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

June 2017

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 Outline was originally issued in the early 1960s and was the work of then Assistant General Counsel Elihu Platt. Former Deputy General Counsel John Higgins graciously volunteered to update the text and did so on multiple occasions from 1992 through 2012. We are very fortunate to have Terry Schoone-Jongen assume this significant responsibility. In this new edition, Mr. Schoone-Jongen primarily revised the text to include relevant cases that issued between 2012 and 2017, included amendments to the Board's election procedures, engaged in significant editing, and reorganized and expanded/condensed many sections.

This Outline remains a very important research tool. During my early tenure at the Board and during my subsequent practice as well as my current tenure as General Counsel, I have referred to this definitive work often.

My sincere thanks to Terry Schoone-Jongen for his tireless efforts at fine-tuning an excellent resource that inures to the benefit of all. I also want to thank former Acting Director of the Office of Representation Appeals Beverly Oyama, Assistant Chief Counsel Jeff Barham, and Attorney Steven Goldstein, for reviewing and providing critical input, as well as Christina Avent-Brown and Jalissa Nugent for editing the Outline and the dedicated employees at the Agency who offered suggestions for improvement.

Richard F. Griffin, Jr.
General Counsel

EDITOR'S NOTE

It is my distinct pleasure to present this update and revision to the *Outline*.

This text is now well over 50 years old; for more than 20 of those years John E. Higgins, Jr., served as the editor, even into his retirement. I am honored that he has asked me to assume this role, and I am thankful to General Counsel Richard F. Griffin, Jr., and to Deputy General Counsel Jennifer Abruzzo for approving this editorial change.

The *Outline* was last updated in 2012. The intervening 5 years have been an unusually active time in terms of Representation case developments: many lead cases have issued, containing significant modifications and clarifications to numerous areas of Board law; decisions of the Recess-era Board were invalidated by the Supreme Court's *Noel Canning* decision; and the Board has finalized and implemented amendments to its election procedures.

In keeping with these developments, I have revised the text to include relevant Board and Court cases through early June 2017. Further, several chapters have been heavily revised to reflect the amendments to the Board's election procedures. In addition, I have revised, reorganized, and expanded or condensed many individual sections of the *Outline*. These revisions are too numerous to summarize here, but of particular note the discussion of supervisory status in Chapter 17 has been significantly reorganized and expanded, and much of Chapter 24 has been substantially reorganized. Beyond these substantive revisions, I have converted most "supra" citations to full citations, and I have also provided pincites for many citations (if a citation lacks a pincite, this is because the cited material is easily located without one—i.e., it appears on the first page of the decision, or else the entire decision deals with the cited material).

This update omits Two Member and Recess Board cases, unless they have been specifically incorporated by reference in decisions issued by a properly-constituted Board. Cases that have not been incorporated by reference may still be of interest to the reader, but in revising the *Outline* I have adhered to an editorial policy of limiting the text's discussion to binding Board precedent. In keeping with this policy, I have removed some material that dealt with peripheral matters (e.g., references to grants of review that never yielded a final decision, proposed rulemaking that has not resulted in a final rule, etc.). For this same reason, the *Outline* continues to cite only published cases. It is, however, worth noting that since 2011, the Board's website provides access to unpublished decisions, many of which may be of interest to the Representation case researcher.

As this *Outline* is now published online in electronic form, future updates may be more frequent than in the past. In addition, I have (like John Higgins before me) taken on the task of preparing a yearly paper summarizing development in "R" Case law for the Midwinter Meetings of the NLRB Practice and Procedure and Development of the Law Under the NLRA Committees of the

American Bar Association's Section of Labor and Employment Law. Historically, these papers use the *Outline*'s classification system, and these papers may continue to be included on the Agency's website as a supplement to this text in the event the text itself cannot be expeditiously revised to include yearly developments.

Once again, I am grateful to John Higgins for the many years he spent editing this important text, and for suggesting that I should succeed him in this capacity. I am most grateful to General Counsel Griffin and Deputy General Counsel Abruzzo for approving this suggestion. I would also like to thank Beverly Oyama, former Acting Director of the Office of Representation Appeals, for reviewing and providing input on several chapters; Jeff Barham, Assistant Chief Counsel, and Steven Goldstein, Attorney, both on the staff of Member Mark Gaston Pearce, for providing suggested revisions concerning the 2014 amendments to the Board's election procedures; and the various Agency employees who offered informal suggestions for improvements. Special thanks also to Christina Avent-Brown and Jalissa Nugent for handling the editorial process.

Terence G. Schoone-Jongen
Assistant Chief Counsel
Office of Representation Appeals
June 2017

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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, 606–607 (1939). See *J. M. Abraham, M.D.*, 242 NLRB 839 (1979) (statutory jurisdiction established by receipt of Medicare funds); *Longshoremen ILWU (Catalina Island Sightseeing Lines)*, 124 NLRB 813 (1959) (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 proscribed 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 in that case. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 684 (1951).

a. History of jurisdictional standards

These broad principles, which delineate the basic law initially developed with respect to the Board's jurisdictional grant, were 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.

The Board's authority to decline jurisdiction over a class or category of employers pursuant to Section 14(c)(1) is distinct from its authority to decline jurisdiction over a particular case pursuant

to *Denver Building Trades*, 341 U.S. 675. *Northwestern University*, 362 NLRB No. 167, slip op. at 6 fn. 28 (2015); see also section 1-500.

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, 323 fn. 3 (1956).

Statutory jurisdiction can be challenged at any stage, but discretionary jurisdiction must be timely raised. *Anchortank, Inc*., 233 NLRB 295 (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 statute's 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. Each of the public utilities met the Board's standard for asserting jurisdiction over public utilities (a certain annual minimum gross volume of business), so the employer's services to the public 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 sections 102.98 and 102.99 of the Board's Rules and Regulations); see also *Newman Livestock-11, Inc.*, 361 NLRB No. 32, slip op. at 1–2 (2014).

Note that the above definition of indirect outflow specifically refers to "users." This was explained in *St. Francis Pie Shop, Inc.*, 172 NLRB 89, 90 (1968). 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, 1376 fn. 1 (1985). In *Combined Century Theatres*, 120 NLRB 1379, 1382–1384 (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*, 122 NLRB at 85, direct and indirect outflow may be combined, as can direct and indirect inflow, but outflow and inflow may not be combined. Inflow of a contractor and its subcontractors can also be combined. See *Oregon Labor Management Relations Board*, 163 NLRB 17 (1967). The Board will decline jurisdiction when two nonretail companies alleged to be a single employer do not, separately or together, meet the nonretail standard. See *Hobart Crane Rental, Inc.*, 337 NLRB 506 (2002).

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).

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, 674 (1946), a Fair Labor Standards Act case, the Court noted that 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.'" The Board has adopted these criteria for determining whether its retail standard for asserting jurisdiction should apply. *Bussey-Williams Tire Co.*, 122 NLRB 1146, 1147 (1959); *Taylor Baking Co.*, 143 NLRB 566 (1963); see also *NLRB v. LeFort Enterprises, Inc.*, 791 F.3d 207 (1st Cir. 2015). If an employer is engaged in both wholesale and retail distribution, either standard applies. *DeMarco Concrete Block Co.*, 221 NLRB 341 (1975). The construction and sale of residential homes exclusively is considered a retail enterprise. See id.

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 employer deductions from employee pay for tips. See *Love's Wood Pit Barbeque Restaurant*, 209 NLRB 220 (1974); *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, e.g., *Longshoremen ILWU (Catalina Island Sightseeing Lines)*, 124 NLRB 813, 815 (1959).

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 Service*, 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's operations that some revenue is derived from interstate travel. *Margate Bridge Co.*, 247 NLRB 1437, 1439 (1980).

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

In *Carteret Towing Co.*, 135 NLRB 975, 976–977 (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, 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); *Boston Cab Assn.*, 177 NLRB 64 (1969) (starter service); *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 the *HPO Service* decision 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 rental revenue from a taxistand and restaurant in determining jurisdiction

because these services were related to and part of the employer's terminal facilities, which were a link in interstate commerce. By contrast, 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 employer's total operation, which was basically a restaurant.

See also *Superior Travel Service*, 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)); a company which hauled garbage away from Government missile sites and related housing units (*Trico 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)). Compare *Pentagon Barber Shop*, 255 NLRB 1248 (1981); and *Fort Houston Beauty Shop*, 270 NLRB 1006 (1984), in which the national defense standard was not applied.

Similarly, 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); *Community Services Planning Council*, 243 NLRB 798 (1979). See also *Electrical Workers Local 48* (*Kingston Constructors)*, 332 NLRB 1492, 1498 (2000).

In *Firstline Transportation Security*, 347 NLRB 447, 455 (2006), the Board rejected a contention that it should decline, for national security reasons, jurisdiction over a private airport screening company, noting that the Board has not asserted national security or defense as a reason to deny employees the right to organize.

See also section 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); *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, Inc.*, 110 NLRB 558 (1955)); *Caribe Lumber & Trading Corp.*, 148 NLRB 277 (1964)); Guam (*RCA Communications, Inc.*, 154 NLRB 34 (1965)); and American Samoa (*Van Camp Seafood Co.*, 212 NLRB 537 (1974)). 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, Inc.*, 267 NLRB 378 (1983), under Foreign Flag Ships, Foreign Nationals, and Related Situations, section 1-501. 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*, 110 NLRB 638 (1955). Jurisdiction is asserted if the standards are satisfied by any member of the association (*Laundry Owners Assn. 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)).

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 (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. v. NLRB*, 372 F.2d 569 (6th Cir. 1967). This issue is discussed in more detail in Chapter 14.

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).

The standard for finding joint employer status, discussed in more detail in Chapter 14, is whether the putative joint employers share or codetermine those matters governing the essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

For further discussion of multiemployer associations and joint employers, see Chapter 14.

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, e.g., *Indiana Bottled Gas Co.*, 128 NLRB 1441 (1960); *Man Products*, 128 NLRB 546 (1960).

In the real estate context, there are different standards for residential and commercial buildings, and where the employer in question owns both residential and commercial property, the Board analyzes one or the other portions of the operation to determine whether they separately meet the relevant jurisdictional standard. But when the gross annual revenues from the operation exceed $1 million—the highest discretionary jurisdictional monetary standard the Board applies to any enterprise—it will simply assert jurisdiction. See *Phipps Houses Services*, 320 NLRB 876, 877 (1996).

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 an unfair labor practice case, the Board, despite finding a respondent's operations did not meet the Board's discretionary standards, fashioned an 8(a)(4) remedy (predicated on the discharge of employees for having met with and given evidence to a Board agent) while

dismissing other types of charges for lack of jurisdiction. The Board 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. *A A Electric Co.*, 177 NLRB 504 (1969), enf. denied on other grounds 435 F.2d 1296 (1971), revd. and remanded 405 U.S. 117, 126 (1971) (stating court of appeals could "canvass" the "marginal" jurisdiction of the Board), enfd. 80 LRRM 3055 (1972).

In the representation context, the Board has similarly processed an election petition involving an employer who did not meet the Board's discretionary standards, finding that doing so would "give full scope and effect" to the Board's previously-entered 8(a)(4) order against the employer. See *Pickle Bill's, Inc.*, 229 NLRB 1091 (1977).

1-212 Secondary Boycotts

260-3380

Although this text 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 part of the national economy, the Board eschewed its previous on/off reservation dichotomy (discussed below) for determining whether or not to assert jurisdiction. Instead, the Board held that the jurisdiction of the Act generally extends to Indian tribes and tribal enterprises but, consistent with Federal court precedent, jurisdiction is precluded where (1) asserting it would touch on exclusive rights of self-government in purely intramural matters, (2) asserting it would abrogate treaty rights, or (3) the language of the Act or its legislative history provides evidence Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction. 341 at 1059–1060. Where, however, the enterprise is a traditional tribal or governmental function, the Board will decline jurisdiction. *Yukon Kuskokwim Health Corp*., 341 NLRB 1075 (2004).

Applying *San Manuel*, the Board asserted jurisdiction over tribal enterprises in a series of cases. See *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB 641 (2013), incorporated by reference at 361 NLRB No. 45 (2014), enfd. 788 F.3d 537 (6th Cir. 2015); *Soaring Eagle Casino & Resort*, 359 NLRB 740 (2013), incorporated by reference at 361 NLRB No. 73 (2014), enfd. 791 F.3d 648 (6th Cir. 2015). But in *Winstar World Casino*, 362 NLRB No. 109, slip op. at 2–4 (2015), the Board declined jurisdiction, finding that application of the Act would abrogate treaty rights.

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); *Southern Indian Health Council*, 290 NLRB 436 (1988). However, the Board asserted jurisdiction where the tribal enterprise was located off the reservation. See *Sac & Fox Industries*, 307 NLRB 241 (1992); *Yukon Kuskokwim Health Corp*., 328 NLRB 761 (1999). The Board also asserted jurisdiction in cases where the enterprise, although located on the tribal reservation, was 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); *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); *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).

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, 1094 fn. 1 (1993); see also *CID-SAM Management Corp*., 315 NLRB 1256, 1256 fn. 4 (1995). Of courfse, there must also be a showing of statutory jurisdiction. Id. at 1256 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, 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); *Rutland Free Library*, 299 NLRB 524 (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. *Operating Engineers Local 49 (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 not less than $1 million. Board's Rules and Regulations section 103.1; see also 35 Fed. Reg. 18370 (Dec. 3, 1970).

The Board's implementation of Rules section 103.1 followed its decision to assert jurisdiction over nonprofit private educational institutions in *Cornell University*, 183 NLRB 329 (1970), which 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); *Garland Junior College*, 188 NLRB 358 (1971), and *Syracuse University*, 204 NLRB 641 (1973).

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 educational institution, on a plenary basis. *Trustees of the 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 after determining that the nature of the employer's operation was dissimilar from that of institutions the Board has found to be educational.

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). Compare *University of Vermont*, 223 NLRB 423 (1976), and 297 NLRB 291 (1989), in which the Board initially asserted jurisdiction over the University of Vermont because it met the $1 million gross annual revenue standard, but subsequently held that it is a political subdivision exempt from jurisdiction. See section 1-401 for further discussion of political subdivisions.

In *Shattuck School*, 189 NLRB 886 (1971), the Board applied the standard for colleges and universities to a private nonprofit secondary school, stating that the employer was "sufficiently similar" to private nonprofit colleges and universities to warrant assertion of jurisdiction under the same jurisdiction standard. See also *Windsor School, Inc.*, 200 NLRB 991 (1972). The Board

applied this standard to a group of private religious high schools in *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975), but this case predates *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). For further discussion of Religious Schools, see section 1-403, and for Religious Organizations, see section 1-503.

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.

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. Like apartment houses, hotels and motels, 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, 1094 fn. 1 (1993).

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

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 employers 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); see also *Ernst & Ernst National Warehouse*, 228 NLRB 590 (1977) (asserting jurisdiction over an independent certified public accounting firm).

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 declines jurisdiction over horseracing and dogracing (see section 1-502). But the Board exercised jurisdiction in two cases involving casinos affiliated with racetracks, finding that the enterprises were predominantly casinos and the employees predominantly casino employees. *Prairie Meadows Racetrack & Casino*, 324 NLRB 550 (1997); *Delaware Park*, 325 NLRB 156 (1997). Similarly, in an advisory opinion, the Board stated that it would assert jurisdiction over a facility that had once been primarily a racetrack, but as a result of changes from the addition of a gambling casino operation was now primarily a casino. *Empire City at Yonkers Raceway*, 355 NLRB 225 (2010).

See also Horseracing and Dogracing, section 1-502.

1-314 Government Contractors

260-3390

260-6736

280-9100 et seq.

In *Management Training Corp*., 317 NLRB 1355 (1995), the Board announced that henceforth it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act in deciding whether the Board will exercise jurisdiction over private sector employers who work under contracts with Federal, state, or local governments." This policy reversed the Board's prior practice of examining the relationship between the employer and the government entity to determine whether "the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." *National Transportation Service*, 240 NLRB 565 (1979); *Res-Care, Inc.*, 280 NLRB 670 (1986). *Res Care* had itself overruled the "intimate connection" test of *Rural Fire Protection Co.*, 216 NLRB 584 (1975). The Fourth, Sixth, Eighth, and Tenth Circuits have upheld the *Management Training* doctrine. See *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997); *Pikeville United Methodist Hospital of Kentucky v. NLRB*, 109 F.3d 1146 (6th Cir. 1997); *NLRB v. Young Women's Christian Assn.*, 192 F.3d 111 (8th Cir. 1999); *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1998); see also *Recana Solutions*, 349 NLRB 1163 (2007); *Jacksonville Urban League*, 340 NLRB 1303 (2003).

The Board has cited the *Management Training* doctrine in stating that whenever it determines whether to assert jurisdiction over an employer with ties to an exempt entity, it will only consider whether the employer meets the statutory definition of "employer" and whether such employer meets the applicable monetary jurisdictional standards. *D & T Limousine Service*, 320 NLRB 859, 860 fn. 3 (1996).

The Board has likened a charter school's relationship to the state to that of a government

subcontractor. See *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 3 fn. 8 (2016); *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5–6 (2016).

For a discussion of State or Political Subdivisions, see section 1-401**.** 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, Inc.*, 218 NLRB 1270, 1271 (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 Applications of San Diego, Inc.*, 216 NLRB 631 (1975)); family planning clinics (*Planned Parenthood Assn.*, 217 NLRB 1098 (1975)); facilities for the care and treatment of the mentally disabled (*Beverly Farm Foundation, Inc.*, 218 NLRB 1275 (1975)); doctors' offices (*Private Medical Group of New Rochelle*, 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).

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); *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 bus drivers are health care employees because they drive medical employees on campus routes.

For discussions of health care unit issues, see section 15-160.

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). At one time, the Board distinguished between residential and transient hotels. See *Floridan Hotel of Tampa*, 124 NLRB 261 (1959); *Continental Hotel*, 133 NLRB 1694 (1961). *Penn-Keystone* abandoned this distinction, given that the Board no longer declined to assert jurisdiction over residential apartment buildings (see *Parkview Gardens*, 166 NLRB 697 (1967), discussed in section 1-303). Thus, because the employer in *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 Co. Neighborhood 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

At one time, the Board did not exercise 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); *Ming Quong Children's Center*, 210 NLRB 899 (1974). The Board reversed this policy in *St. Aloysius Home*, 224 NLRB 1344 (1977), based on the 1974 Health Care Amendments, which deleted the reference to nonprofit hospitals in Section 2(2) of the Act. *St. Aloysius* 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 certain circumstances, however, the Board will nevertheless decline jurisdiction over nonprofit employers. Thus, in *Ohio Public Interest Campaign*, 284 NLRB 281 (1987), the Board noted that even under *St. Aloysius*, it will still decline jurisdiction upon a finding that the employer's activities do not have a sufficient impact on interstate commerce, and accordingly declined to assert jurisdiction based on the local character of a nonprofit corporation engaged in consumer lobbying. The Board will also examine the relationship between the nonprofit employer and its workers, declining jurisdiction where that relationship is primarily rehabilitative, but the Board will not decline jurisdiction solely because of an employer's rehabilitative purpose. See *Goodwill Industries of Denver*, 304 NLRB 764 (1991), revg. *Goodwill Industries of Southern California*, 231 NLRB 536 (1977). See section 20–630 for a more detailed 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); *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 because "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, Inc.*, 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, Inc.*, 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 *Milco Importers, Inc.*, 177 NLRB 702 (1969), in which jurisdiction was asserted over a restaurant that did not itself meet the gross volume standard, but was held out as a single-integrated enterprise with a motel whose revenues, when added to those of the restaurant, exceeded $500,000.

1-325 Shopping Centers

260-6780

280-6510

Shopping centers are treated the same as office buildings (see section 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. Rules sec. 103.2; see also 38 Fed. Reg. 6176 (Mar. 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.*, 122 NLRB 88, 89 fn. 5 (1958), 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.

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 embraces enterprises engaged in intrastate operations but which nonetheless affect substantially interstate commerce. Thus, in *Charleston Transit*, 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. *National Transportation Service*, 231 NLRB 980 (1977).

See also Government Contractors, section 1-314.

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, 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, 604–605 (1971).

The Board has rejected political subdivision contentions for Indian Tribes. See *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004); *Yukon Kuskokwim Health Corp*., 341 NLRB 1075 (2004), and 328 NLRB 761 (1999). The same is true of privately run prisons. *Correction Corp. of America v. NLRB*, 234 F.3d 1321 (D.C. Cir. 2000).

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, Inc.*, 197 NLRB 1218 (1972).

The Board has elaborated on the two-prong *Hawkins County* standard in cases involving charter schools. Following *Charter School Administration Services*, 353 NLRB 394 (2008), a

two-Member decision, and *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 455 (2012), a recess-Board decision, the Board considered whether a Pennsylvania charter school was a political subdivision within the meaning of the Act and concluded that it was not. *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016); see also *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (2016) (applying same analysis to New York charter school). The explication of each prong set forth in *Pennsylvania Virtual Charter School*, as well as prior precedent, is discussed below.

a. Created Directly by the State

Under the first *Hawkins County* prong, the Board first determines whether the entity was created directly by the state (such as by government entity, legislative act, or public official). If it was, the Board then considers whether the entity was created so as to constitute a department or administrative arm of the government. If the "created directly" inquiry is not met, it is unnecessary to consider the "administrative arm" inquiry. *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 6 (2016).

The Board has found direct creation where, for example, a university was created directly by a special act of the state general assembly (*University of Vermont*, 297 NLRB 291 (1989), revg. 223 NLRB 423 (1976); where a state supreme court enacted a rule creating a state bar association (*State Bar of New Mexico*, 346 NLRB 674 (2006); and where an employer was created by a county board of supervisors pursuant to a state statute (*Hinds County Human Resource Agency*, 331 NLRB 1404 (2000)). By contrast, entities created by private individuals as nonprofit corporations are not exempt, even where the private individuals are proceeding in accord with a legislative act. See, e.g., *Regional Medical Center at Memphis*, 343 NLRB 346 (2004) (employer not-for-profit health care corporation created by private individuals following county's dissolution of hospital authority contingent on formation of the employer); *Research Foundation of the City University of New York*, 337 NLRB 965 (2002) (private individuals created employer as not-for-profit educational corporation under New York State Educational Law); *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5–6 (private individuals created employer as not-for-profit charter school under Pennsylvania state charter school law); *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 5–6 (2016) (same, but employer created pursuant to New York law).

An entity is not exempt under the first prong simply because it receives public funding or operates pursuant to a contract with a governmental entity. *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5 (2016). More specifically, 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)).

With respect to the "administrative arm" inquiry, it is not sufficient that state law characterizes the employer as "public" or its administrators as "public officials." *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 6 (2016). State determinations about whether an entity is a political subdivision receive careful consideration, but are not controlling. *Hawkins County*, 402 U.S. at 602. For a further discussion rejecting various administrative arm arguments, see *Pennsylvania Virtual Cyber Charter*, 364 NLRB No. 87, slip op. at 6–7 (2016).

The Board has found the "administrative arm" inquiry met based on the degree of governmental operating and budgeting control as well as the longstanding history of the employer as a state-authorized educational facility. *Jervis Public Library Assn.*, 262 NLRB 1386 (1982); see also *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000) (finding inquiry met based on governmental control of budget, auditing, and operations, as well as state characterizations and other factors); *State Bar of New Mexico*, 346 NLRB 674 (2006) (inquiry met based on statutory

language, entity's assistance to judicial branch in regulating legal profession, and state supreme court control).

b. Administered by Individuals Responsible to Public Officials or General Public

Under the second *Hawkins County* prong, the Board will examine whether the administering individuals are appointed by, or subject to removal procedures applicable to, public officials. *Hawkins County*, 402 U.S. at 608.

In *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7 (2016), the Board—adopting reasoning set forth in *Charter School Administration Services*, 353 NLRB 394 (2008)—held that the "relevant inquiry" under this prong is whether a majority of the individuals who administer the entity (such as the governing board and executive officers) are appointed by or subject to removal by public officials. Under this inquiry, the Board will examine whether the composition, selection, and removal of governing board members are determined by law, or solely by the employer's governing documents. See also *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 6 (2016).

Pennsylvania Virtual Charter School, 364 NLRB No. 87, slip op. at 8–9 (2016), further clarified that although in some cases the Board has referred to additional factors under this prong, it has done so only after making a political subdivision finding based on the method of appointment and removal of the employer's governing board. See, e.g., *University of Vermont*, 297 NLRB 291, 295 (1989); *Regional Medical Center at Memphis*, 343 NLRB 346, 360 (2004); *Cape Girardeau Medical Care Center*, 278 NLRB 1018, 1019 fn. 5 (1986). The Board overruled one prior case that represented the sole exception to this practice. See *Rosenberg Library Assn.*, 269 NLRB 1173 (1984).

For earlier cases in which the Board found that the second prong was not met and asserted jurisdiction, see, e.g., *Enrichment Services Program, Inc.*, 325 NLRB 818, 820 (1998) (reversing prior holdings and ruling 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"); *FiveCap, Inc.*, 331 NLRB 1165 (2000) (governing body of a Head Start program not responsible to the general electorate); *Cape Girardeau Care Center*, 278 NLRB 1018 (1986) (no direct accountability to public officials); *Concordia Electric Cooperative, Inc.*, 315 NLRB 752 (1994) (which, in addition to finding the second prong was not met, observed that Federal and state authorities have uniformly found that electrical cooperatives are wholly private entities); *Columbia Park & Recreation Assn.*, 289 NLRB 123 (1988) (composition of board established by charter, not law).

For earlier cases in which the Board indicated that the second prong was met, see *City Public Service Board of San Antonio*, 197 NLRB 312 (1972) (original trustees appointed by elected public officials); *City of Austell Natural Gas System*, 186 NLRB 280 (1970) (gas board members appointed by mayor and city council); *Founders Society Detroit Institute of Arts*, 271 NLRB 285 (1984) (employer administered by individual responsible to public officials); *Pennsylvania State Assn. of Boroughs*, 267 NLRB 71 (1983) (officers and directors all public officials, and boroughs and county associations retained removal power).

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

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 (RLA), 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. Section 1 of the RLA defines "carrier" to include not only carriers by railroad (and, by extension, air), but also "any company which is directly or indirectly owned or controlled by or under common control with any carrier . . . and which operates any equipment or facilities or performs any service (other than trucking service) in connection with" certain enumerated activities.

The Board accordingly does not have jurisdiction over rail or air "carriers." For a discussion of what constitutes a common carrier by air, see *Phoenix Systems & Technologies, Inc.*, 321 NLRB 1166 (1996).

In many cases, however, there may be an issue as to whether the employer is a "carrier" under the "directly or indirectly owned or controlled by or under common control with any carrier" language.

