considered covered by *Milchem.*

Thus, in *Angelica Healthcare Services*, 280 NLRB 864 (1986), enfd. sub nom. *Clothing & Textile Workers v. NLRB*, 815 F.2d 225 (2d Cir. 1987), a voter initiated a conversation with the union's observer by asking him how he was and by initiating further conversation on the subject of her recent surgery, when the observer responded, "Fine, how are you?" In *Oesterlen Services for Youth*, 243 NLRB 563 (1979), enfd. 649 F.2d 399 (6th Cir. 1981), cert. denied 454 U.S. 1031 (1981), the observer exchanged brief "pleasantries" with voters, answered one voter's question about turnout at the polls with the remark that more might vote at the shift change, told another that the observer would be at union meeting later that month, and spoke about work schedules with a voter who initiated the conversation by coming behind the observers' table to talk. In *Vista Hill Hospital*, 239 NLRB 667 (1978), enfd. 639 F.2d 479 (9th Cir. 1980), the case that comes closest to the line separating objectional conduct under *Milchem, Inc*., 170 NLRB 362 (1968), there were six very brief conversations, four consisting of innocuous greetings and comments on the weather, one involving a brief reply to an employee's question, and one (found by the court to be close to the kind of conduct condemned by *Milchem*) consisting of the observer's comment that if the employee voted for the union, he (the observer) would not be in so much trouble with the hospital. In *Brinks Inc.,* 331 NLRB 46 (2000), a divided Board found a union observer's "vote union" comment and thumbs up sign to be improper electioneering. Compare *U-Haul Co. of Nevada*, *Inc.,* 341 NLRB 195 (2004) (observers "thumbs up" not linked to companying).

In *Hollingsworth Management Service,* 342 NLRB 556 (2004), the Board found improper electioneering where employees were manhandled in front of the others by individuals who came to the polling area "for the apparent purpose of systematically targeting voters with last minute campaigning."

Where during the balloting, two union representatives alternated in positioning themselves for conversation with voters at the foot of an outside stairway, 10 feet in length, leading to the second floor of a two-story building, and the polling area was in a conference room 20 to 25 feet down a hallway from the second floor entrance, the area outside this entrance was deemed beyond the "no electioneering" area established by the Board agent. The alleged conversations, the Board reasoned, did not take place with voters while the latter were in the polling area or in line waiting to vote, and therefore did not violate the *Milchem* rule. The establishment of a nonelectioneering area is left to the informed judgment of the Regional Director's agents conducting the election since they are on the scene and familiar with the physical circumstances surrounding the location of the polls. *Marvil International Security Service*, 173 NLRB 1260 (1968). See also *Faulhaber Co*., 191 NLRB 326 (1971).

For similar reasons, the *Milchem* rule was not applied in the context of the following factual situation: The election was conducted in a warehouse building, the voting area being located about 30 feet from the entrance. Conversations between three union representatives and several employees took place on a parking lot outside the warehouse. The Board held that the *Milchem* rule does not apply to conversations with prospective voters unless the voters are in the polling area or in line waiting to vote. *U-Haul Co. of Nevada,* supra; *Golden Years Rest Home*, 289

NLRB 1106 (1988); *Boston Insulated Wire Co*., 259 NLRB 1118 (1982); and *Harold W. Moore & Son*, 173 NLRB 1258 (1968). See also *American Medical Response,* 339 NLRB 23 (2003), and *Stevenson Equipment Co*., 174 NLRB 865 (1969) . The same reasoning was used in *Lach-Simkins Dental Laboratories*, 186 NLRB 671 (1970), where the union held a luncheon before and during the time the polls were open, but it was held outside of the polling area; employees were not compelled to attend; those who chose to attend had to go out of their way, past the entrance to the polling area; and the value of the sandwiches and soft drinks was not considered sufficient to influence the voting.

A single isolated violation *Milchem, Inc*., 170 NLRB 362 (1968), of *Milchem* was held insufficient to set aside the election where the vote of the employee addressed was not dispositive of the election. *Mead Corp.,* 189 NLRB 190 (1971). Compare *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984).

It should also be noted that an election will not be set aside where the rule was violated by the observer for the losing party in the election. *General Dynamics Corp*., 181 NLRB 874 (1970).

In *Pearson Education, Inc.*, 336 NLRB 979 (2001), the Board found that the posting of an antiunion poster near the polling site was objectionable. Accord: *American Medical Response,* supra.

For discussion of Electioneering see section 24-440 and of the third party conduct, see section 24-326.