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 1155 (1995). The Board gives "substantial deference" to NMB decisions. *DHL Worldwide Express, Inc.*, 340 NLRB 1034 (2003).

In making its determination on whether an employer who is not itself a common carrier is nevertheless subject to its 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. See *System One Corp.*, 322 NLRB 732 (1996). When, under this standard, the NMB determines an employer is subject to RLA jurisdiction, the NLRB declines to assert jurisdiction. See, e.g., *Globe Aviation Services*, 334 NLRB 278 (2001).

There are three situations in which the Board will not refer a case, however. The Board will not refer cases presenting jurisdictional claims in factual situations similar to those where the NMB has previously declined jurisdiction. *United Parcel Service*, 318 NLRB 778, 780 (1995); see *Phoenix Systems & Technologies, Inc.*, 321 NLRB 1166 (1996); *Spartan Aviation Industries*, 337 NLRB 708 (2002); *Air California*, 170 NLRB 18 (1968). But see *ABM Onsite Services – West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017) (faulting Board for asserting jurisdiction based on previous NMB decisions declining jurisdiction where, in court's view, NMB decisions were unexplained departure from NMB's own precedent). Compare *Allied Aviation Service Co. of New Jersey v. NLRB*, 854 F.3d 55 (D.C. Cir. 2017). The Board also does not refer cases involving employees of an air carrier who are not engaged in activity involving airline transportation functions and whose work normally would be covered by the NLRA. See, e.g., *Golden Nugget Motel*, 235 NLRB 1348 (1978); *Trans World Airlines*, 211 NLRB 733 (1974). And the Board will not refer cases where the Board has previously exercised uncontested jurisdiction over the employer. *Teamsters Local 295 (Emery Air Freight Corp.)*, 255 NLRB 1091 (1981); *Dobbs Houses, Inc.*, 183 NLRB 535 (1970), enfd. 443 F.2d 1066 (6th Cir. 1971); *Hot Shoppes, Inc.*, 143 NLRB 578 (1963).

In situations where NMB has previously rejected jurisdiction over an employer, 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); *United Parcel Service*, 318 NLRB 778 (1995).

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, Inc.*, 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)). The NMB has also generally determined it has jurisdiction over companies providing sky cap services. See, e.g., *ServiceMaster Aviation Services*, 325 NLRB 786 (1999); *Aviation Safeguards*, 338 NLRB 770 (2003). The NMB reached the same result concerning a company that provides ramp services to airline carriers (*Swissport USA, Inc.*, 353 NLRB 143 (2003) (two-Member decision)), and a company which leases and operates an airport (*Trans-East Air, Inc.*, 189 NLRB 185 (1971)). See also *Ogden Ground Services*, 339 NLRB 869 (2003) (NMB found jurisdiction but noted it had previously found no jurisdiction over other of the employer's operations); *Chelsea Catering Corp.*, 309 NLRB 822 (1992) (company providing in-flight catering services to airline largely under control of the airline).

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, 18 fn. 6 (1968) (discussing unpublished NMB decision in another case)); and 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)). See also *TNT Skypack, Inc.*, 341 NLRB 62 (1993) (company that contracted with airlines, as shipper, to transport material).

A covered employer's putative joint employer relationship with an air carrier exempt from the Board's jurisdiction does not call the Board's jurisdiction over the employer into question, because the Board does not employ a joint-employer analysis to determine jurisdiction. *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 1 fn. 1 (2016).

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 section 11711.

1-403 Religious Schools

260-6708 et seq.

280-8200 et seq.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (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. Id. at 507.

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.

This does not mean, however, that the Board simply declines jurisdiction over self-identified religious schools and related institutions.

With respect to asserting jurisdiction in cases involving employees of religious schools, the Board has at times drawn a distinction between teachers and other employees. Thus in *Hanna Boys Center*, 284 NLRB 1080 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992), the Board—in asserting jurisdiction over units encompassing clerical employees,

recreation assistants, cooks, helpers, and child-care workers—distinguished between jurisdiction over teachers at religious institutions and other employees of those institutions. Although the Board later characterized *Hanna Boys Center* as involving "a home for troubled boys," see *St. Edmund's High School*, 337 NLRB 1260 (2002) (finding no jurisdiction to process petition covering custodians at parochial school), in *Saint Xavier University*, 365 NLRB No. 54, slip op. at 4–5 (2017), however, the Board stated that it was adhering to precedent—including *Hanna Boys Center*—under which the Board will assert jurisdiction over the nonteaching employees of religious institutions or nonprofit religious organizations unless the employees' actual duties and responsibilities require them to perform a specific role in fulfilling the employer's religious mission. Cf. *Catholic Social Services, Diocese of Belleville*, 355 NLRB 929 (2010) (rejecting employer's contention that it was a school and thus governed by *Catholic Bishop* as applied to such institutions, instead finding it provided social services akin to programs over which the Board has asserted jurisdiction).

As to teachers, before 2014, the test applied in cases involving self-identified religious schools was whether the school had a "substantial religious character" such that Board jurisdiction would present a significant risk of infringing on the employer's First Amendment religious rights. See, e.g., *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987). This test received circuit court criticism, particularly from the D.C. Circuit. See *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir 2002), denying enf. of 331 NLRB 1663 (2000); see also *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985), denying enf. of 273 NLRB 1110 (1984). In *University of Great Falls*, the D.C. Circuit articulated a three-part test, under which the Board should decline jurisdiction if a college or university: (a) holds itself out to students, faculty and the community as providing a religious educational environment, (b) is organized as a nonprofit, and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. See also *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), denying enf. of 350 NLRB No. 30 (2007) (not reported in Board volumes).

Following *University of Great Falls*, initially the Board neither adopted nor rejected the D.C. Circuit's approach, but in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 4–11 (2014), the Board discarded the "substantial religious character test," declined to adopt the *University of Great Falls* approach, and instead set forth a new test under which the Board will not decline jurisdiction over faculty at a college or university that claims to be a religious institution unless the institution demonstrates that (1) it holds itself out as providing a religious educational environment, and (2) it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining that environment. In *Pacific Lutheran* itself, the Board found that the university met the first inquiry but not the second. In two subsequent cases, the Board concluded that the employers had met both parts of the test with respect to some (but not all) of the petitioned-for faculty. See *Saint Xavier University*, 364 NLRB No. 85 (2016) (excluding faculty in the Department of Religious Studies from a unit of contingent faculty); *Seattle University*, 364 NLRB No. 84 (2016) (excluding faculty in the Department of Theology and Religious Studies and the School of Theology and Ministry from a unit of contingent faculty). As indicated above, the Board does not apply *Pacific Lutheran* to nonteaching employees at religious colleges and universities. *Saint Xavier University*, 365 NLRB No. 54, slip op. at 4 (2017).

Occasionally, a school will assert that it is exempt from the Board's jurisdiction pursuant to the Religious Freedom Restoration Act (RFRA). In *Carroll College, Inc.*, 345 NLRB 254 (2005), reaffirmed at 350 NLRB No. 30 (2007) (not reported in Board volumes), enf. denied on other grounds 558 F.3d 568 (2009), the Board clarified that such a claim presents a separate inquiry from *Catholic Bishop*, and thus when such a claim is advanced the Board must separately determine whether requiring an entity to engage in collective bargaining would "substantially burden" its exercise of religion. The Board found the employer in *Carroll College* had not made this showing and asserted jurisdiction. Cf.

University of Great Falls, 331 NLRB 1663 (2000), whose RFRA analysis the *Carroll College* Board disavowed to the extent it conflated the RFRA and *Catholic Bishop* analyses.

The Board has not applied the same type of *Catholic Bishop* analysis applicable to schools to religiously-affiliated health care institutions (see *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 8 fn. 11 (2014)), or to a language school—even though sponsored by the church—when the school was not part of the church's religious mission, but instead was a retail operation operated by a religious institution, over which the Board routinely asserts jurisdiction. *Casa Italiana Language School*, 326 NLRB 40 (1998).

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

1-500 Jurisdiction Declined for Policy Considerations

240-0150

In its discretion, the Board, under Section 14(c)(1) of the Act, is empowered to decline to assert jurisdiction over any labor dispute involving any class or category of employers" where the effect of such dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction, or where, pursuant to *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 684 (1951), it concludes that it would not effectuate the purposes of the Act to assert jurisdiction in a particular case.

The Board has rejected suggestions that it should exercise its discretion to decline jurisdiction over charter schools. *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 9–11 (2016); *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 7–9 (2016).

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, Inc.*, 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) (asserting jurisdiction over unit of foreign nationals working in United States).

In *Herbert Harvey, Inc.*, 171 NLRB 238 (1968), and *National Detective Agencies*, 237 NLRB 451 (1978), the Board stated that it has no jurisdiction over the employees of 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 *Offshore Express*, 267 NLRB 378 (1983) (jurisdiction declined over tugboat operations for the U.S. Navy at Diego Garcia, an island in the British Indian Ocean Territory); *Computer Sciences Raytheon*, 318 NLRB 966 (1995) (declining jurisdiction over American company doing business in Antigua, a sovereign nation, and Ascension, a possession of the United Kingdom); *Range Systems Emergency Support*, 326 NLRB 1047 (1998) (declining jurisdiction over military weapons testing operation in the Bahamas). Compare *Asplundh Tree Expert Co.*, 336 NLRB 1106 (2001) (in unfair labor practice case, asserting jurisdiction over an American firm doing business outside the U.S. on a temporary basis), enf. denied 365 F.3d 168 (3d Cir. 2004). The Board reaffirmed its *Asplundh* holding in *California Gas Transport, Inc.*, 347 NLRB 1313 (2006).

For related discussion see section 1-206.

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. Rules sec. 103.3; see also 38 Fed. Reg. 9507 (Apr. 17, 1973).

This rulemaking determination followed existing Board policy, the Board having concluded that a racetrack operation, 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, Inc.*, 192 NLRB 698 (1971); *Walter A. Kelley*, 139 NLRB 744 (1962); *Meadow Stud, Inc.*, 130 NLRB 1202 (1961); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1960); *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950).

Compare *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. See also *Prairie Meadows Racetrack & Casino*, 324 NLRB 550 (1997) (asserting jurisdiction over casinos affiliated with racetracks); *Empire City at Yonkers Raceway*, 355 NLRB 225 (2010) (advising Board would assert jurisdiction over an operation that had once been primarily a racetrack, but was now primarily a casino as the result of a change in operations including the addition of 2000 slot machines).

See also section 1-313 (Gaming).

1-503 Religious Organizations

280-8660

The Board generally will not assert jurisdiction over nonprofit, religious organizations. *Motherhouse Sisters of Charity*, 232 NLRB 318 (1977); *Board of Jewish Education*, 210 NLRB 1037 (1974). Where a religious organization has commercial operations, and the revenues from such operations are more than a de minimis portion of the employer's revenues, the Board still will not assert jurisdiction unless it is established that the petitioned-for employees spend a substantial amount of their time in activities related to the commercial portions of the employer's operation. *Riverside Church*, 309 NLRB 806 (1992); see also *Faith Center-WHCT Channel 18*, 261 NLRB 106 (1982).

The Board asserted jurisdiction over a corporation performing cleaning and maintenance services for church-operated projects because (1) the employer was not itself a religious institution (although it was founded by the Catholic Church), (2) it did not have a religious mission, and (3) even if it did have a religious mission, there was no showing that the petitioned-for employees perform secular tasks

without which the employer would be unable to accomplish its religious mission. *Ecclesiastical Maintenance Services*, 320 NLRB 70 (1995) and 325 NLRB 629 (1998); 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 distinguished *Ecclesiastical Maintenance* and declined to assert jurisdiction over janitors who were employed by the church and worked at a school that was closely integrated to the mission of the church.

The Board has rejected contentions that asserting jurisdiction over religiously-sponsored colleges and universities would violate the Religious Freedom Restoration Act (RFRA). See *University of Great Falls*, 331 NLRB 1663 (2000); *Carroll College, Inc*., 345 NLRB 254 (2005), reaffirmed at 350 NLRB No. 30 (2007). The Board has rejected a similar RFRA argument with respect to a hospital managed by the Seventh Day Adventist Church. *Ukiah Valley Medical Center*, 332 NLRB 602 (2000).

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

1-504 National Security

280-9700

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 where the Board was confronted with national security contentions that it should decline jurisdiction. Id. at 453–455.

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 over an employer involved in a case currently pending before the agency or court (1) on the basis of its current standards 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); *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 Rules 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). Advisory Opinion proceedings are not designed to resolve disputed issues of fact, and so the Board will dismiss a petition where a State agency asserts that it has no evidence and has not made any factual findings. *DeCoster Egg Farms*, 325 NLRB 350 (1998); see also *Brooklyn Bureau of Community Service*, 320 NLRB 1148 (1996).

The Board will generally not provide the requested advice if there is either a pending representation case (see *Humboldt General Hospital*, 297 NLRB 258 (1989)), or unfair labor

practice case (see *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 Rules 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).

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 Rules section 102.105; *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 Rules section 102.105 are to be distinguished from the procedures available under 5 U.S.C. Section 554(e). See *Wilkes-Barre Publishing Co.*, 245 NLRB 929 (1979); *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, Inc.*, 122 NLRB 121, 123 (1959); *Major League Rodeo, Inc*., 246 NLRB 743, 745 (1979); *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 Cos.*, 160 NLRB 140 (1966).

The *Tropicana* rule is also applicable in unfair labor practice cases. *J.E.L. Painting & Decorating, Inc.*, 303 NLRB 1029 (1991); *Bell Glass Co*., 293 NLRB 700 (1989); *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, Inc.*, 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, Inc.*, 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, 288 fn. 1 (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. See *Idaho State District Court (Cox's Food Center)*, 164 NLRB 95 (1967); see also *Hygienic Sanitation Co.*, 118 NLRB 1030 (1957); *Essex County, Vicinity District Council of Carpenters (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. *Motion Picture Machine Operators 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.

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 a statement describing the delegation to the regional directors pursuant to the amendment of Section 3(b). 26 Fed. Reg. 3911 (May 4, 1961). 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. See generally *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971).

The grant of authority under the amendment to Section 3(b) of the Act was initially challenged in *Wallace Shops, Inc.*, 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. Sec. 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. Sec. 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*, 133 NLRB 36 (1961).

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).

In the absence of a valid quorum of Board members, the delegation of authority to regional directors does not necessarily expire. See *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302 (D.C. Cir. 2015), cert. denied, 137 S.Ct. 473 (2016); see also *UC Health v. NLRB*, 803 F.3d 559 (D.C. Cir. 2015).

SSC Mystic and *UC Health* involved regional director actions subject to Board review. Consent election agreements, however, are not subject to Board review. See section 3-700. In *NLRB v. Bluefield Hospital Co.*, 821 F.3d 534 (4th Cir. 2016), the court rejected a quorum argument that attempted to distinguish between reviewable stipulated election agreements and non-reviewable consent election agreements. In *Hospital of Barstow, Inc. v. NLRB*, 820 F.3d 440 (D.C. Cir. 2016), however, the court remanded a case to the Board to offer an interpretation as to whether a lack of quorum prevents regional directors from exercising their authority in cases involving consent election agreements. On remand, the Board reasoned that in consent elections, the parties' agreement, not the Board's delegation, gives a regional director's decision finality, so the Board accordingly has not delegated final, plenary authority in such instances, and thus a lack of a Board quorum does not affect regional directors' authority in consent election cases. 364 NLRB No. 52 (2016).

For two cases discussing the effectiveness of representation actions taken by a regional director appointed by a Board with a deficient quorum, see *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016), and *ManorCare of Kingston, PA, LLC v. NLRB*, 823 F.3d 81 (D.C. Cir. 2016).

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 review procedures discussed in Chapters 3 and 22.

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; rule on motions to intervene and amend petitions; rule on requests to file briefs in connection with preelection hearings (and on requests for extensions for filing such briefs beyond the time initially granted); pass on rulings made at hearings, including motions to dismiss petitions; rule with respect to showing of interest, waivers, disclaimers, withdrawals, or current charges; and entertain motions for reconsideration. In addition, regional directors have the authority to rule on motions to disqualify a party's counsel due to an alleged conflict of interest. *Supreme Airport Shuttle LLC*, 365 NLRB No. 27 (2017).

The Board's Rules and Regulations were amended to effectuate the terms of the 1961 grant of authority to the regional directors. Subpart D, 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 secs. 102.77(b), 102.80(a), 102.85, and 102.88. Further procedures pertaining to representation issues and the authority of regional directors can be found in Subparts D and E of the Board's Statements of Procedure, sections 101.22 through 101.30. See also Statement of General Course of Proceedings Under Section 9(c) of the Act, 79 Fed. Reg. 74469-74475 (Dec. 15, 2014). The rules specific to representation cases were most recently revised in 2014; many of the forms of regional director authority noted above (and some of those discussed in the following section) are specifically spelled out in the rules.

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 elaborated on the foregoing, or spelled out other specific, forms of authority which may be exercised by the regional directors under the delegation. Some of these are:

1. A regional director may 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).

2. Election arrangements, e.g., dates and places of elections, mail ballots etc., are within the discretion of the regional director. *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954); *Halliburton Services*, 265 NLRB 1154 (1982); *Odebrecht Contractors of Florida, Inc.*, 326 NLRB 33 (1998); *CEVA Logistics U.S. Inc.*, 357 NLRB 628 (2011); see also Rules sec. 102.67(b) (as amended in 2014) (codifying the long-time Casehandling Manual instruction that "[t]he regional director shall schedule the election for the earliest date practicable"); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 206–208 (D.D.C. 2015) (specifically upholding his amendment and the related elimination of the presumptive 25–30 day waiting period between an election's direction and its conduct). This includes the location for a rerun election. See *Austal USA, LLC*, 357 NLRB 329 (2011); *Mental Health Association, Inc.*, 356 NLRB 1220 (2011); *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011). In *Austal*, the Board set out factors regional directors should take into consideration in exercising their discretion with respect to election location. The Board also remanded the case when it was unable to determine whether the regional director actually exercised this discretion.

3. Regional directors have the same authority as the Board to reconsider their decisions. See *Pentagon Plaza, Inc.*, 143 NLRB 1280 (1963); Rules sec. 102.65(e)(1). 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.

4. 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).

5. 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).

6. 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, e,g., *Collins & Aikman Corp*., 143 NLRB 15 (1963).

7. 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).

8. A regional director does not have authority to vary the terms of a Stipulated Election Agreement, absent special circumstances. *T & L Leasing*, 318 NLRB 324 (1995).

9. The 2014 amendments to the Board's election procedures circumscribed regional directors' discretion concerning when to set or to postpone preelection hearings (Rules sec. 102.63(a)(1)), when to set post-election hearings (Rules sec. 102.69(c)(1)(ii)), and whether to continue or to adjourn hearings (Rules sec. 102.64(c)).

10. The Board's 2014 amendments provide that regional directors have discretion to decide the issues to be litigated at the preelection hearing (Rules sec. 102.66(b) and (c)). This discretion includes whether to allow preelection litigation of eligibility or inclusion issues or instead to utilize the Board's long-standing challenged-ballot procedure for disputed individuals (Rules sec. 102.64(a)). See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 195–203 (D.D.C. 2015).

11. The 2014 amendments also grant discretion to regional directors to decide whether to allow briefs following a preelection hearing, and if so, the timing and subjects of those briefs (Rules sec. 102.66(h)), as well as codifying regional directors' discretion to decide whether a petition's processing should be blocked due to allegations that, if proven, would interfere with employee free choice or would be inherently inconsistent with the petition itself (Rules sec. 103.20).

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 & Telegraph Co.*, 136 NLRB 1612, 1613 (1962).

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.

The Board's policy is articulated in Rules section 102.67(g) (formerly 102.67(f)), which 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 has clarified that "related" unfair labor practices are not limited to refusal-to-bargain cases, but "in appropriate circumstances" may include unfair labor practice cases arising under other sections of the Act. *Hafadai Beach Hotel*, 321 NLRB 116, 117 (1996) (precluding relitigation of jurisdiction in 8(a)(1) and (3) case); *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997) (precluding relitigation of supervisory status in 8(a)(5) and (1) case). Cf. *Premier Living Center*, 331 NLRB 123, 123 fn. 5 (2000) (precluding relitigation of supervisory status in a subsequent unit clarification proceeding). Compare *Union Square Theatre Management*, 326

NLRB 70 (1998), later affirmed at 327 NLRB 618 (1999) , in which the Board permitted relitigation of employee status in a subsequent 8(a)(l) and (3) case, stating that a regional director's prior determination in a representation case is "not binding" on the Board in such cases. Even then, however, a regional director's finding in a representation 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 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, Inc.*, 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, Inc.*, 326 NLRB 1379 (1998); *Rapera, Inc.*, 333 NLRB 1287 (2001).

In addition, a regional director's decision is final, and thus may have preclusive effect, if no request for review is made. See *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017).

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*, 192 A.2d 707, 714 (1963).

2-500 Board Review

393-6048

393-6081-4000 et seq.

Prior to the 2014 amendments to the Board's election procedures, the regional director could transfer a case to the Board for initial decision at any time before decision; whether to make such a transfer was left to the regional director's determination (although the Board policy was to discourage these transfers), and it was within the discretion of the regional director to inform the parties of the reason for transferral. Following the 2014 amendments, the Board's rules no longer provide for such transfers. The Board's reasoning for eliminating this practice was that it was little used, ill advised, a source of delay, and that Board decisions are generally improved by obtaining the initial decision of the regional director. See 79 Fed. Reg. 74308, 74309, 74403 (2014).

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 action, unless otherwise ordered by the Board. Prior to the 2014 amendments, absent an order from the Board, the ballots in question would be impounded due to a pending request for review, but this is no longer the case. Instead, a party may now, in a motion for extraordinary relief, request that the ballots be impounded; the impoundment provision of the amended rules covers other forms of extraordinary relief (such as expedited consideration or a stay of some or all proceedings) as well. See Rules sec. 102.67(j)(1). A request for extraordinary relief will only be granted upon a clear showing that it is necessary under the particular circumstances of the case. Rules sec. 102.67(j)(2).

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.

Pursuant to the 2014 amendments, a request for review can be filed at any point following the action for which review is requested until 14 days after a final disposition of the proceeding by the regional director. (A final disposition occurs when the regional director dismisses the petition, issues a certification of representative or certification of election results, or orders challenged ballots to be opened and counted. See GC Memo 15-06, "Guidance Memorandum on Representation Case Procedure Changes" at 27 (April 6, 2015).) Note that this differs markedly from the Board's prior practice, which required that a request for review be filed within 14 days of the regional decision of which the filing party sought review.

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 also section 3-940, which discusses relitigation, and section 3-950, which discusses the exhaustion of administrative remedies.

See Rules sec. 102.67(c)–(g).

*** * * ***

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

Initial Representation Case Procedures—Chapter 3
Election Procedures—Chapter 22
Conduct of Elections—Section 24-400
Objection Procedures—Section 24-100

3. INITIAL REPRESENTATION CASE PROCEDURES

This chapter constitutes a 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 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.

The Board's Rules pertaining to election procedures were most recently amended in 2014. See 79 Fed. Reg. 74308 (Dec. 15, 2014). In some instances, the amendments introduced new procedural requirements, or significantly modified others. Where relevant, the foregoing discussion notes the changes introduced by the amendments, as well as the Board's prior practice. The amendments became effective on April 14, 2015. In addition to the supplementary information on the amendments contained in the Federal Register, see GC Memo 15-06, "Guidance Memorandum on Representation Case Procedure Changes" (Apr. 6, 2015), for more information on the amendments.

The 2014 amendments were upheld in the face of various challenges in *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016), and *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

3-100 Filing of Petition and Notification

316-6700 et seq.

393-1000 et seq.

393-6007-1700 to 8700

Pursuant to the 2014 amendments to the Board's election procedures, a petitioner must, among other things, file the petition with the regional office and serve the petition on the parties named therein. The petition filed with the regional office must be accompanied by a certificate of service. The petitions served on the other parties must be accompanied by the Board's description of procedures in representation cases and a blank Statement of Position form. A petition may be filed electronically. See Rules sec. 102.60.

Prior to the 2014 amendments, a petitioner would file the petition with the regional office; the regional office would send the petitioner a written acknowledgement of the filing, and would give the employer and all other interested parties written notification.

The various types of petitions are discussed in chapter 4. The required contents of most types of petitions are set forth at Rules section 102.61.

The following are regarded as interested parties:

a. The petitioner;

b. The employer (if other than the petitioner);

c. Any other employer which might be a joint employer or the operator of a leased department in case involving a retail store where there are leased departments;

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 employees of the employer;

f. Any labor organization whose name appears as an interested party in any prior case involving the same employees which was closed within 2 years; and

g. Any individual or labor organization which is party to a currently existing or recently expired collective-bargaining agreement covering other employees of the employer in

other related units, when such information is made known to the region.

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

Proof of interest must be submitted to the regional office along with the petition (but shall not be served on the other parties). See Rules sec. 102.61(a)(7), (c)(8). This proof may take the form of electronic signatures. 79 Fed. Reg. 74331 (Dec. 15, 2014); GC Memo 15-08, "Guidance Memorandum on Electronic Signatures to Support a Showing of Interest" (Oct. 26, 2015). Prior to the 2014 amendments, the showing of interest was required to 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 for more complete information on the showing of interest.

3-300 Information Requested of Parties

378-2878

The information that a petitioner is required to include with the petition is set out in Rules section 102.61 (this is true both before and after the 2014 amendments).

Employers are requested to submit commerce data, a payroll list of employees in the proposed unit, and, when appropriate, information concerning striking employees eligible to vote under Section 9(c)(3). See CHM secs. 11008.4, 11024, 11702.1.

The Board has long required that, should an election be agreed to or directed, the employer is required to provide a list of names and addresses of the eligible voters (*Excelsior* list). Under the 2014 amendments, it remains the case that a voter list containing certain voter information must be submitted following approval of an election agreement or direction of election, but the provisions pertaining to this list and the time in which it must be provided have been modified. For further discussion of the prior practice regarding the *Excelsior* list, and current practice regarding the voter list as set forth in Rules sections 102.62(d) and 102.67(l), see sections 23-510 and 24-309 below. It bears emphasis here, however, that under the amendments, an employer's failure to timely serve the voter list (in the proper format) on the petitioner is grounds for setting aside the election whenever proper objections are filed, and the amendments do not grant regional directors the discretion to excuse such a failure. *URS Federal Services, Inc.*, 365 NLRB No. 1 (2016).

See CHM section 11009 for the contents of the initial letter to the employer in an RC case.

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. CHM sec. 11008.4.

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. CHM sec. 11011. For appeals from such dismissals, see Rules section 102.71 and CHM sections 11100–11104.

See also section 8–200.

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 for additional discussion of amending the petition.

3-700 Election Agreements

393-6054 et seq.

There are three types of election agreements, two of which obviate the necessity for a preelection hearing.

In a full consent election agreement with final regional director determinations of pre- and postelection disputes (see Rules section 102.62(c) and Form NLRB-5509), a preelection hearing is conducted but the parties agree that the regional director's resolution of all disputes—whether pre- or postelection—are final. Thus, the parties agree to waive their right to request Board review.

In a consent election agreement with final regional determinations of post-election disputes (see Rules section 102.62(a) and Form NLRB-651), the parties agree to waive a preelection hearing and further agree that the regional director's resolution of post-election disputes will be final (i.e., the parties also waive the right to request Board review of the regional director's post-election determinations).

In a stipulated election agreement with discretionary Board review (see Rules section 102.62(b) and Form NLRB-652), the parties waive a preelection hearing, but retain the right to request Board review of the regional director's resolution of postelection disputes. See section 23-530 for a discussion of the principles the Board follows when called on to interpret parties' stipulations.

Consistent with the statements present in the rules, the Board has held that it will not review the merits of a regional director's determination under a consent election agreement absent a showing of fraud, misconduct, or such gross mistake as to imply bad faith or that the regional director's rulings were arbitrary or capricious. See *Pierre Apartments*, 217 NLRB 445, 446 (1975); *Vanella Buick Opel, Inc.*, 196 NLRB 215, 216 and fn. 4 (1972).

The regional director must approve an election agreement, and retains the authority to revoke his or her approval. CHM sec. 11095. After an agreement has been approved, a party can withdraw from the agreement only if the regional director approves such withdrawal, and the regional director will only approve a withdrawal upon an affirmative showing of unusual circumstances. *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 (1979); CHM sec. 11097.

Once approved, the terms of an election agreement are normally not subject to change. See *Tekweld Solutions*, 361 NLRB No. 18, slip op. at 2 fn. 8 (2014), enfd. 639 Fed. Appx. 16 (2d Cir.

2016).

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

See generally CHM sections 11084-11098 for a discussion of election agreement procedures.

See also section 2-100 for discussion of a regional director's delegated authority with respect to election agreements in the absence of a Board quorum.

3-800 Notice of Hearing and Preelection 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). See Rules sec. 102.63(a). In such circumstances a hearing is held. See 79 Fed. Reg. 74399 (Dec. 15, 2014) ("In short, if the parties do not enter into an election agreement, there will be a preelection hearing. But Section 9(c) does not require a full evidentiary hearing in every case. Rather, it requires 'an appropriate hearing'"). Compare *Mueller Energy Services*, 323 NLRB 785 (1997) (hearing not required where regional director did not have reasonable cause); *Premier Living Center*, 331 NLRB 123, 125 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). Consistent with *Croft Metals*' concern for adequate hearing preparation, Rules section 102.63 (as amended in 2014) guarantees employers (and all non-petitioning parties) at least 8 days' notice of the hearing. See 79 Fed. Reg. 74371 (Dec. 15, 2014).

Under the 2014 amendments, a "Notice of Petition for Election" is included when the region serves the notice of hearing on the parties. The employer is required to post the Notice of Petition for Election and maintain the posting until it is replaced by a Notice of Election (see section 22-106), if an election is ultimately held. Failure to post the Notice of Petition for Election may be grounds for setting aside an election when proper and timely objections are filed. Rules sec. 102.63(a)(1) and (2).

A regional director may use a Notice to Show Cause procedure to assist in expediting a representation case, but the Board has nevertheless directed a hearing where a request for review of the regional director's administrative dismissal without a hearing (pursuant to the Notice to Show Cause procedure, under which the regional director had accepted only documentary evidence) involved an issue of first impression and "where the determination . . . relies so heavily on the full factual context of the relationship." See *Amerihealth Inc.*, 326 NLRB 509 (1998).

Ordinarily a hearing will be conducted even if the issue is one that the Board is currently reconsidering in another case. But in rare circumstances, the Board may stay a hearing in one case involving an issue it is currently reconsidering in another case. See *Pratt Institute*, 339 NLRB 971 (2003) (staying hearing where it would be long and expensive and potentially unnecessary depending on resolution of issue in a case currently before the Board).

3-810 Statement of Position

393-6068-9000

The 2014 amendments to the Board's election procedures introduced a statement of position requirement, which largely requires parties to share information that parties had previously only been requested to share in order to facilitate entry into election agreements. Under Rules section 102.63(b), following issuance of a notice of hearing in an election case, the employer (and potentially other parties, depending on the type of election sought) is required to file with the regional director and serve on the other parties a Statement of Position, which ordinarily must be received by the regional director and the other parties at noon on the business day before the opening of the hearing, although the regional director may extend the time for filing and serving under certain circumstances.

Rules section 102.63(b) sets forth the required contents of the Statement of Position. Generally speaking, a party that is required to file and serve the Statement of Position is required to set forth its position on the Board's jurisdiction, the appropriateness of the petitioned-for unit, any election bars it asserts are present, the eligibility of any individuals it intends to contest at the preelection hearing, the type, date, time, and location of the election, and any other issues it intends to raise at the preelection hearing. In addition, the employer must provide, among other things, requested information concerning its relation to interstate commerce and a list of employees in the petitioned-for unit and in any alternative unit it proposes; this list is distinct from the voter list the employer must also provide under Rules sections 102.62(d) and 102.67(l).

Under Rules section 102.66(b), a regional director may also permit a Statement of Position to be amended in a timely manner for good cause.

Under Rules section 102.66(d), a party is precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its Statement of Position, with the exception of raising or presenting evidence relevant to the Board's statutory jurisdiction. See *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip op. at 1 fn. 1 (2017) (stating that under Rules sec. 102.66(d), regional director correctly precluded employer from litigation appropriateness of petitioned-for unit based on employer's failure to timely serve statement of position on the petitioner). Further, under Rules section 102.66(b), the regional director remains free to direct receipt of evidence concerning any issue as to which he or she determines that record evidence is necessary.

Under these provisions, it was accordingly error for a regional director to accept an untimely filed Statement of Position into evidence (rather than place it in the rejected exhibit file) and to permit the late-filing union from litigating the contract-bar issue raised therein. But in that case, due to the mention of the potential contract bar by the other parties independent of the union's Statement of Position, the regional director remained free to direct receipt of evidence on the contract-bar issue and ultimately to dismiss the petition based on contract-bar principles. *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016).

3-820 Nature and Objective of the Preelection Hearing

393-6068-0100

The preelection 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 whether a question of representation exists. See Rules sec. 102.64(a). The hearing is investigatory, not adversarial. See CHM sec. 11181.

A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified (or is currently recognized by the employer as) the bargaining representative. Accordingly, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. Rules sec. 102.64(a). Note that this differs from the Board's prior practice as articulated in *Barre-National, Inc*., 316 NLRB 877 (1995), which held that a hearing officer erred by excluding evidence concerning individuals' eligibility to vote at the preelection hearing. See also *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999). In adopting the 2014 amendments, the Board overruled these cases. See 79 Fed. Reg. 74385–74386 (2014).

See section 3-850 on the obligation of parties to take positions on issues. See section 22-118(a) for a discussion of subpoenas in representation cases.

3-830 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 regarding the issues that the regional director has determined will be litigated at the preelection hearing. See Rules secs. 102.66(c) and 102.64(b). If necessary to achieve this purpose, the hearing officer has the power to call, examine, and cross-examine witnesses, and to introduce into the record documentary and other evidence. See Rules sec. 102.66(a); CHM sec. 11188,1; *Mariah, Inc*., 322 NLRB 586, 586 fn. 1 (1996). 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 3–850. For discussion of burdens of proof in representation cases see NLRB Hearing Officers Guide.

As indicated above, the 2014 amendments to the Board's election procedures indicate that the hearing officer, at the direction of the regional director, has the authority to limit evidence to the question of the existence of a question concerning representation. See Rules sec. 102.64(a). GC Memo 15–06, "Guidance Memorandum on Representation Case Procedure Changes" (Apr. 6, 2015), discusses which issues can be litigated and which issues can be deferred for postelection proceedings, if necessary. See particularly pages 12–19.

3-840 Intervention

393-2001-2083

Any person desiring to intervene must make a motion for intervention. The regional director, or the hearing officer at the direction of the regional director, may by order permit intervention. See Rules sec. 102.65(b). Motions for intervention are ordinarily 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. See CHM secs. 11022, 11194.4. 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 an AC hearing. (For additional discussion on intervention, see section 5–640.)

3-850 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. Sequestration does not apply in preelection representation cases. *Fall River Savings Bank*, 246 NLRB 831, 831 fn. 4 (1979). 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.

Prior to the 2014 amendments, the Board indicated that issues had to be raised and fully litigated at a hearing in order for them to be resolved (see *Seattle Opera Assn.*, 323 NLRB 641, 641 fn. 1 (1997)), expected parties to take positions on the matters raised at the hearing (see *Mariah, Inc.*, 322 NLRB 586, 586 fn. 1 (1996)), and warned that failure to take a position 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 see *Allen Health Care Services*, 332 NLRB 1308 (2000) (distinguishing *Bennett Industries* where no presumption or burden of proof was present).

The 2014 amendments have codified these requirements. Pursuant to Rules section 102.66(b),

issues in dispute are identified at the start of the hearing. After a Statement of Position is received in evidence and before introduction of further evidence, all other parties are required to respond to each issue raised in the statement. The regional director directs the hearing officer concerning the issues to be litigated at the preelection hearing. Rules sec. 102.66(c). Rules section 102.66(b) further provides that the hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that the regional director has discretion to direct the receipt of evidence concerning any issue as to which the director determines that record evidence is necessary. See also *Brunswick Bowling Products, LLC*, 364 NLRB No. 96, slip op. at 2–3 (2016). As discussed in section 3-810, Rules section 102.66(d) precludes a party from raising any issue it has not raised in its Statement of Position. The explanation for the 2014 amendments states that these requirements are consistent with *Bennett Industries* and *Allen Health Care Services*. See 79 Fed. Reg. 74364–74366, 74399–74400 (2014).

Rules section 102.66(f) sets forth the procedures for seeking subpoenas, as well as the grounds on which a regional director or hearing officer may grant a petition to revoke. 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. And in *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 1 fn. 1 (2016), the Board found a hearing officer had not abused her discretion by closing a hearing despite the possibility that "a few" responsive documents remained unproduced, given that the additional documents were of marginal probative value.

The hearing officer rules on all motions made at the hearing or that are referred to the hearing officer, except that the hearing officer rules on motions to intervene and amend the petition only as directed by the regional director, and all motions to dismiss the petition must be referred to the regional director (or the Board, after the record has been transferred to the Board). See Rules sec. 102.65(a); see also Rules sec. 102.65(b) (provisions for appealing hearing officer rulings).

Prior to the close of the hearing, the hearing officer takes the parties' positions on election details. See Rules sec. 102.66(g). A party is entitled, upon request, to a reasonable period at the close of the hearing for oral argument. See Rules sec. 102.66(h).

A petitioner is permitted to amend the petition during the hearing, subject to the approval by the regional director. See CHM sec. 11493. If the regional director grants an amendment of the petition, there may be good cause to amend the Statements of Position in response to these new matters. See CHM sec. 11204. A withdrawal request submitted at the hearing is referred to the regional director, who will consider the request. See CHM sec. 11209.

3-860 Hearing Officer's Analysis

393-7055

The hearing officer, after the close of the hearing, may submit an analysis of the record to the regional director, but in doing so makes no recommendations. See Rules sec. 102.66(i).

3-870 Briefs

393-7066-2000 through 9000

Rules section 102.67(a) of the Board's Rules and Regulations previously provided that any party desiring to submit a posthearing brief to the regional director could file an original and one copy thereof within 7 days after the close of the hearing (with provision for extension of time to file).

The 2014 amendments (Rules section 102.66(h)) now provide that posthearing briefs shall be filed only upon special permission of the regional director, and within the time and addressing subjects permitted by the regional director. When permitted, copies of the brief must be served on

all other parties.

3-880 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. All motions, or answers to motions, filed after the close of the hearing are filed directly with the regional director. An election agreement may be entered even after hearing.

3-890 Regional Director's or Board Decision and Request for Review

393-6081-2000 et seq.

393-6081-6000 et seq.

393-7077-4000 et seq.

The Regional Director may dismiss a petition, remand it for further hearing, or direct an election.

Rules sections 102.67(c)–(d) and 102.71 provide for requests for review of regional director's decisions. Where a party is challenging a regional director's factual findings, its request for review must specifically cite to the transcript. See Rules sec. 102.67(e). If the request for review is challenging an administrative or prehearing dismissal based on factual grounds, it must be accompanied by documentary evidence previously submitted to the regional director. See Rules sec. 102.71(a)(3); *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998). The filing of such a request or the grant of review does not, "unless specifically 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 Rules sec. 102.67(c); *Mercedes-Benz of Orlando*, 355 NLRB 592 (2010); *Fred Meyer Stores, Inc*., 355 NLRB 629 (2010). A party may request extraordinary relief, including a stay, under Rules section 102.67(j), however. See also section 2-500.

Arguments advanced in a request for review that were not presented to the regional director are not properly before the Board. See Rules sec. 102.67(e); *Pulau Corp.*, 363 NLRB No. 8, slip op. at 1 fn. 1 (2015).

Regional directors and the Board have long exercised discretion in deciding whether to rule on all eligibility and inclusion issues presented prior to the election or whether to permit some individuals to vote under challenge and to rule on their eligibility, if necessary, following the election. See, e.g., *Silver Cross Hospital*, 350 NLRB 114, 116 fn. 10 (2007). As discussed above at section 3-820, the 2014 amendments to the Board's election procedures now explicitly state that such issues "ordinarily" need not be decided prior to the election. Rules sec. 102.64(a). The amendments declined to adopt a proposal that would have required hearing officers to bar litigation of disputes concerning the eligibility or inclusion of individuals comprising less than 20 percent of the unit. Instead, regional directors have been granted discretion to decide whether such issues should be litigated prior to the election, although the Board clarified that "regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on preelection eligibility and inclusion issues amounting to less than 20 percent of the proposed unit." 79 Fed. Reg. 74388 fn. 373 (Dec. 15, 2014). Further, the Board "expect[s] regional directors to permit litigation of, and to resolve, such questions when they might significantly change the size or character of the unit" (thus addressing concerns expressed by certain courts of appeal in this area). Id. at 74390. For more on this, see id. at 74383–74393, and GC Memo 15-06, "Guidance Memorandum on Representation Case Procedure Changes," (Apr. 6, 2015).

In those situations in which the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, and that these individuals' eligibility will be resolved, if necessary, following the election. Rules sec. 102.67(b). Cf. *Orson E. Coe Pontiac-GMC Trucks, Inc.*, 328 NLRB 688, 688 fn. 1 (1999) (if Board decides to vote contested classification or individual under challenge, any ensuing certification will note that the position is neither included nor excluded).

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, Inc.*, 771 F.2d 1294 (9th Cir. 1985); *NLRB v. Parsons 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). See also 79 Fed. Reg. 74389–74390 (Dec. 15, 2014). The Board has held that its *Sonotone* procedures (see sec. 21-400, below) 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 the Board distinguished these cases from the "vote and impound procedures of the Board."

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 regional 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 Health Partners*, 331 NLRB 783 (2000).

A Board decision will ordinarily apply "to all pending cases in whatever stage." *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (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 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

817-0550-3325

A Board order in a representation case is not a final order and is therefore not subject to judicial review directly. *American Federation of Labor 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, 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, 1188 fn. 2 (1994), rejecting an employer defense that the union was dilatory in seeking bargaining.

3-911 Review by Employers

393-7077-4067-6700

817-6833-5600

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(g) of the Board Rules; *Shadow Broadcast Service*, 323 NLRB 1002 (1997); *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*, 318 NLRB 337 (1995). Similarly, 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 postelection 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, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001).

3-912 Review by Unions

578-8050

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. *Department & Specialty Store Local 1265 (Oakland G. R. Kinney Co.)*, 136 NLRB 335 (1962); *Lawrence Typographical Union No. 570 (Kansas Color Press, Inc.)*, 158 NLRB 1332 (1966); *Teamsters Local 327 (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, Inc.*, 130 NLRB 279 (1961); *Cooper Supply Co*., 120 NLRB 1023 (1958); *Capitol Records, Inc.*, 118 NLRB 598 (1957); *Virginia Concrete Corp*., 338 NLRB 1182 (2003). But in *All County Electric Co.*, 332 NLRB 863 (2000), the Board stated that the mere fact that alter ego determinations often arise in an unfair labor practice context does not mean that the Board is precluded from making such a determination in connection with resolution of a representational issue.

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).

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 sections 24-231 and 24-250.

3-930 Effect of Violence on a Board Certification

625-6687-8100

In *Laura Modes Co.*, 144 NLRB 1592, 1595–1596 (1963), the Board found that a company violated Section 8(a)(5) by refusing to recognize the union, but declined to give the union an affirmative bargaining order due to the union's resort to violence. This is regarded as an "extraordinary sanction." *New Fairview Hall Convalescent Home*, 206 NLRB 688, 689 (1973), enfd. 520 F.2d 1316 (2d Cir. 1975), cert. denied 423 U.S. 1053 (1976). In *Overnite Transportation Co.*, 333 NLRB 472 (2001), a refusal-to-bargain case, the Board entertained an argument that, under *Laura Modes*, the union's violence warranted declining to enforce a certification, but ultimately concluded that the union's behavior did not warrant such sanction.

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"). See also section 2-400.

3-950 – Exhaustion of Administrative Remedies

An employer who fails to present an issue to the Board, absent extraordinary circumstances excusing its failure to present the issue, cannot then raise the issue to a court. In *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364 (11th Cir. 2012), the court rejected a due process argument that the employer failed to present to the Board, and further found that the asserted futility of presenting the issue to the Board did not show extraordinary circumstances.

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 rescission of a union-shop authorization. In addition, the Section 102.60(b) of the Board's Rules and Regulations 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. This chapter does not 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 separately in chapter 11.

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 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 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, LLC*, 357 NLRB 645 (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.

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 *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.

The requirements and procedures for UC petitions are set out in section 102.61(d) of the Board's rules and CHM sections 11490–11498.

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.

Note that a 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. *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521 (1964).

The requirements and procedures for AC petitions are set out in Rules section 102.61(e) and CHM sections 11490–11498. See also section 11-100.

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

See discussion in sections 5-610, 7-150, and 22-123.

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." 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 (1962); *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, 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.*, 68 NLRB 516 (1946); *River City Elevator Co*., 339 NLRB 616 (2003); *General Dynamics Corp*., 175 NLRB 1035 (1969); *Allied Chemical Corp*., 165 NLRB 235, 235 fn. 2 (1967); *NLRB v. J. I. Case Co*., 201 F.2d 597 (9th Cir. 1953); *Gaylord Bag Co.*, 313 NLRB 306 (1993).

After an election has been held, the adequacy of the showing of interest is irrelevant. *Gaylord Bag Co*., 313 NLRB 306, 307 (1993); *City Stationery, Inc*., 340 NLRB 523, 525 (2003).

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

Under the 2014 amendments to the Board's election procedures, the showing must be submitted with the petition. See Rules sec. 102.61; see also section 5-200 for a discussion of timing with respect to a showing of interest provided by facsimile. Previously, the Board required that the showing 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. *Mallinckrodt Chemical Works*, 200 NLRB 1 (1972); *Excel Corp.*, 313 NLRB 588 (1993). With respect to this prior practice, in *Rappahannock Sportswear Co.*, 163 NLRB 703 (1967), the Board refused to permit a contract signed after the petition was filed (and of which filing the employer was aware), but before the showing was submitted, to bar the petition.

In situations where an employer's voluntary recognition of another union is asserted as a bar to a petition, the Board will not find a bar if the petitioner's 30-percent showing of interest predates the voluntary recognition. *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844, 846 (1996). For more on recognition bar principles, see section 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, 1285 (1975). Cf. *Brown Transport Corp*., 296 NLRB 1213 (1989). See also section 5-800.

Signatures or cards constituting the showing of interest must be dated, but if undated cards or

signatures are submitted, the party submitting them may establish the dates of signing by affidavit. *Dart Container Corp.*, 294 NLRB 798 (1989). The affidavit itself must be timely, and in *Metal Sales Mfg.*, 310 NLRB 597 (1993), the Board stated that this requirement is satisfied if the affidavit is filed within a reasonable time after the timely filed 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 Power 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, 28 fn. 2 (1950). A recently expired contract may also serve as such evidence. *Bush Terminal Co.*, 121 NLRB 1170, 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. Cf. *Towmotor Corp.*, 182 NLRB 774 (1970). 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, 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, Inc.*, 120 NLRB 1147, 1150 fn. 7 (1958); see also *Halben Chemical Co.*, 124 NLRB 1431 (1959).

Under the 2014 amendments to the Board's election procedures, evidence supporting the showing of interest requirement may be submitted electronically or by facsimile, although where such evidence includes signatures the original signatures must also be received by the regional director no later than 2 days after the electronic or facsimile filing. Rules sec. 102.61(f).

5-210 Construction Industry

324-4020-7000

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 objective considerations is required for an RM election petition filed by the signatory employer. Id. at 1385 fn. 42. 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).

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

120.

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); *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, 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, 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, Inc.*, 120 NLRB 495, 495 fn. 1 (1958); *Stickless Corp.*, 115 NLRB 979, 980 (1956).

For further discussion of joint representation, including the effect of conduct inconsistent with an intent to serve as joint representative, see section 6-370.

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, although the Board will not reject a showing of interest merely because an inducement has been offered in exchange for signing authorization cards. See *Potomac Electric Power Co.*, 111 NLRB 553, 556 (1955) (key case with petitioner's name offered to those who signed cards was a legitimate campaign tactic). These issues are not, as noted earlier, litigable. See CHM section 11028 et seq. for procedures for challenging the showing of interest. 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, Inc.*, 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, Inc.*, 106 NLRB 179 (1953); *Gaylord Bag Co.*, 313 NLRB 306 (1993). The Board has characterized this policy as a "bright line rule" of excluding all cards directly solicited by a supervisor. *Dejana Industries, Inc.*, 336 NLRB 1202 (2001).

In *Catholic Community Services*, 254 NLRB 763, 763 fn. 2 (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, but no supervisors solicited cards. 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).

The Board has found that an individual's participation in obtaining authorization cards did not taint or otherwise cast doubt on the uncoerced nature of the showing of interest where the individual was not a supervisor within the meaning of the Act "during the period in which the authorization cards were solicited." *L. A. Benson Co.*, 154 NLRB 1371, 1371 fn. 1 (1965).

See also sections 24-110 and 24-330 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, 235 fn. 2 (1967); *Vent Control, Inc.*, 126 NLRB 1134 (1960).

Cards signed for more than one labor organization may be counted in determining the 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 Borough 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), explaining that an affidavit filed within a reasonable time of the showing itself will be found timely.

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, 226 fn. 4 (1946); see also *Northern Trust Co.*, 69 NLRB 652, 654 fn. 4 (1946) (10 months); *Covenant Aviation Security, LLC*, 349 NLRB 699 (2007).

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, 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, 653 (1949). In *Big Y Foods, Inc.*, 238 NLRB 855, 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, 17 fn. 3 (1999).

The Board will accept a showing of interest gathered prior to the time a question concerning representation could be raised. *Covenant Aviation Security, LLC*, 349 NLRB 699, 703 (2007), citing *Sheffield Corp*., 108 NLRB 349, 350 (1954).

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, 1171 fn. 3 (1960); see also *Transcontinental Bus System*, 119 NLRB 1840, 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, 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, 1101 fn. 4 (1962); *Barber-Colman Co.*, 130 NLRB 478, 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.*, 116 NLRB 1489 (1957).

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, Inc*., 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, 197 fn. 4 (1961).

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).

If the petitioned-for unit is a multifacility unit, there is no requirement that a showing of interest be demonstrated at each of the facilities, so long as there is a 30 percent showing in the entire unit sought. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 5 (2016).

Cards signed by discharged employees who are alleged discriminatees, with a pending unfair labor practice charge regarding their discharges, are properly included in the count of proposed unit members for showing of interest purposes. *City Stationary, Inc.*, 340 NLRB 523 (2003).

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

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

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*, 349 NLRB 699, 703 (2007), 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 *General Electric Co.*, 89 NLRB 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 the discussion of 8(f) agreements in section 5-210.

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 (see CHM section 11023 and cases cited therein):

(a) An intervenor with at least a 30 percent showing of interest will be treated as a cross-petitioner and may urge the adoption of an appropriate unit differing in substance from that

claimed appropriate by a petitioner or employer. See *Great Atlantic & Pacific Tea Co.*, 130 NLRB 226, 227 (1961).

(b) An intervenor with at least a 10 percent showing is a full intervenor, may "block" any election agreement, and may participate fully in any hearing.

(c) An intervenor with a showing of less than 10 percent—even one designation—is a participating intervenor, but may not "block" an election agreement, or any other stipulation for any reason. A participating intervenor may, however, participate in the hearing and should be accorded a place on the ballot.

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, 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 an intervenor possesses a petitioner's interest and wishes to proceed to an election, the Board will deny the original petitioner's withdrawal request. *Seaboard Machinery Corp.*, 98 NLRB 537 (1951). Similarly, if a petitioner lacks a sufficient interest in the unit found appropriate, but an intervenor possesses a petitioner's showing of interest, the petition will not be dismissed. If the original petition possesses *no* showing of interest in the unit found appropriate, it will not be placed on the ballot. Id.

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 executed a contract after the petition was filed. The additional showing was required to be submitted timely but was not required to predate the execution of the contract.

See also section 3-840.

5-700 Relation to Bargaining Unit

324-0100

324-4001

In all cases, the showing of interest must relate to the bargaining unit involved. *Esso Standard Oil Co.*, 124 NLRB 1383, 1385 (1959) (Board dismissed petition where addition of necessary employees to the petitioned-for unit meant that neither the petitioner nor an intervenor had a sufficient showing of interest, and a second intervenor did not desire an election in the unit found appropriate).

5-800 Date for Computation

324-4090

Normally, the computation as to the showing of interest is made 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, Inc.*, 117 NLRB 662 (1957). This is true even in industries when there is fluctuating employment. *Higgins, Inc*., 111 NLRB 797, 798 fn. 2 (1955); *Trenton Foods, Inc.*, 101 NLRB 1769, 1770 (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 sec. 11031.1; see also *Brown Transport Corp.*, 296 NLRB 1213 (1989); *Casale Industries*, 311 NLRB 951 (1993); *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, 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) (dismissing petition where there were no employees when the petition was filed or at the time of the hearing). 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, 1433 (1959); see also *Bowman Transportation, Inc.*, 120 NLRB 1147, 1150 fn. 7 (1958) (contract executed in violation of Section 8(a)(2) cannot be used to intervene); *Share Group, Inc*., 323 NLRB 704 (1997) (showing of interest must postdate notice posting period set forth in informal settlement agreement settling 8(a)(2) charge to which union submitting showing was a signatory).