24-443 Raffles, Gifts, and Contests

378-2897

378-4284

a. Raffles

In *Atlantic Limousine*, 331 NLRB 1025 (2000), the Board adopted a new rule barring "employers and unions from conducting a raffle if (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls." Accord: *Ryder Student Transportation Services*, 332 NLRB 1590 (2000) (conditioning a raffle on a certain number of employees voting); and *Allenbrook Healthcare Center*, 331 NLRB 1065 (2000) (raffle conducted during balloting).

The Board in *Atlantic Limousine* also concluded, however, that election raffles held outside of the 24-hour period would be scrutinized to determine whether "they involve promises or grants of benefit that would improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus to learn were to direct additional pressure or campaign efforts. Applying this test, the Board set aside the election in *BFI Waste Systems*, 334 NLRB 934 (2001).

b. Gifts

Gifts may not be given to employees as an inducement to secure employee support of a Board election. *General Cable Corp*., 170 NLRB 1682 (1968.

In *B & D Plastics*, 302 NLRB 245 (1991), the Board summarized its test for determining whether benefits or gifts amount to objectional conduct:

> *Gulf States Canners*, 242 NLRB 1326 (1979). To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted

during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant of announcement of such benefits. See *Speco Corp*., 298 NLRB 439 fn. 2 (1990); *United Airlines Services Corp*., 290 NLRB 954 (1988); *May Department Stores Co*., 191 NLRB 928 (1971).

In *B & D*, the Board found that the grant of a day off 2 days after the election was objectionable. See also *Shore & Ocean Services*, 307 NLRB 1051 (1992), in which the granting of two benefits, a change in overtime computation and the providing of uniforms, within a short time after learning the petition was filed was objectionable. But see *Emery Worldwide*, 309 NLRB 185 (1992), in which the outcome of a bonus competition was announced the day before the election. The Board found that timing alone is insufficient to make an otherwise unobjectionable announcement objectionable. Generally speaking, the distribution of inexpensive pieces of campaign propaganda such as buttons, stickers, or T-shirts is not objectionable. Compare *R. L. White Co*., 262 NLRB 575 (1982), and *Nu Skin International*, 307 NLRB 223 (1992) (T-shirts not objectionable), with *Owens-Illinois, Inc*., 271 NLRB 1235 (1984) (free jackets found objectionable). Similarly announcement of a postelection victory party was not deemed objectionable. *Raleigh County Commission on Aging*, 331 NLRB 924 (2000)**.**

In *Go Ahead North America LLC,* 357 NLRB No. 18 (2011), a union promise not to collect back union dues from employees was found to be objectionable warranting a rerun decertification election.

In *Comcast Cablevision-Taylor,* 338 NLRB 1089 (2000), the Board set aside an election after an adverse decision by the Sixth Circuit. The Circuit found that a union promise of a trip to Chicago after the election (a $50 value) was objectionable.

Elimination of a benefit (access to bulletin board) during the election campaign was objectionable. *Bon Marche*, 308 NLRB 184, 185 fn. 7 (1992), and dissent. See also *Chicagoland Television News*, 328 NLRB 367 (1999); *River Parish Maintenance*, 325 NLRB 815 (1998); and *Chicago Tribune*, 326 NLRB 1057 (1998) (paying for attendance at party found objectionable).

c. Contests

In a series of cases, the Board has found that contests in which a prize is awarded for answering questions about the election campaign where employees are required to sign their names is objectionable. See *Melampy Mfg. Co*., 303 NLRB 845 (1991), and cases cited therein. See also *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000) (questionnaire amounted to polling).

The Board evaluates all the circumstances surrounding raffles that are held in connection with an election in deciding whether or not they are objectionable. These circumstances are described in *Grove Valve & Regulator Co*., 262 NLRB 285 (1982). See also *Sony Corp of America*, 313 NLRB 420 (1993), where the Board found that the value of the prize was not sufficiently high to be objectionable. See *Bionetics Corp*., 323 NLRB 639 (1997), for a discussion of late filed contention concerning an employer request that an employee distribute raffle tickets. See also *Arizona Public Service Co.*, 325 NLRB 723 (1998), distinguishing *B & D* (payment cases) from *Sony* (raffles).

24-444 Campaign Insignia

378-2847-8400 et seq.