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 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, 1398 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); *Pearl Packing Co.*, 116 NLRB 1489 (1957); see also *Columbia Records*, 125 NLRB 1161 (1960); *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); *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 (1999). A party must raise such allegations in a timely manner, and having raised such allegations, the party will usually need to submit supporting evidence within 2 business days after raising them. See CHM

sec. 11028.1 (citing *General Dynamics Corp.*, 213 NLRB 851 (1974), and *Globe Iron Foundry*, 112 NLRB 1200 (1955)). Similarly, any attack on the genuineness of signatures (i.e., an allegation of forgery) should be made by submitting supporting evidence to the regional director within 7 days after raising the issue. See CHM sec. 11029.1 (citing *Globe Iron Foundry*, 112 NLRB 1200 (1955).

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, e.g., *Perdue Farms, Inc.*, 328 NLRB 909 (1999); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Georgia Kraft Co.*, 120 NLRB 806 (1958). However, an administrative investigation will not be made unless the allegations of invalidity are accompanied by supporting evidence. *Goldblatt Bros., Inc.*, 118 NLRB 643, 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*, 112 NLRB 1200 (1955). 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 quantitative sufficiency must be made timely, viz. "only at or around the petition is filed." *Community Affairs, Inc*., 326 NLRB 311 (1998).

The administrative investigation 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, 700 fn. 5 (1950); *White River Lumber Co.*, 88 NLRB 158, 158 fn. 3 (1950); *Clarostat Mfg. Co.*, 88 NLRB 723, 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." A proposed bargaining representative accordingly must meet this standard in order to obtain an election and/or certification. This chapter treats the statutory definition of "labor organization," as well as an additional statutory limitation with respect to representatives of statutory guards. 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 *Roytype, Division of Litton*, 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

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.

The Board has also expressed this policy as a three-part test: (1) employees must participate; (2) the organization must exist, at least in part, for the purposes of "dealing with" the employer; and (3) these dealings must concern "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *Vencare Ancillary Services*, 334 NLRB 965, 969 (2001); *Electromation, Inc.*, 309 NLRB 990, 994 (1992). Cf. *Coinmach Laundry Corp.*, 337 NLRB 1286, 1287 (2003).

The Board has elaborated on the phrase "dealing with" in several cases. See *Electromation, Inc.*, 309 NLRB 990, 994 (1992); *Vencare Ancillary Services*, 334 NLRB 965, 969 (2001); *Syracuse University*, 350 NLRB 755 (2007); see also *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210–214 (1959) ("dealing with" is not limited to "bargaining with").

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. *Roytype, Division of Litton*, 199 NLRB 354 (1972); *Michigan Bell Telephone Co.*, 182 NLRB 632 (1970); see also *Comet Rice Mills*, 195 NLRB 671, 674 (1972).

Similarly, a lack of structural formality—for instance, the absence of a constitution or bylaws, or a failure to collect dues or initiation fees—does not disqualify a union as a labor organization, provided it was established for the purpose of representing its membership, and intends to do so if certified. *Butler Mfg. Co.*, 167 NLRB 308 (1967); see also *Yale University*, 184 NLRB 860 (1970); *Stewart-Warner Corp.*, 123 NLRB 447 (1959); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

On a related note, the Board often rejects certain types of arguments against labor organization status as premature. For example, in *Butler Mfg. Co.*, 167 NLRB 308 (1967), the Board stated it was premature to consider an intervenor's argument that the petitioner was not 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. 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. See also *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, 72 fn. 2 (1968); 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.

When confronted with a dispute over whether a union meets the statutory definition of labor organization, the Board may require affirmative evidence that the asserted labor organization exists for the purposes set forth in the statute, and in the absence of credible evidence the Board will find that the statutory definition has not been met. See *Harrah's Marina Hotel*, 267 NLRB 1007 (1983). The petitioner in *Harrah's Marina Hotel* had asserted that the petitioner was not a labor organization due to the criminal activities of its officers. The Board will not, however, revoke a certification simply based on the asserted underworld ties of a labor organization. See *Mohawk Flush Doors, Inc.*, 281 NLRB 410 (1986); *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851–852 (1962).

If a union otherwise qualifies as a "labor organization" within the meaning of the Act, the fact that the petitioner's organizers were members of a former independent union before its affiliation with an intervening union and the fact that the petitioner adopted a name similar to the former union does not preclude the petitioner from filing a petition. *East Dayton Tool Co.*, 194 NLRB 266 (1972). Similarly, 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 (LMRDA) 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 LMRDA 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. *Caesar's Palace*, 194 NLRB 818, 818 fn. 5 (1972); see *Meijer Supermarkets, Inc.*, 142 NLRB 513, 513 fn. 3 (1963); *Harlem River Consumers Cooperative*, 191 NLRB 314, 316 (1971).

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 *Independent Metal Workers Local 1 (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, Inc.)*, 210 NLRB 943 (1974), where the Board ordered two locals—that separately represented male and female unit employees—to merge and admit into membership any unit employee without regard to sex.

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).

See also *Town & Country*, 194 NLRB 1135 (1972) (holding an intervenor, in the absence of a showing that it restricted membership on religious grounds or would not accord adequate representation to all unit employees, was qualified to act as representative).

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." 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.*, 81 NLRB 374 (1949).

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); see also *Wackenhut Corp.*, 169 NLRB 398 (1968) (dismissing petition based on petitioner's indirect affiliation). The Board will, however, refuse to litigate the collateral issue of whether employees represented by the union elsewhere are guards. *Rapid Armored Corp*., 323 NLRB 709, 711 (1997).

But a union which accepts its own nonguard employees into the union is not precluded from representing a unit of guards, because the purpose of Section 9(b)(3) is to prevent a guard union from bargaining on behalf of nonguard members (and a union cannot be certified to act as a representative for collective bargaining as to its own employees). *Sentry Investigation Corp.*, 198 NLRB 1074, 1075 (1972). Municipal police officers are not considered "employees other than guards" for purposes of disqualifying a union to represent guards, because they are not "employees" within the meaning of Section 2(2) of the Act. *Children's Hospital of Michigan*, 299 NLRB 430 (1990). Thus, the mere fact that a 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 *University of Chicago*, 272 NLRB 873 (1984), the Board reversed its practice of permitting mixed guard-nonguard unions 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 mixed guard-nonguard union to enjoy the benefits of the Board's unit clarification procedures. Thus, in *Brink's Inc.*, 272 NLRB 868 (1984), the Board dismissed a UC petition noting that, although an employer can legally recognize a mixed guard-nonguard union, the 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. *Magnavox Co*., 97 NLRB 1111 (1951). The Board has applied this standard with substantial latitude, particularly when guard unions were in their formative stages. *Wells Fargo Guard Services*, 236 NLRB 1196 (1978). Thus, no indirect affiliation was found when 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)). See also *Wackenhut Corp. v. NLRB*, 178 F.3d 543 (D.C. Cir. 1999).

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); *Brink's Inc.*, 274 NLRB 970 (1985). Compare *Lee Adjustment Center*, 325 NLRB 375 (1998), where indirect affiliation was severed before bargaining.

The noncertifiability of an alleged mixed guard-nonguard 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). 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; see also 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.

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, Inc.*, 75 NLRB 1269 (1948); *"M" System, Inc.*, 115 NLRB 1316, 1316 fn. 2 (1956); *Community Service Publishing, Inc.*, 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 (or whose constitution does not specifically encompass) 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, Inc.*, 136 NLRB 1609 (1962); *Big "N," Department Store No. 307*, 200 NLRB 935, 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 Truck & Bus Service Co.*, 257 NLRB 343 (1982), in which the petition was dismissed because the union's membership was expressly limited to "public employees." See also *Children's Hospital of Michigan*, 317 NLRB 580, 582 (1995), in which a constitution's language limiting membership to guards rendered the union in question certifiable as the bargaining representative of a guard unit.

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 alleged to contain unlawful provisions precluding it from representing employees. *Ditto, Inc*., 126 NLRB 135, 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." *Imperial Reed & Rattan Furniture Co.*, 117 NLRB 495, 496 (1957); see also *Gemex Corp.*, 120 NLRB 46 (1958) (charges of exploiting workers and violating AFL–CIO code of ethics are internal union affairs with which Board will not concern itself).

However, when, despite the facade of a separate identity (including a constitution and bylaws), 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 *National Electric Coil*, 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.

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, Inc.*, 127 NLRB 979 (1960); *E. Anthony & Sons, Inc.*, 147 NLRB 204, 205 fn. 2 (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 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, 559 fn. 2 (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 & Paper Co.*, 152 NLRB 973 (1965)), nor independent contractors who, by definition, are not employees within the meaning of the Act (Id.). 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.

That said, 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, Inc.*, 88 NLRB 1296 (1950); *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 also *Power Piping Co.*, 291 NLRB 494 (1988), in which the Board set forth the applicable standard for determining whether an employer unlawfully interfered with administration of a union through supervisory participation in intraunion affairs.

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, Inc.*, 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, 3 (1980), this test for

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 bargaining 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." Id. See also *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, Inc.*, 127 NLRB 92, 92 fn. 2 (1960); *John Liber & Co.*, 123 NLRB 1174, 1174 fn. 1 (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, Inc.*, 119 NLRB 332 (1958); see also section 7-310; *Canter's Fairfax Restaurant, Inc.*, 309 NLRB 883, 885 fn. 2 (1992).

6-340 Nature of Representation

339-2500

The bona fides of labor organization status is not affected by the fact that both office or plant 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, 51 fn. 1 (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, Inc.*, 179 NLRB 447 (1969); *Douglas Oil Co.*, 197 NLRB 308 (1972). See also *NLRB v. David Buttrick Co.*, 361 F.2d 300 (1st Cir. 1966), in which the union through its affiliates was potentially a business rival of the employer.

To establish a disabling conflict of interest, a party asserting the conflict bears the burden of showing a "clear and present" danger that the conflict will prevent the union from vigorously representing the employees in the bargaining process, and this burden is "a heavy one." *Supershuttle International Denver, Inc.*, 357 NLRB 68, 69 (2011). Thus, 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); *IFS Virgin Island Food Service*,

215 NLRB 174 (1974).

Applying these principles, the Board has occasionally found a disqualifying conflict of interest. See, e.g., *Garrison Nursing Home*, 295 NLRB 122 (1989) (conflict based on debtor-creditor relationship between the employer and a high official of the petitioner's union); *Centerville Clinics, Inc.*, 181 NLRB 135 (1970) (finding, in unfair labor practice case, that union was not competent to represent employer's employees due to union's relationship with the employer); *Welfare & Pension Funds*, 178 NLRB 14 (1969) (petitioner disqualified where employer operated funds for benefit of petitioner's sister locals, and parent union's constitution provided parent the right to take over affairs of petitioner if best interests of parent so required). Cf. *Harlem River Consumers Cooperative*, 191 NLRB 314 (1971) (declining to find disqualifying interest based on business agent's financial interests that required him to deal with the employer in a capacity other than as union agent, but stating that union would not be certified as representative so long as individual in question remained a business agent in the area). Compare *Teamsters Local 2000*, 321 NLRB 1383 (1996) (distinguishing *Harlem River Consumers*).

By contrast, the Board has rejected conflict-of-interest contentions in a variety of contexts. See, e.g., *Detroit Newspapers*, 330 NLRB 505, 505 fn. 2 (2000) (no conflict where "interim" newspaper published by strikers would shut down once the strike was settled); *Associated Dry Goods Corp.*, 150 NLRB 812, 813 fn. 4 (1965) (no conflict where 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); *Supershuttle International Denver, Inc.*, 357 NLRB 68 (2011) (no conflict based on relationship between union and nonprofit taxicab cooperative that was not a direct competitor of the employer); *Russ Togs, Inc*., 187 NLRB 134 (1971) (no inherent conflict based on petitioner's affiliation with association with disqualifying conflict, although Board cautioned it could revisit the certification if it subsequently appeared that the petitioner was not acting independently of its disqualified affiliate); *American Arbitration Assn.*, 225 NLRB 291 (1976) (no conflict based on petitioner's membership in the employer, a public service nonprofit organization dedicated to resolution of disputes, including labor-management disputes); *Aetna Freight Lines, Inc.*, 194 NLRB 740 (1972) (no evidence supported employer's argument that petitioner was associated with organization, which may have had some members who competed with the employer).

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*).

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 subcontractor's employees and had previously grieved about the subcontracting. The Board in *CMT* did, however, note two cases in which the Board found a disabling conflict due to a union's overt act showing it was working at cross-purposes with its duty to represent the subcontractor's employees. See *Catalytic Industrial Maintenance*, 209 NLRB 641 (1974); *Valley West Welding Co*., 265 NLRB 1597 (1982). Compare *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41 (1st Cir. 2002) (no disabling conflict simply because union belonged to umbrella organizations that had expressed opposition to contracting-out of public employees' work to private sector employees union sought to represent).

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 (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).

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); *S. D. Warren Co.*, 150 NLRB 288, 290 fn. 3 (1965); *Musical Arts Association v. NLRB*, 466 Fed. Appx. 7 (D.C. Cir. 2012).

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, 898 fn. 3 (1961); *Mid-South Packers, Inc.*, 120 NLRB 495, 495 fn. 1 (1958). But 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 and warrants dismissal of the petition (or that election be vacated where the unions appeared jointly on the ballot). *Automatic Heating & Service Co.*, 194 NLRB 1065 (1972); *Stevens Trucking, Inc.*, 226 NLRB 638 (1976); *Suburban Newspaper Publications*, 230 NLRB 1215 (1977).

6-380 Effect of Union Violence

625-6687-8100

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 "relief is not routine." *Overnite Transportation Co. (Dayton, Ohio Terminal)*, 334 NLRB 1074, 1077 (2001). Indeed, 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 Co.*, 144 NLRB 1592, 1596 (1963),, the Board did not preclude union representation of the unit employees involved, however. The union there had attained its bargaining status through unfair labor practice proceedings and the Board withheld a bargaining order until the union won a Board election.

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 request for recognition which the employer has refused. Shortly after the adoption of the 1947 amendments to the Act, however, the Board rejected a contention that Section 9(c)(1) of the amended Act made such a request and refusal mandatory prior to the filing of a petition. A prior request and refusal, it was decided, is not a jurisdictional prerequisite to proceeding on the merits in a representation case. *Advance Pattern Co*., 80 NLRB 29 (1949). Consequently, the petition form need not show that recognition was requested (*Girton Mfg. Co*., 129 NLRB 656, 656 fn. 3 (1961)), or that it was denied (*Plains Cooperative Oil Mill*, 123 NLRB 1709, 1709 fn. 1 (1959); see also *Seaboard Warehouse Terminals*, 123 NLRB 378, 378 fn. 1 (1959)). The Board reaffirmed *Advance Pattern* in *Aria*, 363 NLRB No. 24 (2015), and observed that nothing in the 2014 amendments to the Board's election procedures purported to alter its longstanding practice in this area.

The request for recognition need not take a particular form, so long as the petitioning union's status as a bargaining representative is disputed as of the date of the hearing. *J. I. Case Co.*, 80 NLRB 223, 223 fn. 1 (1948). The filing of a petition itself is deemed a request for recognition. *Gary Steel Products Corp*., 127 NLRB 1170, 1170 fn. 2 (1960); *National Welders Supply Co*., 145 NLRB 948 (1964). Similarly, a union's claim for recognition need not be made in any particular form to permit an employer to file an RM petition. *American Lawn Mower Co*., 108 NLRB 1589, 1589–1590 (1954).

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, 641 fn. 1 (1958); *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, 338 fn. 2 (1964); see *Duke Power Co*., 173 NLRB 240 (1969); *Jack L. Williams, DDS,*, 219 NLRB 1045 (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 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, 383 fn. 1 (1951); *National Electric Coil*, 199 NLRB 1017, 1017 fn. 4 (1972); *Jefferson City Cabinet Co.*, 120 NLRB 327 (1958).

The *General Box* exception does not apply, however, if there is a showing that the effect of a petitioner's course of action has been to establish that there was a purpose other than certification behind the filing of the petition, and in such a situation regular contract-bar rules apply. See *National Electric Coil*, 199 NLRB 1017, 1018–1019 (1972) (concluding petitioner sought election for purpose of bringing in intervenor as bargaining agent for the employees, not to obtain the benefits of certification for itself).

General Box does not permit a currently-certified incumbent to file a petition seeking a new election, at least not where the petition is filed a little more than a year after the certification and the parties remain engaged in the bargaining process envisaged by the Act (even though they have not concluded a contract). *Seven Up Bottling Co.*, 222 NLRB 278 (1976).

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 representation 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, as opposed to seeking to represent the employees in a separate unit. *Woolwich, Inc*., 185 NLRB 783 (1970). The Board will, however, proceed to consider the accretion issue. Id.; see also *United Hospitals, Inc.*, 249 NLRB 562, 563 (1980); *Valley Harvest Distributing*, 294 NLRB 1166, 1167 (1989) (in both cases, the Board dismissed RM petitions based on *Woolwich*—although neither case involved grievance arbitrary machinery—and then considered an accretion contention). And if there is an arbitration award, the Board will consider the parties' contentions with respect to the accretion issue and the effect of the award (and thus will in effect treat an RM petition as a UC

petition). See *Woolwich, Inc.*, 185 NLRB 783 (1970); see also *Williams Transportation Co*., 233 NLRB 837 (1977) (considering issue in context of employer filing UC petition instead of complying with arbitral award). In *Ziegler, Inc*., 333 NLRB 949 (2001), the Board considered an accretion issue in the face of a pending grievance that could result in an incongruous arbitral award.

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 Supermarkets*, 143 NLRB 256, 258–259 (1963), the Board held that it had the authority to defer to an arbitrator's award in a representation matter, provided that the dispute involved is limited to a question of contract interpretation (and that the arbitrator's decision was not repugnant to the Act). See also *Carey v. Westinghouse*, 375 U.S. 261, 270 fn. 7 (1964); *St. Mary's Medical Center*, 322 NLRB 954 (1997); *Advanced Architectural Metals*, 347 NLRB 1279 (2006); *Hershey Foods Corp*., 208 NLRB 452, 457 (1974); *Commonwealth Gas Co*., 218 NLRB 857, 858 (1975).

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*., 233 NLRB 837 (1977); *Tweddle Litho, Inc.*, 337 NLRB 686 (2002). But it is not the case that the Board will never defer to arbitration in cases involving representation issues. *McDonnell Douglas Corp.*, 324 NLRB 1202, 1204 (1997). Not unlike when the Board is considering whether to defer to an arbitral award, the Board has stated that deferral to the arbitration process is appropriate when resolution of the issue turns solely on the proper interpretation of the parties' contract. Id. at 1205; see also *St. Mary's Medical Center*, 322 NLRB 954 (1997) (deferring meaning of exclusion language in recognition clause to arbitration); *Appollo Systems, Inc.*, 360 NLRB 687 (2014) (deferring where dispute turned on whether there was a valid agreement between the employer and union as to employees' unit status, what the terms of any such agreement were, and whether the employer breached the agreement); *Central Parking System*, 335 NLRB 390 (2001) (deferring question of whether agreement contained "after-acquired" clause).

In *Verizon Information Systems*, 335 NLRB 558 (2001), the Board concluded that a petition should be dismissed even though it raised unit scope issues because the parties had previously expressly agreed that the issue would be decided by an arbitrator, and the petitioning union had invoked that agreement. The Board held that the union was therefore estopped from utilizing the Board's processes, as it was attempting to take advantage of the benefits of the agreement while seeking to avoid its commitment to arbitrate the unit scope issue. In subsequent cases, the Board has emphasized that *Verizon Information Systems* turned on the parties' express agreement. See *Tweddle Litho, Inc.*, 337 NLRB 686 (2002); *Postal Service*, 348 NLRB 25 (2006).

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

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). 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.

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); *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 secs. 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); *Trailmobile, Division of Pullman, Inc*., 221 NLRB 954 (1975). See also section 10-600, discussing expanding units.

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, Inc.*, 150 NLRB 1679 (1965); *Wilson & Dean Construction Co*., 295 NLRB 484 (1989).

Similarly, the seasonal nature of a business does not preclude a question concerning representation, but the election may be postponed until a time when the employee complement is at its peak. See *Mark Farmer Co.*, 184 NLRB 785 (1970); *Baugh Chemical Co.*, 150 NLRB 1034 (1961). For more on election timing in seasonal industries, see section 20-370.

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 uncertified 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 sec. 102.77; Statements of Procedure, secs. 101.22-101.25; CHM secs. 10244.3 and 11312.1(k).

The basic ground rules and conditions necessary to trigger the 8(b)(7)(C) expedited election machinery are spelled out in *Hod Carriers Local 840 (C. A. Blinne Construction)*, 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 *Retail Wholesale Union District 65 (Eastern Camera & Photo Corp.)*, 141 NLRB 991, 999–1000 (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 *C. A. 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. *C. A. Blinne*, 135 NLRB 1153, 1157 fn. 10 (1963).

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 representation case procedures and do not serve as a defense to 8(b)(7)(C) picketing which has exceeded 30 days. See *Local Joint Exec. Bd. Hotel Workers (Crown Cafeteria)*, 135 NLRB 1183, 1185 fn. 4 (1962); *Chicago Printing Pressmen's Union No. 3 (Moore Laminating, Inc.)*, 137 NLRB 729, 732 fn. 6 (1962).

For other material on Expedited Elections, see sections 5-610 and 22-123.

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, 847 (1961); *Bowman Transportation, Inc.*, 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, Inc.*, 122 NLRB 801, 802 (1959); *Rusty Scupper*, 215 NLRB 201 (1974)), including picketing for an 8(f) agreement (*Elec-Comm, Inc.*, 298 NLRB 705, 706 fn. 5 (1990)), or a demand for a new contract (*Mastic Tile Corp.*, 122 NLRB 1528, 1529 fn. 2 (1959)). Picketing for an 8(f) agreement is distinguished from a mere request that an employer sign an 8(f) agreement, which does not amount to a present

demand for recognition. *Albuquerque Insulation Contractor*, 256 NLRB 61 (1981); *PSM Steel Construction*, 309 NLRB 1302, 1303–1304 (1992); *Western Pipeline, Inc*., 328 NLRB 925, 927 (1999).

But the union conduct in question must constitute a *present* demand for recognition. *Martino's Complete Home Furnishings*, 145 NLRB 604, 607 (1963). The Board has held that informational picketing, although it may be conducted with a representational objective, does not constitute such a present demand for recognition. *Windee's Metal Industries*, 309 NLRB 1074, 1074–1075 (1992). Nor does area standards picketing. *New Otani Hotel & Garden*, 331 NLRB 1078, 1079 (2000); *Old Angus Restaurant*, 165 NLRB 675 (1967). Similarly, picketing and boycotts, accompanied by requests for a neutrality card check agreement (which also disclaim making any claim for recognition), do not constitute a present demand for recognition and thus do not warrant processing an RM petition. *New Otani Hotel & Garden*, 331 NLRB 1078 (2000); *Brylane, L.P.*, 338 NLRB 538 (2002). If, however, such conduct occurs in conjunction with other actions or statements establishing that the union's real object is to obtain immediate recognition, the Board will find a present demand for recognition. *New Otani Hotel & Garden*, 331 NLRB 1078, 1079 (2000).

For a discussion of conduct allegedly constituting a demand for recognition following a union's disclaimer of interest in representing the employees involved, see section 8-100.

A work assignment dispute does not 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, 783 fn. 1 (1958).

In *Kingsport Press, Inc.*, 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, Inc.*, 142 NLRB 1093 (1963), found that the petition raised a question concerning representation.

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. In *Levitz Furniture Co.*, 333 NLRB 717, 717 (2001), the Board defined the standard for filing an RM petition in these circumstances as a "good-faith reasonable *uncertainty* (rather than *disbelief*)" that a majority of unit employees continue to support the union. The Board offered two examples of cases in which an employer had not established good-faith uncertainty. See *Henry Bierce Co.*, 328 NLRB 646 (1999), enfd. in relevant part 234 F.3d 1268 (6th Cir. 2000); *Scepter Ingot Castings*, 331 NLRB 1509 (2000). In *ADT LLC*, 365 NLRB No. 77, slip op. at 4–6 (2017), the Board held that an employer's reorganization of its operations following merger with a purchased company, such that the currently-represented technicians were now a minority of all the employer's technicians, did not furnish the requisite good-faith reasonable uncertainty where the union had made no demand for recognition of the unrepresented technicians, nor had the employer provided any evidence of loss of support in the historic unit. The Board commented that although the historic unit was perhaps no longer appropriate due to the merger and reorganization,

the issue was not one of continuing appropriateness, but only whether an election was appropriate under Section 9(c)(1)(B). Id., slip op. at 5.

Before *Levitz Furniture*, the Board had 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). And before *U.S. Gypsum*, an employer-petitioner had to show only that the union had claimed representative status in the unit and that the employer had questioned it. Note that prior to *Levitz Furniture*, the Board had applied the same standard for filing RM petitions and withdrawing recognition. *Levitz Furniture* abandoned this practice by lowering the standard for filing an RM petition and raising the standard for withdrawing recognition (to an "actual loss of majority"). 333 NLRB at 725. See also *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 364–366 (1998) (discussing the Board's prior "unitary standard" for RM petitions, withdrawal of recognition, and polling).

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*, 333 NLRB at 726. Note that an employer who claims to have evidence of actual loss of majority during the pendency of an RD petition cannot suspend bargaining pending resolution of the representation issue while continuing to recognize the union and abide by an expired agreement. See *T-Mobile USA, Inc.*, 365 NLRB No. 23 (2017).

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 RM petition is supported by objective evidence that reliably indicates that a majority of employees opposed the incumbent union. See CHM sec. 11042.

Once an incumbent union has accepted a contract offer, the employer cannot challenge its majority status based on an alleged good faith doubt. *Auciello Iron Works*, 317 NLRB 364, 374 (1995). See also Chapter 9, which discusses contract bar principles.

7-230 Accretions

316-3301-5000

347-8020-8067

420-2360

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); *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); *Martin Marietta Co.*, 270 NLRB 821 (1984); *F.H.E. Services*, 338 NLRB 1095 (2003).

Accretion analysis is inapplicable when the unit is functionally described, i.e., defined by the work performed. See *The Sun*, 329 NLRB 854 (1999); *Archer Daniels Midland Co.*, 333 NLRB 673 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166, 1168 fn. 9 (2001).

Accretion analysis also does not apply if a new classification performs the same basic functions that a unit classification historically had performed, because in such a situation 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, 1366 (2001).

Nor does the accretion doctrine apply where the employee group sought to be accreted may separately constitute an appropriate bargaining unit. *Passavant Retirement & Health Center*, 313

NLRB 1216 (1994).

Accretion is more fully discussed in section 12-500. See also sections 12-600 and 21-500.

7-240 Changes in Affiliation

316-3390

385-2525

In *NLRB v. Financial Institution Employees of America Local 1182 (Seattle-First)*, 475 U.S. 192, 198–200 (1986), 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. Section 11-100, below, 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, 52–53 (1987); *Western Commercial Transport*, 288 NLRB 214, 216–218 (1988); *City Wide Insulation*, 307 NLRB 1, 3–4 (1992); *Service America Corp.*, 307 NLRB 57, 59–61 (1992); *Mike Basil Chevrolet*, 331 NLRB 1044 (2000); *Avante at Boca Raton, Inc.*, 334 NLRB 381 (2001).

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 (Stanford Hospital)*, 355 NLRB 353, 356 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), incorporated by reference at 356 NLRB 2 (2010).

Disaffiliation of a union from the AFL–CIO does not, standing alone, create a question concerning representation. See *Laurel Baye Healthcare of Lake Lanier, LLC*, 346 NLRB 159, 160 (2007); *New York Center for Rehabilitation Care*, 346 NLRB 447 (2006).

7-250 Employer Waiver

347-4040-5080

347-4080-6775

775-8701

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 section 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, Inc.*, 106 NLRB 826, 827 fn. 1 (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); *Harter Equipment*, 293 NLRB 647, 647 fn. 4 (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, 1634 (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.

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

See section 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); *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. *Campbell Soup Co.*, 111 NLRB 234, 235 (1955).

The "existing unit" may not always correspond to the unit initially recognized or certified. 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).

Conversely, when a long, continuous pattern of bargaining between a union and an employer bring about an effective merger of individually certified units into a multiplant contractual unit, the Board will dismiss a petition for a decertification election in one of the originally certified units. *General Electric Co*., 180 NLRB 1094 (1970); *Green-Wood Cemetery*, 280 NLRB 1359 (1986); *Wisconsin Bell*, 283 NLRB 1165 (1987); *Albertson's, Inc.*, 307 NLRB 338 (1992). But see *Duke Power Co.*, 191 NLRB 308, 312 (1971) (directing separate elections where insufficient time had elapsed since certification or recognition of the separate units to warrant the units had been "irrevocably amalgamated" into the larger collective-bargaining unit); *West Lawrence Care Center*, 305 NLRB 212, 215 (1991) (permitting individual election after balancing brief identity as multiemployer unit against earlier long history of individual bargaining). See also *Food Fair Stores*, 204 NLRB 75 (1973) (permitting individual election at store, even though employer had recognized it as an accretion to an existing multistore

unit, given absence of evidence showing it had been effectively merged into the existing unit).

Generally, a decertification petition for a single-facility location will be dismissed if that location's bargaining history has occurred within a multilocation unit for more than a year. *Arrow Uniform Rental*, 300 NLRB 246, 247 and fn. 10 (1990). For a multiemployer unit, a decertification petition may be processed for an individual employer who has timely withdrawn from the multiemployer association. Id. Where a multilocation employer has bargained on a multilocation basis within a multiemployer association, and has timely withdrawn from the association, the multilocation bargaining history will ordinarily remain determinative (and a decertification petition for a different unit will be dismissed), provided the multilocation unit is one which the Board would find appropriate in an initial unit determination. Id. at 248. Compare *Albertson's Inc*., 273 NLRB 286 (1984) (permitting election in single store unit, following employer's timely withdrawal from multiemployer association, given that most recent multistore unit would not have been found appropriate in an initial unit determination).

When the union is the currently recognized majority representative of a mixed unit of guards and nonguards, a unit limited to guards constitutes the appropriate unit in a decertification election, because Section 9(b)(3) prohibits the Board from deciding that a unit of guards and nonguards is appropriate, and following the general rule concerning existing units would, in effect, constitute an acceptance of the appropriateness of the mixed unit.. *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, 244 (1995) (dismissing petition on various grounds, including that it was unclear whether employees sought were the only professionals and thus whether they constituted an appropriate unit by themselves).

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*, 198 NLRB 342 (1972) (excluding supervisors).

7-340 Certification not a Prerequisite

355-3301

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, Inc.*, 183 NLRB 991 (1970).

7-400 Effect of Delay and Turnover

393-7077-6050

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, Inc.*, 120 NLRB 388, 391–392 (1958); *Rochelle's Restaurant*, 152 NLRB 1401, 1402–1403 (1965); *Gazette Printing Co.*, 175 NLRB 1103 (1969). In *International Paper*, 325 NLRB 689 (1998), the Board suggested that the request to withdraw must be "sincere 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, Inc.*, 244 NLRB 555 (1979); *Ogden Enterprises Ltd.*, 248 NLRB 290 (1980). See also *Windee's Metal Industries*, 309 NLRB 1074, 1076 (1992) (no disclaimer needed where no claim to recognition has been made).

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, 701 (1961); see also *Electrical Workers Local 58 (Steinmetz Electrical)*, 234 NLRB 633 (1978) (applying same principle in unfair labor practice case). In making such an inquiry, the Board has frequently found that a purported disclaimer could not be accepted at face value, given subsequent inconsistent conduct. See, e.g., *Holiday Inn of Providence-Downtown*, 179 NLRB 337, 338 (1969) (subsequent demand, picketing, and other conduct); *Peninsula General Tire Co.*, 144 NLRB 1459, 1462 (1963) (subsequent picketing tantamount to demand); *Rusty Scupper*, 215 NLRB 201 (1974) (allegedly informational picketing was in fact recognitional and inconsistent with disclaimer); *McClintock Market*, 244 NLRB 555, 556 (1979) (continued picketing apparently recognitional); *Ogden Enterprises, Ltd.*, 248 NLRB 290 (1980) (picketing that was by inference recognitional); see also *Denny's Restaurant, Inc.*, 186 NLRB 48, 49 fn. 12 (1970) (in finding inconsistent conduct, Board rejected contention that withdrawal or dismissal of employer-filed 8(b)(7)(C) charges precluded such a finding).

As indicated above, the effectiveness of a disclaimer often arises in the context of picketing. In this regard, the Board has stated that, if there is recognitional picketing immediately prior to a disclaimer, and picketing continues or resumes after the disclaimer for an allegedly different 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.*, 175 NLRB 1103, 1104 (1969)). For further discussion of hiatus, see *Philadelphia Building Trades Council (Altemose Construction)*, 222 NLRB 1276, 1280–1281 (1970), and *Electrical Workers Local 453 (Southern Sun*), 242 NLRB 1130, 1131 (1979).

Thus, for instance, where a union informed the employer that its picketing was in support of a demand for recognition it had made 3 months before, made a disclaimer 2 days later, but continued picketing with no interruption and only slightly modified the picket signs' wording, the union's "entire course of conduct" was inconsistent with its expressed disclaimer. *Capitol*

Market No. 1, 145 NLRB 1430, 1432 (1964).

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, informational 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 *Old Angus Restaurant*, 165 NLRB 675 (1967).

Similarly, picketing for reinstatement does not necessarily have a recognitional objective (and thus is not inherently inconsistent with a disclaimer), see *Auto Workers Local 254 (Fanelli Ford)*, 133 NLRB 1468 (1961), but under certain circumstances picketing for reinstatement may be found to nevertheless have a recognitional purpose, rendering a disclaimer ineffective. *Gazette Printing Co.*, 175 NLRB 1103 (1969); see also *Automobile Workers, Local 55 (Don Davis Pontiac)*, 233 NLRB 853 (1977).

Likewise, area standards picketing is not necessarily recognitional, see *McClintock Market*, 244 NLRB 555, 556 (1979), but the Board has found picketing recognitional and a disclaimer ineffective where a union alleged that its picketing was to protest an employer's substandard wages and working conditions, but the union at no time had inquired into these subjects. *Peninsula General Tire Co*., 144 NLRB 1459 (1963).

Publicity picketing, or picketing aimed only at organizing the employees with the hope of eventually succeeding and then obtaining recognition, is also not necessarily inconsistent with a disclaimer of a *present* claim for recognition. *Martino's Complete Home Furnishings*, 145 NLRB 604 (1963). 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. Id. at 607–608. 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).

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)(1) 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.

A contracting union's valid disclaimer removes that contract as a bar to an election. *American Sunroof*, 243 NLRB 1128 (1979); *VFL Technology Corp.*, 332 NLRB 1443 (2000). Compare *Mack Trucks*, 209 NLRB 1003 (1974) (contract remained bar where disclaimer was result of collusive agreement between contracting union and second union seeking an election); *Gate City Optical Co*., 175 NLRB 1059 (1969) (contract remained bar where contracting union was defunct, but no disclaimer was present); *East Mfg. Corp.*, 242 NLRB 5 (1979) (disclaimer ineffective and contract remained bar where disclaimer was based on unit employees' known disaffection). For further discussion of this issue, see chapter 9.

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); *Texas Bus Lines*, 277 NLRB 626, 632–633 (1985). The Board does not treat mere nonappearance at a hearing as a disclaimer, however. See *McClintock Market*, 244 NLRB 555, 556 fn. 5 (1979); *Brazeway, Inc.*, 119 NLRB 87, 88 fn. 3 (1958);

O'Connor Motor, Inc., 100 NLRB 1146, 1146 fn. 1 (1952); *Felton Oil Co*., 78 NLRB 1033, 1034 (1948).

8-200 Withdrawal

332-5000 et seq.

Prior to the transfer of the record in 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 the record 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 sec. 102.60(a).

The Board's Casehandling Manual states that a regional director's "general policy should favor the effectuation of a petitioner's genuine voluntary desire to terminate the proceeding," although a regional director should withhold approval if approving the withdrawal would result in a situation that would run counter to the purposes of the Act. CHM sec. 11110.

A request to withdraw will generally be granted without prejudice if made before approval of an election agreement or the close of a hearing. CHM sec. 11111.

After the approval of an election agreement or the close of a hearing, but before the election, a request to withdraw may be approved, although such approval may be with prejudice. If a petitioning union is the sole union involved, a request to withdraw the petition will be approved, but with 6 months' prejudice to the petitioner's filing another petition. See *Sears, Roebuck & Co.*, 107 NLRB 716 (1954); CHM sec. 11112.1(a). If the petitioning union is not the sole union involved, and an intervening union possesses (or within a reasonable period can obtain) a cross-petitioning showing of interest (i.e., 30 percent), the original petition will be permitted to withdraw from the proceeding (with 6 months' prejudice), but the petition itself will not be withdrawn and an election will proceed. *Carpenter Baking Co*., 112 NLRB 288, 289 (1955); see also CHM sec. 11112.1(b). If the petitioner is an employer seeking an RM petition, it may withdraw the petition without prejudice, unless a union (other than the certified incumbent) opposes withdrawal, in which case withdrawal will not be permitted (regardless of the opposing union's showing of interest). *International Aluminum Corp.*, 117 NLRB 1221 (1957); CHM sec. 11112.2. And if the petitioner is an RD petitioner, he or she may withdraw the petition without prejudice, unless an intervenor (other than a certified or recognized incumbent union) possesses a petitioner's showing of interest and wishes to proceed to an election, in which case withdrawal is not permitted. CHM sec. 11112.3.

In the event an election is directed in a substantially different unit from that sought by the petitioner, a withdrawal request is generally approved without prejudice if made before the election. The request will be approved with prejudice if certain conditions are present. CHM sec. 11113; see also *Stock Building Supply*, 337 NLRB 440 (2002).

After an election, a request to withdraw will not be approved if it appears the intent of the withdrawal is to circumvent the 1-year election bar set forth in Section 9(c)(3) of the Act. *Transportation Maintenance Services*, 328 NLRB 691 (1999). The withdrawal may be with prejudice if challenges are pending. CHM sec. 11116.2. If objections are pending, the request will not normally be approved, although a regional director has the discretion to approve a request in the face of pending objections under some circumstances. See CHM sec. 11116.3; *Baltimore Gas & Electric Co.*, 330 NLRB 3 (1999) (approving withdrawal where petitioner agreed in writing not to file a petition seeking another election to be held less than a year after the first). And if an election has been set aside based on a petitioner's objection, a request to withdraw the petition will ordinarily be approved without prejudice. CHM sec. 11116.4; see also *Mercy General Hospital*, 336 NLRB 1047 (2001) (approving withdrawal following direction of second election upon a showing parties had entered settlement agreement under which the petitioner agreed to withdraw the instant petitions).

In instances where the Board directs an election based on an RM petition that asserts that

employees in two previous separate units (represented by different unions) are now in a combined unit, the Board has provided that either or both unions may withdraw from the election within 10 days of the Board's decision, and that if both withdraw, the RM petition will be dismissed (although the petition can be reinstated if either or both unions claim to represent the employees in the combined unit within 6 months of the date of dismissal). *Westinghouse Electric Corp*., 144 NLRB 455 (1963); *Denver Publishing Co*., 238 NLRB 207 (1978).

The amendment of a petition to exclude a classification the petitioner initially sought to include in the unit does not constitute a "partial withdrawal" with respect to the affected employees. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 5 fn. 12 (2016).

8-300 Effect of Disclaimer or Withdrawal

393-6027-7500

Board policies and procedures with respect to disclaimers and withdrawals including the effects thereof are set out in CHM sections 11110–11118 (withdrawals) and 11120–11124 (disclaimers). See also *Stock Building Supply*, 337 NLRB 440 (2002); *NLRB v. Davenport Lutheran Home*, 244 F.3d 660 (8th Cir. 2001); *Baltimore Gas & Electric Co.*, 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. See, e.g., *Seton Medical Center*, 317 NLRB 87, 88 (1995). 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, Inc.*, 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, 87 (1995).

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

For other types of bars to an election, see Chapter 10.

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—many of which are interrelated—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, Inc.*, 249 NLRB 718 (1980); *J. 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, Inc.*, 177 NLRB 940, 940 (1969). Compare *Stur-Dee Health Products*, 248 NLRB 1100 (1980), in which a provision to arbitrate economic terms did not render an otherwise adequate contract defective as a contract bar.

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 employment and that they are signed. *Waste Management of Maryland, Inc.*, 338 NLRB

1002, 1002–1003 (2003); see also *St. Mary's Hospital*, 317 NLRB 89 (1995) (signed tentative agreement sufficient to constitute a bar). Compare *Seton Medical Center*, 317 NLRB 87 (1995) (no bar where no document, formal or informal, reflected the parties' full agreement). Further, a written document that does not contain the current terms and conditions of employment will not serve as a bar. See *Raymond's, Inc.*, 161 NLRB 838, 840 (1966).

The absence of a date will not, by itself, invalidate a written contract. *Western Roto Engravers, Inc.*, 168 NLRB 986, 986–987 (1968), See section 9-120 for a discussion of contracts that do not contain their execution dates and section 9-510 for a discussion of contracts that do not clearly reflect their expiration dates.

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, 311 (1969). Similarly, a written contract that 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, or that the employer expected them to be so bound) is not a bar. *Austin Powder Co.*, 201 NLRB 566, 567 (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); *Television Station WVTV*, 250 NLRB 198, 199 (1980); *Farrel Rochester Div. of USM Corp.*, 256 NLRB 996, 999 fn. 18 (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); *Freuhauf Trailer Co.*, 87 NLRB 589 (1949). The party asserting contract bar has the burden of proving the agreement was signed by the parties prior to the filing of a petition. *Jackson Terrace Associates*, 346 NLRB 180 (2005).

The signatures do not have to be on the same formal document. *Holiday Inn of Ft. Pierce*, 225 NLRB 1092 (1976); *Liberty House (AMFAC Corp.)*, 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, 146 (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); *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970). 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); *Cooper Tank & 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); *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. *Pharmaseal 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. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958) 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, Inc.*, 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*., 121 NLRB 1160 (1958); *Waste Management of Maryland, Inc*., 338 NLRB 1002 (2003); *Yellow Cab, Inc.*, 131 NLRB 239, 240 (1961); *United Telephone Co. of Ohio*, 179 NLRB 732, 733 fn. 4 (1969); *Permanente Medical Group*, 187 NLRB 1033, 1034 (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. *Television Station WVTV*, 250 NLRB 198, 199 (1980).

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) (parent union—a named party—had not signed and contract therefore was 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, Inc.*, 168 NLRB 986 (1968).

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.*, 121 NLRB 1160, 1163 (1958); *Artcraft Displays, Inc.*, 262 NLRB 1233, 1235 (1982); *Southern California Gas Co.*, 178 NLRB 607 (1969). Compare *Leone Industries*, 172 NLRB 1463, 1464–1465 (1968) (contract a bar to petition for trainees despite containing few provisions relating to trainees). 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 (that those employees were susceptible to organization) and did not purport to reflect an agreement with respect to sufficient terms and conditions of employment, 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*, 159 NLRB 143, 147 (1966); see also *Waste Management of Maryland*, 338 NLRB 1002 (2003).

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.*, 256 NLRB 996, 999 fn. 18 (1981), 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, 181 fn. 3 (2005); *Cooper Tank & Welding Corp.*, 328 NLRB 759 (1999); *Stur-Dee Health Products*, 248 NLRB 1100 (1980). Compare *Herlin Press*, 177 NLRB 940 (1969) (agreement to arbitrate provisions of new agreement is not a bar); *Dana Corp.*, 356 NLRB 256, 262 fn. 18 (2010) (agreement on "principles that would inform future bargaining on particular topics" would not amount to "substantial terms and conditions of employment").

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.

For an application of this rule in a case involving handwritten notes containing unintelligible terms, 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, and will not constitute a bar if it does not. *Houck Transport Co*., 130 NLRB 270 (1961); *Bargain City, U.S.A., Inc.*, 131 NLRB 803 (1961); *Plimpton Press*, 140 NLRB 975, 975 fn. 1 (1963); *Moore-McCormack Lines*, 181 NLRB 510 (1970); see also *United Telephone Co. of Ohio*, 179 NLRB 732 (1969) (finding employees at issue were covered by the contract).

It should be noted that the precise wording used in the contract is not necessarily controlling. Thus, when the preamble 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 where another clause clearly covered the employees in question. *Simmons Co.*, 126 NLRB 656, 658 (1960). Furthermore, the parties' intent regarding employee coverage may be elucidated by their bargaining history. *Trade Wind Taxi*, 168 NLRB 860 (1968); *Hyatt House Motel*, 174 NLRB 1009 (1969). See also *RPM Products, Inc.*, 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 for those employees. *Firestone Synthetic Fibers Co.*, 171 NLRB 1121, 1123 (1968).

If, however, a group of employees votes to join an existing unit through a self-determination election during the term of a contract covering the existing unit, that contract is not automatically applied to the employees who have voted to join the unit. *Federal-Mogul Corp.*, 209 NLRB 343 (1974). It follows that an existing contract does not bar a petition filed for a self-determination election for employees who are voting on whether to join the unit, but are not covered by the unit's existing contract. *UMass Memorial Medical Center*, 349 NLRB 369, 370–371 (2007). In *UMass Memorial* itself, the union represented a unit of regular paramedics, and the parties had discussed per diem paramedics during negotiations but the union had not requested recognition as the per diem paramedics' representative at that time. Accordingly, when the union filed a self-determination petition to represent the per diem paramedics, there was no bar.

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, e.g., *Arrow Co.*, 147 NLRB 829 (1964).

A contract's limited coverage area does not affect its bar quality with respect to the geographic area in which it applies. *G.L. Milliken Plastering*, 340 NLRB 1169, 1170 fn. 4 (2003).

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 Power & Light Co*., 76 NLRB 136, 138 fn. 4 (1948); *Moveable Partitions*, 175 NLRB 915, 916 (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); *Canal Carting, Inc*., 339 NLRB 969, 970 (2003). But, the Board said in *Mathieson Alkali Works*, 51 NLRB 113, 115 (1943): "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); *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 analogized the situation to cases involving unions found to be defunct because of the conflict of interest. See section 9-420 for more on defunctness.

Under Section 9(b)(3), mixed units of guards and nonguards are never appropriate for certification and hence a contract covering such a unit is not a bar. *Monsanto Chemical Co.*, 108 NLRB 870 (1950) (directing election where petitioner sought guards in mixed unit covered by contract); *Corrections Corp. of America*, 327 NLRB 577 (1999) (same). If, however, the unit is appropriate, e.g., is an all guards unit, and the contract is otherwise lawful, it serves as a bar even if the union representing the guards is not certifiable because it admits guards and nonguards. *Wm. J. Burns International Detective Agency, Inc.*, 134 NLRB 451 (1962); *Stay Security*, 311 NLRB 252 (1993). For further discussion of guards issues, see sections 6-200 and 18-200.

Similarly, although professionals included in a unit with nonprofessionals may obtain a self-determination election if they were not previously afforded the opportunity to vote on their inclusion in the unit, see *Utah Power & Light Co.*, 258 NLRB 1059 (1981), such a petition will be barred if there is currently a contract covering the combined professional and nonprofessional unit. *Corporacion de Servicios Legales*, 289 NLRB 612 (1988). For more on professional employees, see sections 12-110 and 18-100.

9-160 "Members Only"

347-4040-3367

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." Accordingly, a contract for "members only" does not operate as a bar. *Appalachian Shale Products Co*., 121 NLRB 1160, 1164 (1958); *G. C. Murphy Co.*, 80 NLRB 1072 (1949); *N. Sumergrade & Sons*, 121 NLRB 667, 669–670 (1958); *Bob's Big Boy Family Restaurants*, 235 NLRB 1227 (1978).

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 also *NLRB v. Bob's Big Boy Family Restaurants*, 625 F.2d 850 (9th Cir. 1980) (remanding to consider extrinsic evidence bearing on whether the clause was in fact "members only").

For extensive analysis of a "members only" contention in an unfair labor practice case, see *A & M Trucking*, 314 NLRB 991 (1994).

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. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1164 (1958); *Burns International Security Service*, 257 NLRB 387, 387–388 (1981). When the master agreement is found to be the basic agreement, however, 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.*, 121 NLRB 1160, 1164 (1958); *Pillsbury Mills, Inc.*, 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.*, 179 NLRB 310, 311 (1969).

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* provision in the contract itself, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162–1163 (1958); *International Paper Co.*, 294 NLRB 1168, 1168 fn. 1 (1989); see also *Merico, Inc.*, 207 NLRB 101 (1973); *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998); *United Health Care Services*, 326 NLRB 1379 (1998). In such circumstances, where ratification is required, 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, 1167 (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.*, 121 NLRB 1165, 1167 (1958); *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 fn. 2 (1961); *John Deklewa & Sons*, 282 NLRB 1375, 1377

(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 15-120.

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*., 121 NLRB 1165, 1167 (1958); *Rheem Mfg. Co*., 188 NLRB 436 (1971); *Guy H. James Construction Co.*, 191 NLRB 282 (1971); *Cheney Bigelow Wire Works, Inc.*, 197 NLRB 1279 (1972); *National Cash Register Co*., 201 NLRB 846 (1973); *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. *Leone Industries*, 172 NLRB 1463, 1464 (1968). 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).

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, 659 (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.*, 121 NLRB 1165, 1167 (1958); *Kroger* Co., 155 NLRB 546, 548–549 (1965); *General Electric Co.*, 170 NLRB 1272 (1968); *General Electric Co.*, 170 NLRB 1277 (1968); *General Electric Co.*, 185 NLRB 13 (1970). Compare *Bowman Dairy Co*., 123 NLRB 707 (1959) (merger and consolidation did not create entirely new operation with major personnel changes); *Builders Emporium*, 97 NLRB 1113 (1952)

(consolidation did not result in substantial change to character of jobs and functions of unit employees).

This is so even when the two groups to be merged are represented separately by different unions. *Panda Terminals*, 161 NLRB 1215, 1222–1223 (1966), *Massachusetts Electric Co*., 248 NLRB 155, 155–157 (1980).

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*., 121 NLRB 1165, 1167 (1958). When, however, the shutdown is temporary, the employees were told they would be recalled, 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. *General Extrusion Co*., 121 NLRB 1165, 1167–1168 (1958); see *Builders Emporium*, 97 NLRB 1113 (1952); *Electrospace Corp.*, 189 NLRB 572 (1971); see also *Rock Bottom Stores*, 312 NLRB 400, 402 (1993) (contract remained bar where operations were same after relocation and transferees from former location were 40 percent of employee complement), 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) (contract remained bar where new warehouse was merely a relocation and consolidation of facilities in two other cities); *H. L. Klion, Inc*., 148 NLRB 656 (1964) (contract remained bar where employer and intervenor agreed to apply existing written contract as modified to new facility); *Pepsi-Cola Bottlers*, 173 NLRB 815 (1969) (contract remained bar where new plant was essentially relocation of previous plant). In *Electrospace Corp*., 189 NLRB 572 (1971), 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. The contract therefore remained a bar. Compare *Consolidated Fibres, Inc*., 205 NLRB 557 (1973), where the relocation resulted in an entirely new operation and the existing contract accordingly was not a bar.

In determining whether a relocation has been accompanied by a transfer of a considerable proportion 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, 954 fn. 5 (1966); *Arrow Co.*, 147 NLRB 829 (1964). In *Harte & Co*., 278 NLRB 947 (1986), 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. See also *Rock Bottom Stores*, 312 NLRB 400 (1993).

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. *Beacon Photo Service*, 163 NLRB 706 (1967); *Patterson-Sargent Div. of Textron*, 173 NLRB 1290, 1291 (1969). Compare. *Beacon Photo Service*, 163 NLRB 706 (1967) (employees at new facility constituted accretion to existing unit and existing contract was thus a bar); *Towmotor Corp.*, 182 NLRB 774 (1970) (same); *Public Service Co. of New Hampshire*, 190 NLRB 350 (1971) (same). In the event an arbitrator has decided that the contract covers the new employees, the Board will nevertheless determine whether they are an accretion and, if not, the contract will not be a bar. *Beacon Photo Service*, 163 NLRB 706 (1967).

The Board has employed a similar approach—in cases that do not necessarily involve an asserted relocation—to analyzing alleged accretions to existing units covered by a contract in cases that involve newly-created departments. See, e.g., *Flint Steel Corp.*, 168 NLRB 271 (1968) (finding no accretion and no contract bar where there was no evidence that employees in a new department created at a new facility were actually represented by the intervenor); *J. C. Penney Co., Store No. 139*, 151 NLRB 53 (1965) (no accretion and no bar where union representing existing unit did not wish to represent and had not previously bargained for employees in subsequently-added, functionally distinct department).