378-8440

The wearing at the polls by observers of buttons or other insignia merely bearing the name of their union is not prejudicial to the fair conduct of an election. *Electric Wheel Co*., 120 NLRB 1644, 1646 (1958). And viewing the identity and special interests of employer observers as not reasonably presumed to be less well known than that of union observers, the Board holds that the

impact on voters is not materially different "whether the observers wear prounion or antiunion insignia of this kind. (A hat with the words 'Vote No.')" *Larkwood Farms*, 178 NLRB 226 (1969), and *Fiber Industries*, 267 NLRB 840, 850 (1983).

Factual situations differ in many instances. In *Mar-Jac Poultry Co*., 123 NLRB 1571 (1959), the employer closed down its operations one-half hour before voting on election day, and some employees walked around the plant at such time wearing handmade paper hats lettered with words "Vote No." An objection to the election on this ground was found to be without merit. In *Delaware Mills*, 123 NLRB 943 (1959), an employee, whose vote had been challenged, was required to sit at the polling place. She wore a coat, which was unbuttoned, revealing a T-shirt which bore the printed letters "TWUA," and on her coat she wore a button with words "Vote Yes." An objection primarily based on this behavior was overruled, the Board finding that her presence, "even if she in fact waved and smiled at the voters," did not tend to so influence the voters as to warrant setting aside the election. In *Sewanee Coal Operators' Assn*., 146 NLRB 1145 (1964), the Board held that the presence of a crowd or a massing of voters at the entrance to the polling place and placard electioneering by unidentified persons on behalf of a union in the area outside the polls, standing alone, did not impair the exercise of free choice in the election. The wearing of T-shirts by union observers, bearing the union name and emblem in such a manner as to be visible to the voters, and the congregating of persons in an area of the polls during the election wearing the same type shirts were raised by way of objection in *R. H Osbrink Mfg. Co*., 114 NLRB 940 (1955), but found without merit. The Board has consistently held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election is, without more, not prejudicial. See also *Furniture City Upholstery Co*., 115 NLRB 1433 (1956). See CHM section 11310.4 indicating that no insignia is preferred but not required of observers.

A significant distinction should be drawn between the situation involved in the above cases and one in which the employer makes badges or other campaign insignia available to employees.

Illustrative of the latter is *Macklanburg-Duncan Co*., 179 NLRB 848 (1969), where the employer not only utilized its supervisory personnel in furtherance of its campaign by having them wear buttons and T-shirts displaying proemployer and antiunion propaganda, but intended via the supervisors to make the antiunion materials readily available to employees who, by electing whether or not to wear them, would disclose their respective choices. The Board found such tactics constituted unlawful interference with the election. See also *Garland Knitting Mills*, 170 NLRB 821 (1968), enfd. in material part 414 F.2d 1214 (D.C. Cir. 1969); and *Chas. V. Weise Co*., 133 NLRB 765 (1961). Compare *Black Dot, Inc*., 239 NLRB 929 (1978), in which the Board found the availability of such buttons was not objectionable as long as supervisors were not involved in distribution. See also *Columbia Alaska Regional Hospital*, 327 NLRB 876 (1998). But see *Gonzales Packing Co*., 304 NLRB 805 (1991); *Barton-Nelson, Inc*., 318 NLRB 712 (1995); and *Circuit City Stores,* 324 NLRB 147 (1997), where the material—vote no stickers in *Gonzales*, antiunion hats in *Barton*, and mugs in *Circuit City*—was distributed by supervisors.

In *2 Sisters Food Group, Inc*., 357 NLRB No. 168 (2011), the distribution of antiunion campaign paraphernalia on election day was found objectionable where it required employees to choose to accept or not in presence of employer agents.

24-445 Checking Off Names of Voters

370-3533-4050-2500

378-2857

378-4260

378-5625-7000

As already indicated, Board policy prohibits the keeping of a list, apart from the official voting list, of persons who have voted in the election. *International Stamping Co*., 97 NLRB 921 (1951). Thus, where one of the union representatives had a sheet of paper in his hand and, as employees passed him to enter the store where a Board election was being conducted, he made notations of the names of employees who had voted, the election was set aside. *Piggly-Wiggly #011*, 168 NLRB 792 (1967). Although it is the policy of the Board to prohibit the keeping of a list of persons who have voted in the election, it is necessary to affirmatively show or to infer from the circumstances that the employees knew that their names were being recorded. See *Days Inn Management Co*., 299 NLRB 735 (1992); and *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994). Where no such affirmative evidence of this exists or where it cannot be inferred from the circumstances of the case, the election is sustained. *A. D. Juilliard & Co*., 110 NLRB 2197, 2199 (1954). See also *Cross Pointe Paper Corp.,* 330 NLRB 658 (2000); *Southland Containers*, 312 NLRB 1087 (1993), the cases cited therein; and *Textile Service Industries*, 284 NLRB 1108 (1987), "in which the Board found unobjectionable an observer's writing, in addition to hash marks, 'unknown words' and recognized as names while attempting to conceal the paper." *Cross-Pointe Corp*., 315 NLRB 714 (1994).