Similarly, a multistore contract applies to a subsequently-established store only if the store is an accretion to the existing unit, and thus where a new store is not an accretion, a multistore contract will not constitute a bar. *Almacs Inc.*, 176 NLRB 671 (1969); see also *Melbet Jewelry Co.*, 180 NLRB 107 (1970) (considering whether new store was an accretion in unfair labor practice case).

See section 11-220 and 12-500 for more on accretion.

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, Inc.*, 128 NLRB 720 (1960); *M. V. Dominator*, 162 NLRB 1514, 1516 (1967); see also *Great Atlantic & Pacific Tea Co.*, 197 NLRB 922 (1972) (reaffirming this policy following *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972)); *Trans-American Video, Inc.*, 198 NLRB 1247 (1972) (same). 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, Inc.*, 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); *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, 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, 992 (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. In *Dobbs International Services*, 323 NLRB 1159, 1159 fn. 1 (1997), the Board denied a request for review asking it to enlarge the contract bar period from 3 years to 4 years. Cf. *Shaw's Supermarkets*, 350 NLRB 585 (2007), in which the Board rejected the General Counsel's argument that an employer should not be allowed to withdraw recognition during the term of a contract of any length and permitted the employer to withdraw recognition during the fourth year of a five-year agreement. But see *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), discussed in section 9-310.

On the other end of the spectrum, the Board has held that agreements of less than 90 days do not bar a petition. See *Crompton Co.*, 260 NLRB 417, 418 (1982).

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).

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*., 139 NLRB 1123, 1125 (1962); *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*, as opposed to its execution date. *Benjamin Franklin Paint Co*., 124 NLRB 54 (1959).

A significant exception to this rule is that a contract of more than 3 years will be a bar for its entire term with respect to any petitions filed by the employer or the contracting union, because contracting parties should not be able to take advantage of the contract's benefits "with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition" for a Board election. *Montgomery Ward & Co.*, 137 NLRB 346, 348–349 (1962). For similar reasons, an employer cannot obtain an election during the term of a contract it has entered with an uncertified union. *Absorbent Cotton Co.*, 137 NLRB 908 (1962). Cf. *Shaw's Supermarkets*, 350 NLRB 585, 588 (2007) (contrasting withdrawal of recognition situation with contract bar situation).

The length of the term of the contract as well as its adequacy must be ascertainable on its face, with no resort to parol evidence, for it to be a bar. *Union Fish Co.*, 156 NLRB 187 (1966); see *South Mountain Healthcare & Rehabilitation Center*, 344 NLRB 375 (2005); *Cind-R-Lite Co.*, 239 NLRB 1255 (1979). Cf. *Cooper Tire & Rubber Co*., 181 NLRB 509 (1970) (deducing

term from several provisions in document itself).

When, after the end of the first 3 years of a longer-term contract, and before the filing of a petition, the parties execute (1) a new agreement which embodies new terms and conditions, or incorporate by reference the terms and conditions of the longer-term contract, or (2) a written amendment which *expressly* reaffirms the longer-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); *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 test. Cf. *Victor Mfg. & Gasket Co.*, 133 NLRB 1283 (1961) (finding neither term met). For further discussion of the *Southwestern Portland Cement* test and the "premature extension" doctrine, see *Shen-Valley Meat Packers, Inc*., 261 NLRB 958 (1982); *M.C.P. Foods*, 311 NLRB 1159 (1993). The "premature extension" doctrine is discussed in detail in 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.

The Board has varied the 3-year rule in certain successorship situations. Thus, in *UGL-UNICCO Service Co.*, 357 NLRB 801, 810 (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 a petition during the final year of the predecessor employer's bargaining relationship with the union."

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*., 121 NLRB 990, 993 (1958); *McLean County Roofing*, 290 NLRB 685, 686 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 See *Lane Aviation Corp.*, 211 NLRB 824, 825 (1974); *W. Horace Williams Co.*, 130 NLRB 223 (1961); *Pacific Coast Assn. of Pulp & Paper Mfrs*., 121 NLRB 990, 993–994 (1958).

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); *Rohm & Haas Co.*, 108 NLRB 1285, 1286 (1954)

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, 998 (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. Such an extension does not constitute a bar. *Union Bag & Paper Corp*., 110 NLRB 1631, 1634 (1955); *Frye & Smith, Ltd.*, 151 NLRB 49 (1956); see also *Crompton Co.*, 260 NLRB 417 (1982). Similarly, an agreement to begin negotiations in the near future does not constitute a bar, particularly where the agreement is, in fact, an attempt to transform the fourth year of a 4-year contract into a 1-year bar. *Madelaine Chocolate Novelties*, 333 NLRB 1312 (2001).

The Board has permitted an agreement to be extended for an additional period of time based on the order of a Bankruptcy Court, finding that such extension was an appropriate accommodation of the NLRA and the Bankruptcy Code, and that the court's extension was not prohibited by the "premature extension" doctrine. *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 861 (1999). For more on the "premature extension" doctrine, see section 9-580.

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, 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*., 121 NLRB 901, 906–909 (1958), must exist.

9-411 Basic Intraunion Conflict

177-3987

347-2017-7533-6700

347-4030-5000

The first element is a basic intraunion conflict affecting the contracting representative. *Hershey Chocolate Corp.*, 121 NLRB 901, 907 (1958). 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).

As illustrations of the type of disruption envisaged, the Board in *Hershey Chocolate Corp.*, 121 NLRB 901, 907–908 (1958), 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. Compare *Saginaw Furniture Shops, Inc.*, 97 NLRB 1488 (1951) (single intervenor meeting where small minority of unit members attended and carried motion to affiliate with petitioner does not show split).

The conflict must have a substantial disruptive effect on the industrial stability normally flowing from the existence of a collective-bargaining agreement, given that the Board will not allow 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." *Allied Chemical Corp.*, 196 NLRB 483, 484 (1972); *B & B Beer Distributing Co.*, 124 NLRB 1420, 1422 (1960).

A distinction thus exists between schism and "mere individual dissatisfaction with the collective bargaining apparatus." *Southwestern Portland Cement Co.*, 126 NLRB 931, 934 (1960). Similarly, 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.*, 196 NLRB 483, 484 (1972). See also *Georgia Kaolin Co.*, 287 NLRB 485, 487–488 (1987) (Board found no conflict at the highest level and therefore did not reach the question of whether the other conditions existed for a schism).

A mere change in affiliation 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.*, 145 NLRB 756, 762 (1963); *Kimco Auto Products*, 183 NLRB 993 (1970); *Bluff City Transfer & Storage Co.*, 184 NLRB 604 (1970); *Buckeye Cellulose Corp.*, 184 NLRB 606 (1970); see also *B & B Beer Distributing Co.*, 124 NLRB 1420 (1960) (expulsion of Teamsters from AFL–CIO, by itself, insufficient to show basic intraunion conflict); *Polar Ware Co.*, 139 NLRB 1006 (1962) (issue of communist domination and disaffiliation movement that may or may not have been related to that issue did not constitute basic intraunion split).

Disaffiliation may, however, warrant a schism finding depending on the circumstances. See *St. Louis Bakery Employers Labor Council*, 121 NLRB 1548, 1550–1551 (1958) (disaffiliation action by a joint representative sufficient to cause type of confusion that destabilizes the bargaining relationship); *Purity Baking Co.*, 121 NLRB 75 (1958) (disaffiliation by one of three joint representatives affected four plants in seven-plant single-employer unit).

On a related note, there is no conflict (and thus no schism) where a contracting local assigns the contract to a successor, and the assigned contract remains a bar. See *Louisville Railway Co.*, 90 NLRB 678 (1950); *Prudential Insurance Co.*, 106 NLRB 237 (1953). In *Hershey Chocolate Corp.*, 121 NLRB 901, 910–911 (1958), the Board emphasized that such situations, along with mere changes in designation or affiliation of the contractual representative, do not involve "a true schismatic situation," and removing a contract bar in such circumstances "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."

9-412 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. *Hershey Chocolate Corp.*, 121 NLRB 901, 908 (1958).

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, Inc.*, 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. *Hershey Chocolate Corp.*, 121 NLRB 901, 908–909 (1958). What is reasonable depends on the circumstances. Thus, 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); *Oregon Macaroni Co.*, 124 NLRB 1001, 1004 (1959). But in *Standard Brands*, 214 NLRB 72, 73 (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

347-2017-7533-6700

347-4030-5050

Apart from the above basic elements comprising the definition of "schism," additional rules relate to filing, intervention, and a place on the ballot in the election, and also concern the effect on the existing contract. Thus, in view of 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*., 121 NLRB 901, 909–910 (1958).

9-420 Defunctness and Disclaimer

347-2017-7533-5000

347-4030-2500 et seq.

347-4030-6700

a. Defunctness

A contract does not bar an election if the contracting representative is defunct. *Hershey Chocolate Corp*., 121 NLRB 901, 911 (1958); *International Harvester Co*., 111 NLRB 276 (1955).

A representative is deemed defunct if it "is unable or unwilling to represent the employees," but "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." *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958). The "relative inactivity" of the union is irrelevant to a defunctness determination. *Kent Corp.*, 272 NLRB 735, 736 (1984); *Rocky Mountain Hospital*, 289 NLRB 1347 (1988).

The Board has frequently rejected defunctness arguments in the face of evidence that the union was in fact still functioning. See *Polar Ware Co.*, 139 NLRB 1006 (1962) (union continued to hold regular meetings, meet with employer to settle grievances, and stated willingness to administer contract); *Gary Steel Supply Co.*, 144 NLRB 470, 470 fn. 3 (1963) (union had elective officers and was in fact administering contract); *Swift & Co.*, 145 NLRB 756, 759, fn. 6 (1963) (union maintained bank account, held membership meetings, and discussed plant shutdown with employer); *Wahiawa Transport System, Inc.*, 183 NLRB 991 (1970) (union was actively representing employees); *Automated Business Systems*, 189 NLRB 124, 125 (1971) (union continued to exist under new leadership and still claimed to represent unit); *Loree Footwear Corp.*, 197 NLRB 360 (1972) (union presently willing and able to represent unit employees); *East Mfg. Co.*, 242 NLRB 5 (1979) (union continued meeting with management to discuss employment matters and participated in an arbitration proceeding).

Similarly, a resolution purporting to "dissolve and disestablish" a union will not result in a finding of defunctness if the union is not in fact defunct. *News-Press Publishing Co.*, 145 NLRB 803 (1964). In such a situation, the Board may consider the circumstances under which such a resolution was reached. See id. at 804–805. See also *Gate City Optical Co.*, 175 NLRB 1059 (1969), in which a union that succeeded to the contracting union could not escape its contractual obligations by claiming its predecessor was defunct.

As indicated above, a union's inactivity does not necessarily establish defunctness. See *Dorado Beach Hotel*, 144 NLRB 712 (1963) (no defunctness where union's inability to function was only temporary); *Moore Drop Forging Co.*, 168 NLRB 984, 985 (1967) (no defunctness where inactivity was due to shop steward's erroneous legal conclusion that Board's election notice precluded union from continuing to negotiate with employer); *Aircraft Turbine Service*, 173 NLRB 709 (1969) (no defunctness where labor organization committee members had never informed employer or members that it was no longer functioning as a labor organization, had never called a meeting to discuss the status of the organization, and record did not support a finding that the organization was unable to represent employees or that employees did not want it to represent them); *Nevada Club*, 178 NLRB 81 (1969) (no defunctness where local was reactivated following an attempted failed merger).

Defunctness was found, however, in *Bennett Stone Co.*, 139 NLRB 1422 (1962), where 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. In *Apex Tankers Co.*, 257 NLRB 685 (1981), the Board treated a union that was dominated by supervisors as if it were defunct. 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.

Although the Board found no defunctness in *Nevada Club*, 178 NLRB 81 (1969), 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

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 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 often arises 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*., 121 NLRB 995, 999 fn. 6 (1958); *National Broadcasting Co.*, 104 NLRB 587, 587–588 (1953); *Herdon Rock Products*, 97 NLRB 1250, 1251–1252 (1951); see also *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002).

The Board's "postmark rule"—set forth in section 102.2(b) of the Board's Rules and Regulations—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.

As discussed in Chapter 3, the 2014 amendments to the Board's election procedures require that when an election petition is filed with the regional office, it be accompanied by a showing of interest, as well as a certificate of service stating that the petitioner has also served a copy of the petition, the Board's description of representation case procedures, and a Statement of Position form on the other parties. GC Memo 15-06, "Guidance Memorandum on Representation Case Procedure Changes" p. 4 (Apr. 6, 2015), states that a petition will not be docketed unless accompanied by the showing of interest and the certificate of service.

Prior to the 2014 amendments, the Board developed a body of law concerning the bar quality of a contract executed on the same date that a petition is filed with the Board. The precise procedural circumstances of some of these cases, however, may not be entirely consistent with the procedural requirements of the 2014 amendments. (The Board has not, since the 2014 amendments, issued any published decisions in this area; a few unpublished decisions, which are available on the Board's website, do involve questions of when a petition should be treated as having been filed for contract bar purposes.) In any event, the Board has long held that 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. *Deluxe Metal Furnishing Co.*, 121 NLRB 995, 999 (1958). 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). See also *Hamilton Park Health Care Center, Inc.*, 298 NLRB 608 (1990), where the Board held that knowledge of a rival union campaign is irrelevant to a contract-bar determination.

In *Weather Vane Outerwear Corp.*, 233 NLRB 414, 415 (1977), the Board held that when one petition filed under Section 9(c) 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.

A contract may be deprived of its bar quality if it does not clearly reflect its expiration date, such as when a contract contains two different stated effective dates and a petition is timely filed with respect to one of those dates. *Bob's Big Boy Family Restaurants*, 259 NLRB 153 (1981). Compare *Suffolk Banana Co.*, 328 NLRB 1086 (1999) (contract with two different expiration dates still a bar where employees filing a petition did not rely on either date).

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*., 121 NLRB 995, 1000 fn. 12 (1958); see also *Illinois Bell Telephone Co*., 77 NLRB 1073, 1075 fn. 3 (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) (petitioner enlarged unit through amendment and intervening contract was held to be a bar). 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. *Deluxe Metal Furniture Co*., 121 NLRB 995, 1000 fn. 12 (1985). But 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); *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*., 121 NLRB 995, 998–999 (1958); see also *Acme Brewing Co*., 72 NLRB 1005, 1012 (1947); *Chicago Bridge & Iron Co*., 88 NLRB 402, 404–405 (1950); *Greenpoint Sleep Products*, 128 NLRB 548 (1960); *Southern Permanente Services*, 172 NLRB 1399 (1968); *Riverside Manor Home for Adults*, 189 NLRB 176 (1971). But see *RCA Del Caribe, Inc*., 262 NLRB 963, 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. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 998 (1958).

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 "insulated period" immediately preceding and including the expiration date to negotiate and execute a new contract. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958). Petitions filed during the insulated period are dismissed, regardless of whether the contract contains an automatic renewal clause and regardless of the length of the renewal period. Id.

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, 817 fn. 2 (1959)). There are slightly different rules with respect to the "insulated period" for health care institutions, however. See section 9-550.

The "insulated period" 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); *Stewart-Warner Corp.*, 123 NLRB 447, 449 (1959).

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 than 90 days are not a bar because they do not stabilize the relationship and provide no "insulation period."

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. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001 (1958). 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." Id.; see *Electric Boat Division*, 158 NLRB 956 (1966); *National Cash Register Co.*, 201 NLRB 846 (1973).

Pursuant to *Electric Boat Division*, 158 NLRB 956, 958 (1966), an additional 60-day insulated period is granted 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); *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, Inc.*, 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 as to the applicable window and insulated periods.

A Presidential wage-price freeze in 1972 resulted in a special exception to the *Deluxe Metal* rule. For more on this circumstance, see *West India Mfg. & Service Co*., 195 NLRB 1135 (1972); *Hill & Sanders-Wheaton, Inc*., 195 NLRB 1137 (1972); *Dennis Chemical Co*., 196 NLRB 226 (1972); *Bowling Green Foods*, 196 NLRB 814 (1972); *California Parts & Equipment*, 196 NLRB 1108 (1972); *Roytype, Division of Litton*, 199 NLRB 354 (1972).

Representation petitions filed timely under the "postmark rule" (Rules section 102.2(b)) will be processed even though received in the Regional Office during the insulated period. *Central Supply Co. of Virginia, Inc.*, 217 NLRB 642 (1975); see also *John I. Haas, Inc.*, 301 NLRB 300 (1991); *Cargill Nutrena, Inc.*, 344 NLRB 1125 (2005).

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 more than 90 days but less than 120 days before expiration. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975). With respect to seasonal industries, the 60-day insulated period is applicable, but the rule that a petition is premature if filed more than 90 days before expiration is not. See *Cooperativa Azucarera Los Canos*, 122 NLRB 817, 817 fn. 2 (1959).

As noted above, 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.

An untimely filed petition 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); *Mosler Safe Co*., 216 NLRB 9 (1975); see *Royal Crown Cola Bottling Co.*, 150 NLRB 1624 (1964); *General Time Corp*., 195 NLRB 1107 (1972); *Maramount Corp.*, 310 NLRB 508, 512 (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 section 9-520.

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, Inc.*, 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 Restaurants*, 235 NLRB 1227 (1978).

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, 586 (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, 236 fn. 4 (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. 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.*, 121 NLRB 995, 1000 (1958).

b. 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.*, 121 NLRB at 1001.

c. Any notice of a desire to negotiate changes in a contract received by the other party immediately preceding the automatic renewal date provided for in the contract will prevent its renewal for contract-bar purposes, despite a provision or agreement for the continuation of the existing contract during negotiations, and regardless of the form of the notice. *Deluxe Metal Furniture Co.*, 121 NLRB at 1002.

d. A written agreement which reinstates the old automatically renewable contract is treated as a new contract. *Deluxe Metal Furniture Co.*, 121 NLRB at 1002.

e. When the administration of the contract has been abandoned, it cannot automatically renew. *Deluxe Metal Furniture Co.*, 121 NLRB at 1002 fn. 15.

f. 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. *Deluxe Metal*

Furniture Co., 121 NLRB at 1002 fn. 16.

g. 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. *Deluxe Metal Furniture Co.*, 121 NLRB at 1003; *Wagoner Transportation Co.*, 177 NLRB 452, 453 fn. 2 (1969).

h. 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*., 121 NLRB at 1003; *Ellison Bros. Oyster Co*., 124 NLRB 1225 (1959); *Penn-Keystone Realty Corp*., 191 NLRB 800 (1971); *Providence Television, Inc.*, 194 NLRB 759, 760 (1972).

i. Repeated negotiation in the absence of timely notice does not waive the untimeliness of such notice, and accordingly automatic renewal is not forestalled. See *Moore Drop Forging Co.*, 168 NLRB 984 (1967); *Deluxe Metal Furniture Co.*, 121 NLRB at 1002.

j. Automatic renewal is not forestalled by oral notice. *Appalachian Shale Products Co*., 121 NLRB 1160, 1162 fn. 6 (1958).

For other cases dealing with automatic renewal, see *Carter Machine & Tool Co*., 133 NLRB 247, 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*., 121 NLRB 995, 1001–1002; *Lord Baltimore Press, Inc.*, 144 NLRB 1376 (1963); *New England Telephone & Telegraph Co*., 179 NLRB 531 (1969); *M.C.P. Foods*, 311 NLRB 1159 (1993); and *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958 (1982).

Under this doctrine, when 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. *New England Telephone & Telegraph Co.*, 179 NLRB 531, 532 (1969); see also *Hertz Corp*., 265 NLRB 1127 (1982). In other words, 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).

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; or (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 was of unreasonable duration and a reasonable term had passed, as in *Cushman's Sons, Inc*., 88 NLRB 121 (1950). In addition, the doctrine does not apply where an employer, who is not a party to its predecessor's agreement with the incumbent union, enters into new obligations, separately undertaken, by executing with the union a new contract with different starting and termination dates (even if the new contract is labeled an "extension agreement"). *Chrysler Corp.*, 153 NLRB 578, 580 (1965).

When the antecedent contract contains a discriminatory provision, it does not bar an election

and therefore, under the third *Deluxe Metal Furniture* exception outlined above (121 NLRB at 1002), does not come within the premature extension rule. But if an allegedly discriminatory provision is not unlawful on its face and the Board thus cannot determine, without resort to extrinsic evidence (which the Board does not admit in representation proceedings to establish the unlawful nature of a contract provision), that the provision is unlawful, the premature extension doctrine still applies. *St. Louis Cordage Mills*, 168 NLRB 981 (1967). See also section 9-800.

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, 967 (1957); *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. *Auburn Rubber Co.*, 140 NLRB at 920. 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 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, 362 (1954).

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). But see *Ameriguard Security Services*, 362 NLRB No. 160 (2015) (finding *Michigan Bell* did not apply where the employer had entered into a new agreement covering a group of guards who had all previously been covered by a collective-bargaining agreement).

The Board's rule is not an absolute ban on premature extensions. *H. L. Klion, Inc.*, 148 NLRB 656, 660 (1964). Rather, it holds that there is no bar to petitions timely filed with respect to antecedent agreements. The rule's primary purpose is to protect petitioners in general from being faced with prematurely executed contracts at a time a petitioner would normally be permitted to file a petition. Id. Accordingly, a petition is still dismissed if filed outside of what would have (or should have) been the window period under the antecedent agreement. See *Union Carbide Corp.*, 190 NLRB 191, 192 (1971) (dismissing petition where filed 90 to 60 days before end of contract of unreasonable duration, and thus after 90 to 60 day period prior to the third anniversary of the earlier agreement). Likewise, 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 section 9-324.

9-600 Private Agreements

9-610 Agreements not to Represent Certain Employees

347-4070

Under the *Briggs Indiana* rule (*Briggs Indiana Corp.*, 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.

In *Cessna Aircraft Co.*, 123 NLRB 855 (1959), the Board restated the rule, with certain qualifications. Most prominently, the union must make an *express* promise agreeing not to seek to represent the employees in question (or to refrain from accepting them into membership). Id. at 857; *Springfield Terrace, LTD*, 355 NLRB 937 (2010). Such a promise will not be implied from a mere unit exclusion. *Cessna Aircraft*, 123 NLRB at 857; see *Budd Co.*, 154 NLRB 421, 423 (1965); *Women & Infants' Hospital of Rhode Island*, 333 NLRB 479 (2001). Nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations. *Cessna Aircraft*, 123 NLRB at 857; see *UMass Memorial Medical Center*, 349 NLRB 369, 370 (2007). The agreement does not, however, have to be embodied in a collective-bargaining agreement, so long as it is an express promise. *Lexington House*, 328 NLRB 894, 896 (1999); see also *United Broadcasting Co.*, 223 NLRB 908, 909–910 (1976).

Where an international union is a party to a contract that meets the *Briggs Indiana* rule, the rule applies to both the international itself and any of its locals; likewise, if a local is party to such an agreement, the rule applies to any other local of the same international union. *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959); see *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 fn. 6 (1969); *Huron Portland Cement Co.*, 115 NLRB 879, 880–881 (1956).

The rule does not apply to a contract by a certified union which contains a provision not to represent certain employees in the certified unit. *Cessna Aircraft*, 123 NLRB at 857.

The Board has applied the rule to an 8(f) agreement in which the employer agreed not to file a petition. *Northern Pacific Sealcoating*, 309 NLRB 759 (1992). The Board reasoned that if it will enforce a union's waiver under *Briggs Indiana*, the "logical corollary" of that proposition is that the Board should enforce an employer's waiver of its right to challenge the union's representation of certain employees during the contract's term. Id. at 760.

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, 429 (1965). In such a situation, the Board noted, it is not expending its efforts to assist a union in breaching its agreement.

In *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 3 (1969), the Board explained that the *Briggs Indiana* rule is not an "undue encroachment" on employee rights, because the rule does not disenfranchise employees; it only removes one union as an available representative. Further, application of the rule ensures that government sanction is not lent "to undo the terms of a bargain which the parties themselves have struck." Id.; see also *Montgomery Ward & Co.*, 137 NLRB 346, 349 fn. 6 (1962); *Huron Portland Cement Co.*, 115 NLRB 879, 881 (1956).

9-620 "Neutrality" Agreements

301-5000

347-4070-0100

Beyond agreements covered by the *Briggs Indiana* rule, discussed in the previous section, employers and unions may enter into a variety of types of agreements, here grouped under the broad term "neutrality" agreements, under which the parties agree to resolve possible subsequent representation issues in certain ways. Generally speaking, the Board will hold parties to such agreements, because national labor policy favors the honoring of voluntary agreements reached between employers and labor organizations. *Verizon Information Systems*, 335 NLRB 558, 559 (2001).

Such agreements may have contract-bar ramifications. Thus, for example, in *Verizon Information Systems*, the parties entered into an agreement which provided that the parties would attempt to define appropriate bargaining units (and would submit the issue to arbitration and be bound by an arbitrator's decision if they could not agree), that the employer would recognize the union as representative of any of these units upon notice that the union had presented a majority of authorization cards to the agreed-

upon arbitrator, and that the employer would neither assist nor hinder the union on the issue of union representation. See id. at 558–559. When the union filed a petition with the Board after invoking the agreement's provisions, the Board dismissed the petition, finding that under such circumstances the union's agreement with the employer was a bar, notwithstanding the union's argument that dismissal would result in an arbitrator deciding unit placement and scope issues. Id. at 560. But see *Postal Service*, 348 NLRB 25, 26 (2006) (distinguishing *Verizon* and accepting petition where settlement agreement providing for arbitration did not provide "express agreement" that employer would not file petition).

Similarly, where a union asserts that the employer has agreed to an "after-acquired" clause requiring recognition of the union at future employer locations upon proof of majority status, and on that basis makes a demand for recognition, the Board has stated that such a claim does not entitle the employer to file an RM petition. *Central Parking System*, 335 NLRB 390 (2001). The Board has elaborated that this is because interpreting an "after-acquired" clause to mean that an employer can demand an election renders such a clause "totally meaningless and without effect." *Houston Div. of the Kroger Co.*, 219 NLRB 388, 389 (1975); see also *Pall Biomedical Products Corp*., 331 NLRB 1674 (2000).

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. See *Paragon Products Corp*., 134 NLRB 662 (1961); *Electrical Workers Local 444 (Paramax Systems)*, 311 NLRB 1031, 1035, 1037 fn. 32 (1993). Such provisions are dealt with below (9-710), as are certain types of checkoff provisions (9-720).

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*., 134 NLRB 662, 666. An ambiguous clause, however, does not remove the contract's bar quality. See *Electrical Workers Local 444 (Paramax Systems*), 311 NLRB 1031, 1037 fn. 32 (1993). Thus, 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). The lawfulness of the clause may be analyzed by reading it in the context of other clauses. See *H. L. Klion, Inc.*, 148 NLRB 656, 660 (1964) (finding that clause providing for pay increase "After 3 Months Service When Join Union," when read in the context of a provision lawfully requiring employees to become union members after 3 months' service, was not clearly unlawful).

It accordingly follows that contracts containing ambiguous, not clearly unlawful union security provisions continue to serve as a bar 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. *Paragon Products Corp.*, 134 NLRB at 667. No testimony or evidence relevant only to the practice under the contract is admissible in a representation proceeding. *Peabody Coal Co.*, 197 NLRB 1231, 1233 (1972). Note that this approach to ambiguous union security clauses differs from the Board's approach to analyzing an ambiguous contract asserted to be a "members only" contract, in which case the Board considers the intent and practice of the contracting parties. See *Post Houses*, 173 NLRB 1320 (1969). By contrast, the Board's approach to ambiguous union security clauses is similar to the Board's approach to allegedly unlawful

seniority provisions (which also render a contract inoperative as a bar). See *St. Louis Cordage Mills*, 168 NLRB 981, 982 (1967).

A contract's "savings clause" will not preserve the contract bar quality of an agreement that contains a facially unlawful union security provision. See *Ace Car & Limousine Service*, 357 NLRB 359 (2011).

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 to comply with an otherwise-lawful union security clause (see Section 8(a)(3) of the Act); 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." *Paragon Products Corp.*, 134 NLRB at 666.

By way of specific illustrations, a contract containing an unambiguous closed shop clause will not bar a petition. *Horizon House*, 151 NLRB 766, 768 fn. 3 (1965). So too will a clause requiring preference for union members in hiring. *Peabody Coal Co.*, 197 NLRB 1231, 1233–1234 (1972). Similarly, clauses that condition retention and accumulation of seniority on maintenance of membership—including for employees promoted outside the unit—remove a contract's bar quality. See *Pine Transportation*, 197 NLRB 256 (1972); see also *Steelworkers Local 1070 (Columbia Steel & Shafting Co.)*, 171 NLRB 945 (1968) (no bar where clause conditioned relative seniority standing of supervisors returning to unit upon payment of equivalent of union dues during period when such individuals were outside the unit).

By contrast, a union security clause that requires union "membership," without expressly explaining the rights of employees under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Communication Workers v. Beck*, 487 U.S. 735 (1988), is not unlawful on its face. *Assn. for Retarded Citizens* (*Opportunities Unlimited)*, 327 NLRB 463, 465 (1999) (citing *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998)).

With respect to clauses concerning the 30-day grace period, the Board has held that a contract that is, on its face, retroactively effective and has geared its grace period to that effective date, thus failing to accord nonmember incumbent employees the 30-day grace period (which is computed from the execution date for retroactive contracts), will not bar a petition. *Standard Molding Corp.*, 137 NLRB 1515, 1516 (1962). Similarly, a clause requiring employees, upon employment, to sign a union membership application to become effective 30 days after the date of hire is unlawful because it denies the 30-day grace period, which is to designed to allow newly-hired employees to consider the matter of joining the union. *Sentry Investigation Corp.*, 198 NLRB 1074, 1074 fn. 1 (1972). But see *National Seal Div. of Federal Mogul*, 176 NLRB 619 (1969), and *Weyerhaeuser Co.*, 142 NLRB 702 (1963), both of which distinguished *Standard Molding Corp.* and found that provisions that allegedly denied the grace period were not unlawful on their face.

For clauses that allegedly require payments other than periodic dues and initiation fees, a 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, 1515 (1962). But 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, Inc.*, 140 NLRB 1239, 1241 (1963). See also *Suffolk Banana Co.*, 328 NLRB 1086 (1999) (bar status not lost because the contract did not require payment of assessments).

9-720 Checkoff Provisions

347-4040-6750

536-2554-2500

725-6733-8045

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."

Plainly, a dues checkoff provision that conforms to this statutory language is not unlawful and a contract containing such a clause remains a bar. A contract will not lose its effectiveness as a bar, however, simply because it contains it contains a checkoff provision which fails to spell out the requirements set forth in Section 302. *Gary Steel Supply Co.*, 144 NLRB 470, 472–473 (1963). Rather, to remove a bar, a checkoff provision must either be (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. Id. at 472–473. In this respect, the Board's reasoning in *Gary Steel Supply* drew on *Paragon Products Corp.*, 134 NLRB 662 (1961), discussed in section 9-710.

For other applications of these principles, see *America Beef Packers, Inc.*, 169 NLRB 215 (1968); *General Electric Co.*, 173 NLRB 511 (1969).

9-800 Racial and Gender-Based 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, 55 (1963). 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. The Board has stated that removing such contracts as bars is consistent with decisions by the courts in other contexts condemning governmental sanction of racially separate grouping as inherently discriminatory. Id. In *Pioneer Bus* itself, the employer executed separate contracts covering white and black employees in the same classifications, and although both contracts were otherwise identical, separate seniority lists were maintained for each unit; the Board held such an arrangement would not bar the petition. Id.

Similarly, in *Safety Cabs, Inc.*, 173 NLRB 17 (1968), the Board concluded that contracts that separated employees based on racial lines could not bar a petition. In a previous case involving the same employers, the Board had refused to find appropriate two racially segregated units and declined to accord any weight to bargaining history "essentially based on race." *New Deal Cab Co.*, 159 NLRB 1838 (1966). In *Safety Cabs*, the Board rejected the further contention that segregation was inherent in and a reflection of the history of the community in which the parties functioned and thus justified the separate units and contracts. "The fact that the parties may not have caused the racial segregation,'' observed the Board, "does not make its perpetuation less invidious." 173 NLRB at 17.

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), which in essence held that the duty of fair representation includes a duty not to discriminate on the basis of sex (see *Bell & Howell Co.*, 230 NLRB 420, 423 (1977), may suggest the same result where there is gender discrimination in a contract. But see *St. Louis Cordage Mills*, 168 NLRB 981, 982 (1967), in which the Board held that a contract providing for separate sex-based seniority lists remained a bar, given that Section 703(a) of the Civil Rights Act of 1964 prohibited such separate lists only when sex is not a bona fide occupational qualification for the job involved, and the Board was unable to determine

(absent extrinsic evidence) that sex was not a bona fide qualification for the job involved and thus could not find that the clause was unlawful on its face.

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, Inc.*, 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. Id. at 936. 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).

See also *Four Seasons Solar Products Corp*., 332 NLRB 67, 70 and fn. 11 (2000) (citing *Food Haulers* for proposition that illegal provisions remove a contract's bar quality where the provisions constrain employee choice).

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, 1377 (1987); *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)," constitutes a bar despite the proviso to Section 8(f). *Island Construction Co*., 135 NLRB 13, 15–16 (1962); *John Deklewa & Sons*, 282 NLRB 1375, 1387 fn. 53 (1987). 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. *Island Construction*, 135 NLRB at 15.

Further, once 9(a) bargaining status is created (based on, for example, the employer's voluntary recognition based on a majority showing), a preexisting 8(f) agreement becomes a 9(a) agreement and thus will bar a rival petition. *VFL Technology Corp*., 329 NLRB 458, 459 (1999).

In *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717, 719 (2001), the Board defined the minimum requirements for 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 offering to show, substantiation of its majority support.

The Board declined to revisit *Staunton Fuel* in *King's Fire Protection, Inc.*, 362 NLRB No. 129, slip op. at 1 fn. 1 (2015), and *Colorado Fire Sprinkler Inc.*, 364 NLRB No. 55 (2016).

The Board has declined to rely on *Staunton Fuel* where a finding of 9(a) status was not based solely on the language of the contract. See *Donaldson Traditional Interiors*, 345 NLRB 1298, 1300 fn. 8 (2005). The D.C. Circuit has questioned aspects of *Staunton Fuel*. *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003); see also *Allied Mechanical Services, Inc. v. NLRB*, 668 F.3d 758, 770–771 (2012) (distinguishing *Nova Plumbing*).

Outside of the *Staunton Fuel* context, the party asserting a 9(a) relationship in the construction industry had the burden of providing such a relationship exists. *Golden West Electric*, 307 NLRB 1494, 1495 (1992). In making such a showing, there must be positive evidence that a union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such. *J & R Tile*, 291 NLRB 1034, 1036 (1988). The Board also requires a contemporaneous showing of majority support for the union at the time 9(a) recognition is granted. *H. Y. Floors*, 331 NLRB 304 (2000). On this last count, the Board has held that an employer acknowledgment of such support is sufficient to preclude the employer from challenging majority status. *Oklahoma Installation Co*., 325 NLRB 741 (1998).

If a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board will not entertain a claim that majority status was lacking at the time of recognition. *Casale Industries*, 311 NLRB 951 (1993). Compare *H. Y. Floors*, 331 NLRB 304, 305 fn. 8 (2000) (petition filed less than 6 months after purported 9(a) recognition).

In the absence of a showing that the parties intended a 9(a) relationship, the Board will not presume that a relationship predating the enactment of Section 8(f) was a 9(a) relationship. *Brannan Sand & Gravel*, 289 NLRB 977 (1988).

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, 1247 fn. 1 (1993).

For discussions of other prehire-8(f) issues, see sections 5-210 (Showing of Interest), 9-211 (Contract Bar), 10-600 (Expanding Unit), 14-350 (Multiemployer, Single Employer, and Joint Employer Units), and 15-120 (Construction Units).

10. PRIOR DETERMINATIONS AND OTHER BARS TO AN ELECTION

The processing of a petition for an election is subject to certain other limitations which are designed, like contract bar (treated in Chapter 9), to implement the statutory objective of achieving a balance between industrial stability and freedom of choice.

This chapter treats these other bars, one (the election-year bar) a statutory bar mandated by Section 9(c)(3) of the Act, and the others (like contract bar) based 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.

The 12-month period runs from the date of balloting, not from the date of the certification. *Mallinckrodt Chemical Works*, 84 NLRB 291, 292 (1949); *Retail Store Employees Local 692 (Irvins, Inc.)*, 134 NLRB 686, 688 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).

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

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).

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. *American Bridge Div., U.S. Steel Corp*., 156 NLRB 1216, 1218–1219 (1966).

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, 1052 (1959). Note the distinction between this rule and the 1-year certification rule (see section 10-200), which precludes the processing of a petition filed before the end of the 1-year certification 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, because "[t]o 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*., 117 NLRB 1206, 1208 (1955); see also *Mason & Hanger-Silas Mason Co*., 142 NLRB 699, 701 (1963). 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) only precludes an election in a "unit or any subdivision" in which the earlier election was held. Thus, it does not preclude 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. (see *Thiokol Chemical Corp*., 123 NLRB 888 (1959)), nor does it preclude employees from voting in a unit in a larger election because they previously voted in an earlier election in a smaller unit (see *Robertson Bros. Department Store, Inc.*, 95 NLRB 271, 273 (1951)). See also *Allegheny Pepsi-Cola Bottling Co.*, 222 NLRB 1298 (1976); *Allstate Insurance Co*., 176 NLRB 94 (1969). Cf, *Vickers, Inc*., 124 NLRB 1051, 1052 (1959) (an earlier election was held in a larger unit and the present petition sought a smaller unit of some of those same employees; the Board found that even assuming Section 9(c)(3) applied, the petition could be processed for other reasons). 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, 1192 (1994); *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. *Camvac International*, 297 NLRB 853 (1991); *Great Scot Supermarket*, 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); *T-H Products Co.*, 113 NLRB 1246 (1955).

The Board will extend comity where (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. *Summer's Living Systems*, 332 NLRB 275, 277 (2000); *Standby One Associates*, 274 NLRB 952, 953 (1985); *Allegheny General Hospital*, 230 NLRB 954, 955 (1977), enf. denied on other grounds 608 F.2d 965 (3d Cir. 1979). The Board will not withhold comity where state procedures do not precisely conform to those of the Board where the parties voluntarily participated in the election and the due process requirement was met. *West Indian Co.*, 129 NLRB 1203 (1961).

In addition, the unit established in the State proceeding must not be "repugnant" to the Act, although it need not conform to Board precedent. *Allegheny General Hospital*, 230 NLRB 954, 955 (1977). In this regard, the Board has not extended comity to units of professionals and nonprofessionals where the State election did not afford professionals a separate vote, *Brookhaven Memorial Hospital*, 214 NLRB 1010 (1974), commenting that such an election is not "valid." *Mental Health Center*, 222 NLRB 901, 902 (1976); see also *Southern Minnesota Supply Co.*, 116 NLRB 968, 969 (1957) (state election not valid where supervisors within meaning of Act were included in unit).

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).

At one time, the Board held that where a union-security provision was authorized through state procedures, a petition to rescind such a provision must also be left to state procedures, and thus refused to entertain a UD petition. See *City Markets, Inc.*, 266 NLRB 1020 (1983). In *Albertson's/Max Food Warehouse*, 329 NLRB 410 (1999), however, the Board ruled that the timeliness of a UD petition is to be determined under the NLRA, not State law.

Although not specifically limited to questions of state comity, the Board has stated that in the absence of sufficient safeguards, it will not accord to the results of a privately-conducted election the same effect it attaches to election conducted by a Government agency, or one privately conducted with an impartial overseer in charge. *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. *Mar-Jac Poultry Co.*, 136 NLRB 785, 785–786 (1962).

This rule was upheld by the 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." See also *Chelsea Industries*, 331 NLRB 1648, 1648–1649 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002); *Latino Express, Inc.*, 360 NLRB 911 (2014).

The certification year rule applies in every instance in which the Board certifies a union after a representation election, even if the Board has previously certified the union's representative status for the same unit. *Americare-New Lexington Health Care Center*, 316 NLRB 1226, 1226–1227 (1995). Thus, the rule applies after employees vote for continued representation in a decertification election. Id.; *Beverly Manor Health Care Center*, 322 NLRB 881 (1997).

The rule applies for 1 year following the date of certification. *Americare-New Lexington Health Care Center*, 316 NLRB 1226 (1995). As detailed below in section 10-220, the certification year may instead commence from the first bargaining session if the employer refuses to bargain following certification while pursuing its right to judicial review. See *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, 278 fn. 4 (1990), enfd. 939 F.2d 402 (6th Cir. 1991); *Virginia Mason Medical Center*, 350 NLRB 923 (2007).

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 has 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." *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508–1509 (1951). This rule is applied strictly. *United Supermarkets*, 287 NLRB 119, 120 (1987). Similarly, an employer cannot withdraw recognition after the certification year expires based on evidence of employee dissatisfaction that was obtained during the certification year. *Chelsea Industries*, 331 NLRB 1648 (2000). But see *LTD Ceramics, Inc.*, 341 NLRB 86 (2004) (withdrawal permitted based on

employee petition including some signatures obtained on last day of certification year).

The certification year rule ensures that a certified union's representative status cannot be challenged during that time. UC petitions, however, do not necessarily infringe on a union's representative status, and accordingly may, in certain instances, be processed during the certification year. *Kirkhill Rubber Co.*, 306 NLRB 559 (1992) (processing UC petition seeking to clarify the unit so as to include only those employees actually covered by the stipulated unit description). *Kirkhill Rubber* distinguished a situation where granting a UC petition would "obliterat[e]" the certified unit. See *Firestone Tire Co.*, 185 NLRB 63 (1970) (dismissing UC petition).

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, Inc.*, 128 NLRB 720 (1960).

By contrast, 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).

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); see also *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994). For more on self-determination elections, see Chapter 21.

10-220 Exceptions to the Rule

347-2017 7500

10-221 The *Mar-Jac* Exception

347-2017-5000

347-2017-7567

625-6675

The certification year is extended in situations where the employer has failed to carry out its 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 fn. 6 (1962); *Lamar Hotel*, 137 NLRB 1271, 1273 (1962); see also *Bridgestone/Firestone, Inc.*, 337 NLRB 133, 134 (2001); *JASCO Industries, Inc.*, 328 NLRB 201 (1999).

The reason for this policy is because by permitting a petition, after the employer has refused to bargain for part of the certification year—the time, the Board has stated, "when Unions are generally at their greatest strength"—"would be to allow" an employer 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." *Mar-Jac Poultry*, 136 NLRB at 787; see also *Midstate Telephone Co.*, 179 NLRB 85, 86 (1969); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lower Bucks Cooling & Heating*, 316 NLRB 16 (1995).

In determining the length of an extension to the certification year, the Board considers the

nature of the employer's violations, the number, extent, and dates of the collective-bargaining sessions, the impact of unfair labor practices on the bargaining process, and the conduct of the union during negotiations. *American Medical Response*, 346 NLRB 1004, 1005 (2007). If there has not been "a single minute of bargaining uncompromised by . . . unlawful conduct," the Board may extend the certification bar for another full year. *Metta Electric*, 349 NLRB 1088 (2007); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011).

If the employer's refusal to bargain is predicated on its pursuit of its right to judicial review, and the court ultimately affirms the Board's order, the certification year will begin with the first bargaining session, not the date of court enforcement and not the date on which the parties agree to schedule a bargaining session. *Dominguez Valley Hospital*, 287 NLRB 149, 149–150 (1987); see also *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990); *Jasco Industries*, 328 NLRB 201 (1999).

The Board has held that an employer's offers to bargain conditional on litigation in the Supreme Court did not in any way afford the unions their *Mar-Jac* year. *Chicago Health & Tennis Clubs*, 251 NLRB 140 (1980).

If there is a significant delay in the commencement of bargaining due to "inexcusable procrastination or other manifestations of bad faith" on the part of the union, the commencement of the certification year will not be equated with the first bargaining session. *Dominguez Valley Hospital*, 287 NLRB 149, 150 (1987). 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 doing so would have proved futile) and where the employer had an appeal pending in a related bargaining case.

By contrast, the "equities of the present 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 parties' 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, 785 (1963).

Mar-Jac Poultry, 136 NLRB at 786, itself involved a settlement agreement, as did *Southern Mfg.*, 144 NLRB at 784. 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).

The Board has indicated that no extension to the certification year is warranted if the employer's violations occur before the beginning of the certification year and it does not appear any further violations were committed between the date of the certification and the union's request for bargaining (which was not made until after the certification year had passed). *Dixie Gas, Inc.*, 151 NLRB 1257, 1259–1260 (1965).

Similarly, the *Mar-Jac* rule is not necessarily applicable in any 8(a)(5) situation; for example, where an employer failed to provide the union with information regarding a discharge or unilateral changes, no *Mar-Jac* remedy was warranted where there was no general allegation that the employer had failed or refused to recognize or bargain with the union in good faith and no indication how the failure to provide information affected the parties' negotiations. *Cortland Transit, Inc.*, 324 NLRB 372 (1997).

The Board has specifically rejected the application of *Mar-Jac* where the underlying representation proceeding involved a self-determination election. *White Cap Inc.*, 323 NLRB 477, 478 fn. 3 (1997); *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994).

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); *Westinghouse Electric Corp*., 114 NLRB 1515 (1956).

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, 36 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952); *Caterair International*, 322 NLRB 64, 67 (1996).

For a discussion of what constitutes a "reasonable period," see section 10-1000 below.

During this reasonable period, no question concerning representation may be raised. *Freedom WLNE-TV*, 295 NLRB 634 (1989). *Interstate Brick Co.*, 167 NLRB 831 (1967); *Frank Becker Towing Co.*, 151 NLRB 466, 467 (1965); *Dick Bros., Inc.*, 110 NLRB 451 (1955).

For this rule to apply, there must, of course, be a settlement agreement. See *Lexus of Concord, Inc*., 343 NLRB 851, 854–855 (2004) (declining to extend settlement bar principles where there was no settlement agreement, express or implied). Further, in order to have bar quality, the settlement agreement must provide for bargaining. *BOC Group, Inc.*, 323 NLRB 1100 (1997).

Under current precedent, the timing of a petition may affect a settlement agreement's bar quality. Thus, in *Truserv Corp.*, 349 NLRB 227, 228 (2007), the Board held that where a decertification petition is filed after the alleged unlawful conduct, but *before* the employer and union entering into a settlement agreement that does not contain an admission of wrongdoing, the settlement agreement will not bar the petition. In this respect, *Truserv* reversed one line of precedent holding such settlement agreements to be bars (*Douglas Randall, Inc.*, 320 NLRB 431 (1995); *Liberty Fabrics*, 327 NLRB 38 (1998); *Supershuttle of Orange County*, 330 NLRB 1016 (2000)), and reinstated a prior line of cases (*Passavant Health Center*, 278 NLRB 483 (1986); *Nu-Aimco, Inc.*, 306 NLRB 978 (1992); *Jefferson Hotel*, 309 NLRB 705 (1992)). *Truserv* reaffirmed, however, that pursuant to *Poole Foundry*, a petition will be dismissed if it is filed within a reasonable time *after* the parties enter into a settlement agreement requiring bargaining. See *Truserv*, 349 NLRB at 231. In addition, a petition will be dismissed if there is a finding that it was instigated by the employer or that the showing of interest in support thereof was solicited by the employer. Id. at 229.

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 a discussion of related issues, see section 10-800, which deals with the Board's policy with respect to unfair labor practice charges that may "block" a petition.

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. See *Ellis-Klatcher & Co.*, 79 NLRB 183, 184 (1948), where more than 4 years had elapsed since the entry of the court decree, and *Mascot Stove Co.*, 75 NLRB 427 (1948), where more than a year had elapsed.

10-500 Recognition Bar and Successor Bar

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); *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844 (1996); *Seattle Mariners*, 335 NLRB 563 (2001). The Board currently holds that this reasonable period ranges from a minimum of 6 months to 1 year. *Lamons Gasket Co.*, 357 NLRB 739, 748 (2011). Previously the Board had tailored the length of the period to the circumstances of the case. See, e.g., *Royal Coach Lines*, 282 NLRB 1037 (1987); *Tajon, Inc.*, 269 NLRB 327 (1984); *Brennan's Cadillac*, 231 NLRB 225 (1977); *Ford Center for the Performing Arts*, 328 NLRB 1 (1998); *MGM Grand Hotel*, 329 NLRB 464 (1999). See section 10-1000 below for further discussion of the calculation of a "reasonable period."

The recognition bar will not apply if it does not appear that recognition was extended "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 Assn.*, 162 NLRB 364, 365 (1966); *Josephine Furniture Co.*, 172 NLRB 404, 405 (1968). For cases in which one or more of these criteria were not affirmatively met and no bar found, see *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, Inc.*, 167 NLRB 361 (1967).

Voluntary recognition of a union will not bar processing of a subsequent petition if the petitioner demonstrates that it had a 30-percent showing of interest at the time of voluntary recognition. *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), modifying *Rollins Transportation System*, 296 NLRB 793 (1989); see also *Lamons Gasket Co.*, 357 NLRB 739, 745 fn. 22 (2011).

Under *Dana Corp.*, 351 NLRB 343 (2007), the Board introduced a requirement that an employer notify unit employees that it had voluntarily recognized a union, and that the employees or a rival union could then seek an election during a 45-day period, after which the recognition bar policy would operate for a reasonable period of time. The Board reversed this policy in *Lamons Gasket Co.*, 357 NLRB 739 (2011).

For a discussion of recognition principles in the construction industry, see section 9-1000.

The Board has, at times, followed a "successor bar" policy, which is a subspecies of recognition bar. For many years, the Board held that although a successor employer extends recognition to an incumbent union, the union only has a rebuttable presumption of continuing majority status and thus, if there is no contract between the union and the successor employer, the successor's recognition will not bar a petition. *Southern Moldings, Inc.*, 219 NLRB 119 (1975). In *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 344–346 (1999), the Board stated that there was no reason to distinguish between recognition in an initial organizing or successor situation, and accordingly held that after a successor employer recognizes an incumbent union, any petition will be barred for a reasonable period of time. The Board repudiated the successor bar doctrine in *MV*

Transportation, 337 NLRB 770 (2002), but the Board reinstated the doctrine in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and defined a reasonable period as ranging from a minimum of 6 months to 1 year. Compare *FJC Security Services*, 360 NLRB 929 (2014) (finding no successor bar), with *Jamestown Fabricated Steel & Supply, Inc*, 362 NLRB No. 161, slip op. at 1 fn. 1 (2015), and *Empire Janitorial Sales & Services*, 364 NLRB No. 138 (2016) (both finding successor bar).

The First Circuit has rejected a contention that no deference is owed to the Board's successor bar doctrine based (among other things) on the Board's changes in course in this area, stating that the Board has explained its reasoning for doing so. See *NLRB v. Lily Transportation Co.*, 853 F.3d 31 (1st Cir. 2017).

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 cases involving such "expanding unit" arguments, the test is whether the present employee complement is substantial and representative of the unit workforce to be employed in the near future. *Yellowstone International Mailing*, 332 NLRB 386 (2000). The Board has emphasized that the criteria set forth in *General Extrusion Co.*, 121 NLRB 1165 (1958) (see section 9-200), do *not* apply in expanding unit cases. *Endicott Johnson de Puerto Rico*, 172 NLRB 1676, 1677 fn. 3 (1968). If the Board finds the existing complement is substantial and representative, it will direct an immediate election. See *General Cable Corp.*, 173 NLRB 251 (1969). 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, 455 fn. 2 (2004); *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994). For an example of a case finding that a substantial complement nevertheless was not representative, see *Some Industries*, 204 NLRB 1142, 1143 (1973). Compare *Witteman Steel Mills, Inc.*, 253 NLRB 320, 321 fn. 7 (1981).

At the same time, the Board has also indicated that there is no hard and fast rule for determining whether an employee complement is substantial and representative, and will analyze the relevant factors in each case. See *Toto Industries (Atlanta)*, 323 NLRB 645 (1997) (Board denied review of regional director's decision listing nine possible factors for consideration).

Among other considerations, the Board has examined 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, 64 (1970); *Bell Aerospace Co.*, 190 NLRB 509 (1971); *St. John of God Hospital, Inc.*, 260 NLRB 905, 906 (1982).

The Board may also consider 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, Inc.*, 180 NLRB 188, 189 (1970); *Redman Industries*, 174 NLRB 1065, 1066 (1969); *Revere Copper & Brass, Inc.*, 172 NLRB 1126 (1968). Compare *Bekaert Steel Wire Corp.*, 189 NLRB 561, 562 (1971) (stating that while current complement was "representative" and "a separate appropriate unit" warranting election, the continuing viability of any certification resulting from the election and the effect, if any, of such certification could be reviewed in a subsequent appropriate proceeding after the anticipated new operations

the employer contended rendered an immediate election inappropriate had materialized).

The Board has also analyzed the rate of expansion of the unit. Thus, 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, 559 (1971); see also *Bekaert Steel Wire Corp*., 189 NLRB 561, 562 (1971); *Key Research & Development Co.*, 176 NLRB 134 (1969).