For example, an observer for the employer, during the morning voting session at one of the polling places, used a copy of the voting list to determine whether the voters as they appeared to vote were among those he had been instructed to challenge. Although he began by checking off voters on his list, doing so only as to the first few voters, he discontinued such practice when warned against it by the Board agent, nor was it clear that any voter was aware his name was being checked off. The Board concluded that any breach of the rule which may have occurred was de minimis and did not constitute a basis for invalidating the election. *Tom Brown Drilling Co*., 172 NLRB 1267 (1968).

Lists of those to be challenged are of course permitted. See *Cerock Wire & Cable Group*, 273 NLRB 1041 (1984), and CHM section 11338.2, but the Board prefers that the observer not use a duplicate *Excelsior* list, *Mead Southern Wood Products*, 337 NLRB 497 (2002).

In two rather interesting cases, the Board did permit the employer to maintain lists where they were unrelated to the actual polling itself. *American Nuclear Resources*, 300 NLRB 567 (1990) (list maintained for security reasons); and *Red Lion*, 301 NLRB 33 (1991) (list maintained for payroll reasons).

See also the discussion of Observers at section 24-424, supra.

24-446 Filing Lawsuits

In 2011, the Board revised its policy with respect to whether a union's action in filing a lawsuit on behalf of employees amounts to objectionable conduct. In prior cases, particularly *Nestles Dairy Systems,* 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995), the Board set out a two part test for determining whether such action is objectionable. In *Stericycle, Inc*., 357 NLRB No. 61 (2011), the Board announced that the adverse reactions of the courts to its *Nestles* policy warranted reconsideration of the issue. Thus, the Board now holds that the filing of a lawsuit by the union on behalf of unit employees during the critical period is objectionable.

24-500 The *Lufkin* Rule

370-2817-3366

In *Lufkin Rule Co*., 147 NLRB 341 (1964), at the request of the party whose objections to election conduct had been sustained, the Board directed its Regional Director to include in the notice of the repeat election the fact that a new election would be conducted because the employer's preelection conduct had interfered with the employees' exercise of a free and reasoned choice and thus warranted setting aside the original election. *Fieldcrest Cannon, Inc*., 327 NLRB 109 (1998).

The employer, in opposition to the union's request, contended that to grant the motion would unduly prejudice it because such a statement, having the *imprimatur* of the Board, would suggest to the employees that in view of the employer's misconduct the Board favored a vote for the petitioner in the second election. The Board rejected this contention, stating that it did "not believe that the notice in any way indicated that the Board favors the petitioner in the second election" and that the "primary purpose of the notice is to provide official notification to all eligible voters, without detailing the specific conduct involved, as to the reason why the elections were set aside."

Prior to *Lufkin Rule Co*., supra, Board had "seldom heretofore exercised its discretion to incorporate in the election notice any language which might explain the basis for the holding of a new election." 29 NLRB Ann. Rep. 63 (1964). As a result of *Lufkin*, the Board may, in appropriate circumstances, exercise this discretion.

The notice reads as follows:

NOTICE TO ALL VOTERS

> The elections conducted on [insert date] were set aside because the National Labor Relations Board found that certain conduct or the Employer [Union] interfered with the employees' exercise of a free and reasoned choice. Therefore, new elections will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

For an application to this rule, see, for example, *Snap-On Tools, Inc.,* 342 NLRB 5 (2004); and *Bush Hog, Inc*., 161 NLRB 1575 (1966). See also *Monfort of Colorado*, 298 NLRB 73 (1990); and *SDC Investment*, 274 NLRB 556 (1985). In *Miller Industries,* 342 NLRB 1047 fn. 4 (2004), the Board denied a request for a special notice but did direct a notice of election in accordance with *Lufkin* rule.

If the *Lufkin* language is not used, the notice of election should be modified to the extent that it should explain that the election being announced is a "rerun of the election held on [insert date of original election]."

See section 22-106, for discussion of Board policy of including statement of reasons for rescheduling elections in the Notice of Election.

24-600 Postelection Unit Modifications

Under certain circumstances, the Second Circuit has held that a postelection unit modification may affect the outcome of an election.

For a discussion of the cases, see section 3-880.

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