As indicated above, the Board will also look at the employer's projected plans and will not dismiss a petition where the plans for expansion are mere speculation or conjecture. See, e.g., *General Engineering, Inc.*, 123 NLRB 586, 589 (1959); *Meramec Mining Co.*, 134 NLRB 1675, 1679–1680 (1962); *Trailmobile, Division of Pullman, Inc*., 221 NLRB 954 (1975).

The Board has explained that its approach to expanding units attempts 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. With respect to the construction industry, however, the Board has noted that it is characterized by activities of "a fluctuating nature and unpredictable duration," and that delaying an election until the employee complement was full or almost full accordingly "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, 502–503 (1970). For further discussion see *John Deklewa & Sons*, 282 NLRB 1375, 1386 fn. 45 (1987). For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-700, and 15-120.

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. See, e.g., *Douglas Motors Corp*., 128 NLRB 307 (1960); see also *NLRB v. Engineer Constructors*, 756 F.2d 464, 466 (6th Cir. 1985). Thus, as with an expanding unit, to warrant an election where there is definitive evidence of a 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." *MJM Studios*, 336 NLRB 1255, 1256 (2001).

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, 733 (1970); *Douglas Motors Corp*., 128 NLRB 307, 308 (1960); *Wm. L. Hoge & Co*., 103 NLRB 20 (1953); see also *Pathology Institute*, 320 NLRB 1050, 1051 (1996) (in unfair labor practice case, Board noted that reduction in operations did not "destroy the continued appropriateness of the historic unit").

If a party contends that a petition should be dismissed due to a cessation of operations (as distinct from a contracting unit argument), the Board will dismiss the petition where cessation is imminent (such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business). *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 4 (2016); *Hughes Aircraft Co*., 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646–647 (1974); *Cooper International*, 205 NLRB 1057, 1057 (1973). The party asserting an imminent cessation of operations bears the burden of showing, through concrete evidence, that cessation is both imminent and definite. *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 4 (2016); *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646–647 (1974). A petition will not be dismissed based on conjecture

or uncertainty concerning future operations. See *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Similarly, a petition will be processed where the evidence shows that an employer's initial anticipated date for completing its operations is inaccurate. *Gibson Electric*, 226 NLRB 1063 (1976). Compare *Larson Plywood Co.*, 223 NLRB 1161 (1976) (finding imminent cessation based on resolution to liquidate business within 90 days and no evidence of inconsistent action). Cf. *Cal-Neva Lodge*, 235 NLRB 1167 (1978) (dismissing petition where operations had ceased and testimony they would resume in near future was speculative).

For an analysis of Board policy with respect to cessation of operations in construction cases, compare *Fish Engineering & Construction*, 308 NLRB 836 (1992); and *Davey McKee Corp.*, 308 NLRB 839 (1992). See also *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 4–5 (2016) (discussing alleged cessation of joint operation where neither joint employer itself intended to cease operations and, on that basis, distinguishing *Davey McKee*). For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-600, and 15-120.

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 & Coke Co.*, 3 NLRB 398 (1937); *Big Three Industries*, 201 NLRB 197 (1973). This policy is known as the blocking charge policy. The policy (as modified) is set forth in section 103.20 of the Board's Rules and Regulations. Put briefly, a party to a representation who files (or has previously filed) an unfair labor practice charge may request that the charge "block" the representation proceeding. Such request must be accompanied by an offer of proof; the regional director will continue processing the petition if the offer of proof is inadequate.

The blocking charge policy is set forth in more detail in CHM sections 11730–11734. In practice, the policy has two different applications.

First, if the charges are filed by a party to the representation proceeding and allege conduct that only interferes with employee free choice ("Type I" charges), the charges should be investigated and either dismissed or remedied before further processing of the petition. CHM sec. 11730.2. If the regional director determines that a Type I charge has merit, the petition should be held in abeyance until disposition of the charge, unless one of the exceptions discussed below applies. CHM sec. 11733.1.

Second, if the charges—whether or not they are filed by a party to the election proceeding—allege conduct that interferes with employee free choice and also is inherently inconsistent with the petition itself ("Type II" charges), the charges may block a related petition during investigation of the charges, because a determination of merit of the charges may also result in the dismissal of the petition. Type II charges include (i) Section 8(a)(1) and (2) or 8(b)(1)(A) charges challenging the circumstances surrounding the petition or the showing of interest, (ii) Section 8(a)(2) and (5), 8(b)(3), or other charges alleging violations involving recognition issues, and (iii) charges that taint an incumbent union's subsequent loss of majority support (which may take the form of the decertification petition at issue). CHM sec. 11730.3. With respect to (i) and (ii), if the regional director finds merit to the charges, the petition will be dismissed (subject to reinstatement upon the petitioner's request after final disposition of the charges). CHM sec. 11733.2(a)(1)–(2).

With respect to Type II charges that may have tainted an incumbent's loss of majority support or the decertification petition, if the regional director finds merit to the charges, and there is specific proof of a causal relationship between the allegations and ensuing events indicating that the alleged conduct caused a subsequent expression of employee disaffection with an incumbent union, the petition should be dismissed based on that disaffection, see CHM sec. 11730.3(c), 11733.2(a)(3).

The causal relationship may be presumed in cases involving a refusal to recognize and bargain with the incumbent, but otherwise it must be shown. *Overnite Transportation Co.*, 333 NLRB 1392, 1393 (2001); *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996). The four-factor test for determining a causal connection is set forth in *Master Slack*, 271 NLRB 78, 84 (1984). The factors are (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. For applications of these factors (in both unfair labor practice and representation cases), see *LTD Ceramics*, 341 NLRB 86 (2004) (no taint); *AT Systems West, Inc.*, 341 NLRB 57 (2004) (taint); *Penn Tank Lines, Inc.*, 336 NLRB 1066 (2001) (taint); *Overnite Transportation Co.*, 333 NLRB 1392 (2001) (taint); *Priority One Services*, 331 NLRB 1527 (2000) (taint). Cf. *Bentonite Performance Materials v. NLRB*, 456 Fed. Appx. 2 (D.C. Cir. 2012) (*Master Slack* has been applied to cases where unfair labor practices not directly related to the decertification process are claimed to have caused the vote in favor of decertification, and has not been used in cases of employer involvement in the decertification process itself).

Overnite Transportation and *Priority One Services* were representation cases in which a causal relationship was found in the absence of a hearing. Under certain circumstances, however, a hearing on the causal nexus may be required. See *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) (remanding for hearing to resolve genuine factual issues as to whether there was causal nexus between single charge alleging unlawful unilateral change and subsequent decertification petition). The Board has stated that a *Saint Gobain* hearing is not required when a petition is held in abeyance, *Linwood Care Center*, 365 NLRB No. 24 (2016), or when the charges challenge the circumstances surrounding the petition itself. *Linwood Care Center*, 365 NLRB No. 8 (2016).

The general effect of the blocking charge policy is to hold the processing of representation petitions in abeyance under the circumstances outlined above. *Mark Burnett Productions*, 349 NLRB 706 (2007). There are, however, several exceptions to the policy, most of which may apply to both Type I and Type II charges:

(1) *Failure to Request Blocking* (CHM sec. 11731.1): A petition may be processed notwithstanding the pendency of a Type I charge if the party filing the charge fails to request that the petition be blocked. Having made a request to block, a party may also seek to rescind the request and resume action on the petition, although the regional director must determine whether to grant approval of the rescission.

In cases where the Board has required an employer to withdraw and withhold recognition from an assisted union unless and until it has been certified, the regional director may honor a waiver whereby the petitioner indicates a willingness to withdraw an 8(a)(2) assistance charge in the event the allegedly assisted union is certified. *Carlson Furniture Industries*, 157 NLRB 851 (1966); CHM sec. 11731.1(c). 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, Inc.*, 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) *Free Choice Possible Notwithstanding Charge* (CHM sec. 11731.2). This exception is available where—even in the presence of a request to block—the regional director concludes that employees could, under the circumstances, exercise their free choice despite the unfair labor practices.

(3) *Charges Otherwise Appropriate for Deferral* (CHM sec. 11731.3): This exception may apply where a petition is, or may be, blocked by an unfair labor practice charge otherwise appropriate for deferral. Consult the CHM for details of this exception.

(4) *Petition and Charge Raise Significant Common Issues; UC and AC Petitions* (11731.4): It may be appropriate to process the representation petition where doing so will

resolve issues common to the representation and unfair labor practice cases. When a UC or AC petition raises the same issue as an 8(a)(2) or (5) charge, the UC or AC petition may be the more effective way of resolving the issue and ordinarily should be processed while the charge is held in abeyance. See also discussion of *A. J. Schneider & Associates*, 227 NLRB 1305 (1977), in section 11-220.

(5) and (6) *Scheduled Hearing and Scheduled Election* (CHM secs. 11731.5 and 11731.6): If a hearing is scheduled and there is insufficient time between the request to block and the hearing to determine possible merit to the charge, the regional director may proceed to a hearing in the representation case, after which the regional director will determine whether exceptions 2 and 3 apply. If an election has been scheduled and there is insufficient time to determine possible merit to a charge, the regional director has the discretion to postpone the election; conduct the election and impound the ballots; or conduct the election, issue a tally (and, in the absence of objections, a certification), and then proceed to investigate the charge. The CHM lists several factors for regional directors to consider in exercising his or her discretion in this respect.

(7) A final exception—not specifically discussed in the CHM—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, Co.*, 139 NLRB 601, 604–605 (1962). For more on striker eligibility, see section 23-120.

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, although certain preliminary processing of the petition is permitted. See CHM sec. 11734; see also *Matson Terminals*, 321 NLRB 879, 880 fn. 7 (1996). If, of course, other bar doctrines and policies discussed above have come to bear in the interim, the petition may be subject to dismissal on those other grounds.

As noted above, a petitioner may request that a dismissed petition be reinstated, but a petition is subject to reinstatement only if the allegations in the unfair labor practice case that caused the dismissal are ultimately found to be without merit. CHM sec. 11733.2(b).

The blocking charge policy is not to be misused by a party as a delaying tactic. CHM sec. 11730. That said, absent evidence that a charge is baseless or frivolous, the blocking charge policy may be properly invoked, even if the charge is later dismissed. See *Warren Unilube, Inc. v. NLRB*, 690 F.3d 969, 975–976 (8th Cir. 2012).

For a related discussion of the effect of settlement agreements on petitions, see section 10-300. See also section 10-1000 for a discussion of the "reasonable period of time" which may, pursuant to a Board order or settlement agreement, bar any petition during that period.

10-900 Special Situations

347-0100

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, 510 (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

316-6733-5000

347-2050-5000

347-2067-6700

347-4050-5025

347-6020-5067

530-4075

A *Board order requiring bargaining* as a remedy for unfair labor practices or when the employer has unlawfully withdrawn recognition or wholly refused to bargain will bar any challenge to the union's status for "a reasonable period of time." See *Frank Bros. v. NLRB*, 321 U.S. 702, 705 (1944); *Lamons Gasket Co.*, 357 NLRB 739, 744 (2011). 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 under an order requiring bargaining:

> [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.

Under *Lee Lumber*, the reasonable period begins when the employer commences bargaining in good faith. See id. at 399 fn. 6.

As discussed above in section 10-500, application of *recognition bar (or successor bar) principles* will also bar a petition for a reasonable period of time. In *Lamons Gasket Co.*, 357 NLRB 739, 748 (2011), the Board held that the *Lee Lumber* analysis applies in calculating a reasonable period for purposes of recognition bar. The period is measured from the date of the first bargaining meeting between the union and the employer. *Americold Logistics, LLC*, 362 NLRB No. 58, slip op. at 3 (2015). In *UGL-UNICCO Service Co.*, 357 NLRB 801, 808–809 (2011), the Board similarly held that the *Lee Lumber* analysis applies in calculating a reasonable period under the successor bar doctrine, with the following modification: if a successor employer expressly adopts existing terms

and conditions of employment as the starting point for bargaining, without making any unilateral changes, the reasonable period will only be a 6-month period (measured from the date of the first bargaining meeting), whereas the entirety of the *Lee Lumber* analysis applies where a successor recognizes the union but unilaterally establishes initial terms and conditions prior to bargaining.

A *settlement agreement* that provides for bargaining also bars a petition for a reasonable period of time following the date of the settlement agreement. *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). In deciding whether a reasonable period has elapsed under *Poole Foundry*, the Board considers whether the parties were 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 were to agreement, and the presence or absence of bargaining impasse. *AT Systems West, Inc.*, 341 NLRB 57, 61 (2004). There is no minimum period under *Poole Foundry*, although the Board will dismiss a petition filed during the settlement agreement's notice-posting period. See *Hertz Equipment Rental Corp.*, 328 NLRB 28 (1999). The Board has emphasized, however, that there is no requirement that *Poole Foundry* be used to calculate the reasonable period following all settlement agreements, regardless of the agreements' content, *Lift Truck Sales & Services*, 364 NLRB No. 47, slip op. at 2 fn. 6 (2016), and in this regard the Board has held that where a settlement agreement admits that the employer has bargained in bad faith, the *Lee Lumber* analysis applies, rather than the *Poole Foundry* factors. See id. (noting that neither *Poole Foundry* itself nor subsequent cases applying it involved a settlement with a clause admitting a refusal to bargain).

See also sections 10-300 and 10-500.

11. AMENDMENT, CLARIFICATION, AND DEAUTHORIZATION PETITIONS, FINAL OFFER ELECTIONS AND WAGE-HOUR CERTIFICATIONS

Chapter 4 described, in bare outline, the six types of petitions. The variety of areas of law and procedure involved in the handling of certification petitions (RC), employer petitions (RM), and decertification petitions (RD) have been treated in the intervening chapters. 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). Final offer elections and wage-hour certifications are also included in this chapter.

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, a party may file a petition to amend a certification to reflect changed circumstances, such as a merger or a change 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, Inc.*, 221 NLRB 197 (1976). The required contents of an AC petition are set forth in Section 102.61(e), and the procedures for UC petitions are described at CHM sections 11490–11498. Note that, as the name implies, there must be a certification to amend.

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. Historically, the Board required that, to grant an AC petition in such instances, there must have been (1) a vote on the change that satisfied minimum due process, and (2) a substantial continuity between the pre- and postaffiliation bargaining representative. *Hammond Publishers, Inc.*, 286 NLRB 49, 51 (1987); *Hamilton Tool Co*., 190 NLRB 571 (1971); see also *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986). In *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 147 (2007), however, the Board abandoned the due process requirement, and subsequently applied that principle retroactively. See *Allied Mechanical Services*, 352 NLRB 662 (2008), incorporated by reference at 356 NLRB 2 (2010).

Regarding the second part of the test—continuity—the Board has dismissed an AC petition where an affiliation of the certified union with another union results in "a sufficiently 'dramatic' change in the identity of the bargaining representative to raise a question concerning representation." *Western Commercial Transport*, 288 NLRB 214, 218 (1988) (dismissing based on fundamental change in character of certified union as shown by substantial changes in size, organization structure, and administration resulting in loss of autonomy and diminishment in rights of membership). Compare *Mike Basil Chevrolet*, 331 NLRB 1044 (2000) (finding sufficient continuity). The issue of continuity often arises in the unfair labor practice context, but the analysis is the same. See, e.g., *Avante at Boca Raton, Inc*., 334 NLRB 381 (2001); *Garlock Equipment Co.*, 288 NLRB 247 (1988); *Chas. S. Winner, Inc.*, 289 NLRB 62 (1988); *May Department Stores*, 289 NLRB 661 (1988), enfd. 897 F.2d 221 (7th Cir. 1990); *Sioux City Foundry*, 323 NLRB 1071 (1997), enfd. 154 F.3d 832 (8th Cir. 1998); *CPS Chemical Co.*, 324 NLRB 1018 (1997); *Seattle-First National Bank*, 290 NLRB 571 (1988), enfd. 892 F.2d 792 (9th Cir. 1989), cert. denied 496 U.S.

925 (1990); *News/Sun-Sentinel Co.*, 290 NLRB 1171 (1988); *National Posters*, 289 NLRB 468 (1988); *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) (merger of local and larger district council); and *Service America Corp.*, 307 NLRB 57 (1992) (merger of two locals).

An amendment of certification is not affected by the Board's normal contract-bar rules. *Hamilton Tool Co.*, 190 NLRB 571, 573 (1971). However, in some circumstances, an amendment of certification may be denied where granting it would result in the certification of a union that had previously been rejected by unit employees in a Board election within the last year. See *Williamson Co.*, 244 NLRB 953, 955 (1979); *Bunker Hill Co.*, 197 NLRB 334 (1972). *Bedford Gear & Machine Products, Inc.*, 150 NLRB 1 (1964); *Gulf Oil Corp.*, 109 NLRB 861 (1954); *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); *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); *Missouri Beef Packers*, 175 NLRB 1100 (1969).

11-200 Unit Clarification (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, 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. The required contents for a UC petition are set forth in Rules section 102.61(d), and the procedures for UC 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.*, 288 NLRB 1173 (1988).

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.

See also *CHS, Inc.*, 355 NLRB 914, 916 (2010); *E. I. Du Pont, Inc*., 341 NLRB 607, 608 (2004); *Developmental Disabilities Institute*, 334 NLRB 1166, 1167 (2001); *Robert Wood Johnson University Hospital*, 328 NLRB 912, 914 (1999); *United Parcel Service*, 303 NLRB 326, 327 (1991).

Work assignment disputes are not appropriate for a UC proceeding, however. *Coatings Application Co.*, 307 NLRB 806 (1992). Compare *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913 (1989).

When an RC petition has been filed and the Board finds no question concerning representation but rather a problem that can be resolved by unit clarification, it may on its own initiative clarify the existing certification. *Pacific Coast Shipbuilders Assn.*, 157 NLRB 384 (1966); *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).

The unit in question need not be certified, because national labor policy requires the Board to take all positive action available to eliminate industrial strife and encourage collective bargaining. *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1524 (1964); *Seaway Food Town, Inc.*, 171 NLRB 729 (1968); *Alaska Steamship Co*., 172 NLRB 1200, 1202 fn. 8 (1968); *Manitowoc Shipbuilding, Inc.*, 191 NLRB 786 (1971); *Peerless Publications, Inc.*, 190 NLRB 658, 659 (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). The Board has explained that there is no requirement "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*." *United Parcel Service*, 303 NLRB 326, 327 (1991) (emphasis in original); *Robert Wood Johnson University Hospital*, 328 NLRB 912, 914 (1999); see also *Kaiser Foundation Hospitals*, 337 NLRB 1061 (2002) (stating that the Board's historical exclusion principles apply to cases implicating *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), discussed in section 14-600). 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).

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, 124 (2000); *I.O.O.F. Home of Ohio, Inc*., 322 NLRB 921, 922 (1997). There is an exception to this rule when the parties have specifically stipulated to the placement of now-disputed employees whose inclusion "would violate the principles of the Act." *Washington Post Co.*, 254 NLRB 168 (1981); *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. *Goddard Riverside Community Center*, 351 NLRB at 1236. See section 11-210 for a discussion of what constitutes an appropriate time.

In deciding whether a new group of employees should be added to an existing bargaining unit through unit clarification, the Board generally weighs a variety of community-of-interest factors to determine whether the employees at issue share an "overwhelming community of interest" with unit employees and thus constitute an accretion to the existing unit. *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 3–4 (2015); see sections 11-220 and 12-500. But in UC cases involving units defined by the work performed, the Board applies the following standard:

> 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.

The Sun, 329 NLRB 854, 859 (1999) (footnote omitted); see also *WLVI, Inc.*, 349 NLRB 683 (2007). Compare *Archer Daniels Midland Co.*, 333 NLRB 673 (2001).

By contrast, if a new classification is performing the same basic function as 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.*, 333 NLRB 1365, 1366 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001). Compare *AT Wall, Inc.*, 361 NLRB No. 62, slip op. at 3–4 (2014).

An employer acts at its peril in removing a position from a bargaining unit during the pendency of a unit clarification petition. *Bay State Gas Co.*, 253 NLRB 538, 539 (1980); *Entergy Mississippi, Inc.*, 361 NLRB No. 89, slip op. at 2 (2014), affd. in relevant part 810 F.3d 287 (5th Cir. 2015).

11-210 Timing of UC Petition

385-7501-2581

385-7501-2585

385-7533-2001-5000

385-7522-2020

385-7533-2020-4100

385-7533-2060

385-7533-8008

393-6007-1700

393-8000

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, 172 (1973); *Alaska Steamship Co*., 172 NLRB 1200 (1968). 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); see also *Bethlehem Steel Corp.*, 329 NLRB 241 (1999) (UC petition processed where classifications were not in existence at facility until after contract was executed and contract did not specifically cover their placement); *Bethlehem Steel Corp.*, 329 NLRB 245 (1999) (similar). Compare *Bethlehem Steel Corp.*, 329 NLRB 243 (1999).

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); *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); *Wallace-Murray Corp*., 192 NLRB 1090 (1971). In *Edison Sault Electric*, 313 NLRB at 754, 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, 950 (2001) (citing *Williams Transportation Co*., 233 NLRB 837, 838 (1977)). The Board will, however, clarify the unit where the petition is filed shortly before expiration of the contract. *Shop Rite Foods, Inc*., 247 NLRB 883 (1980); *University of Dubuque*, 289 NLRB 349, 350 (1988).

A petition will also be entertained shortly after a contract is executed when the parties could not reach agreement on a disputed classification and the UC petitioner did not abandon its position in exchange for contract concessions. *St. Francis Hospital*, 282 NLRB 950, 951 (1987), and cases cited therein; *Kirkhill Rubber Co.*, 306 NLRB 559 (1992); *Brookdale Hospital Medical Center*, 313 NLRB 592, 592 fn. 3 (1993). Cf. *Goddard Riverside Community Center*, 351 NLRB 1234 (2007) (UC petition seeking to exclude historically supervisors processed during contract term). 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, 154 fn. 1 (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). But in *Dixie Electric Membership*, 358 NLRB 1089 (2012), incorporated by reference at 361 NLRB No. 107 (2014), enfd. 814 F.3d 752 (5th Cir. 2016), the Board found that a UC petition filed between 121 and 143 days after the contract's execution was not filed "shortly after" execution.

11-220 Accretion v. Question Concerning Representation

385-7501-2512

393-8000

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, 681 (1966); *Bendix Corp*., 168 NLRB 371, 372 (1968); *AMF Electro Systems Division*, 193 NLRB 1113, 1114 fn .6 (1971); *International Silver Co*., 203 NLRB 221 (1973). 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 & Telegraph Co*., 175 NLRB 553 (1969); *Lufkin Foundry & Machine Co.*, 174 NLRB 556 (1969); *National Can Corp.*, 170 NLRB 926 (1968); *Sterilon Corp.*, 147 NLRB 219 (1964). In addition, as discussed above, 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. *Plough, Inc.*, 203 NLRB 818 (1973); *SunarHauserman*, 273 NLRB 1176 (1984); *ATS Acquisition Corp.*, 321 NLRB 712, 713 fn. 6 (1996); *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999). Cf. *Teamsters Local 89 (United Parcel Service)*, 346 NLRB 484 (2006) (it is an unfair labor practice to "accrete" a group of employees that has been historically excluded from the unit).

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*, 310 NLRB 844 (1993); *Westinghouse Electric Corp.*, 173 NLRB 310 (1969); *Brockton Taunton Gas Co.*, 178 NLRB 404 (1969); *Roper Corp*., 186 NLRB 437 (1970); *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); see also *Steelworkers Local 7912 (U.S. Tsubaki)*, 338 NLRB 29 (2002).

As discussed in section 11-200, a new classification performing the same basic function as the unit employees have historically performed is not analyzed as an accretion, but is instead "viewed as remaining in the unit." *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001).

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).

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 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 arbitrator'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).

Unit clarification cases raise a variety of issues and concerns not easily susceptible to a ready summary. Several situations the Board has encountered are detailed in the remainder of this section.

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, 847–848 (1967); *International Telephone Corp*., 159 NLRB 1757, 1762–1763 (1966); see *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247, 1251 (1963). But see *Wells Fargo Corp*., 270 NLRB 787, 787 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); *Lockheed Aircraft Corp*., 155 NLRB 702, 713 (1965).

In *Brink's Inc*., 272 NLRB 868, 870 (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 Co.*, 189 NLRB 869 (1971), the petitioner represented a multiplant unit, as well as several single-plant units, and it sought to use UC proceedings to absorb the single-plant units into the multiplant unit. The Board dismissed the petition, reasoning that unit scope, rather than representation, was at issue, that there was no statutory authority for permitting employees to decide which contract unit they wished, and that it was left to the parties to decide whether to merge the single-facility units into the larger multiplant unit (unless the choice of a bargaining representative is an issue). In doing so, the majority relied on the dissenting opinion in *Libbey-Owens-Ford Glass Co.*, 169 NLRB 126 (1968). 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 predominant to determine exclusive bargaining status. *F.H.E. Services*, 338 NLRB 1095 (2003), relying on *National Carloading Corp.*, 167 NLRB 801 (1967).

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); *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); *Libby, McNeill & Libby*, 159 NLRB 677, 681 (1966).

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).

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," that employees at issue are not part of the unit. The *Schneider* decision must, however, be read in conjunction with Exception 4 of the Blocking Charge rule (see section 10-800). 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. See also *Armco Steel Co.*, 312 NLRB 257 (1993) (indicating support for use of UC proceedings to resolve unit scope as well as unit placement issues when use of such proceedings will be more expeditious and will obviate the need for unfair labor practice proceedings).

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. UD procedures are set forth in Rules sections 102.83–102.88 and CHM secs. 11500–11516.

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, Inc.*, 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 "the 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 Palsy 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 Associates*, 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.*, 266 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)

133-7700

240-6750

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

385-5001 et seq.

A certification must be honored for a reasonable period, ordinarily 1 year, in the absence of "unusual circumstances." *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 (section 9-420); (2) a schism (section 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, 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.'" *South Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)).

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 (see chapters 13–14). Composition of a unit relates to such questions as the inclusion or exclusion of disputed employee categories or unit placement in general (see chapters 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." *Morand Bros. Beverage Co.*, 91 NLRB 409, 417–418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); see also *Bartlett Collins Co*., 334 NLRB 484 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Federal Electric Corp*., 157 NLRB 1130, 1132 (1966); *Parsons Investment Co.*, 152 NLRB 192, 193 fn. 1 (1965); *Capital Bakers, Inc.*, 168 NLRB 904, 905 (1968); *National Cash Register Co*., 166 NLRB 173, 174 (1967); *NLRB v. Carson Cable TV*, 795 F.2d 879, 887 (9th Cir. 1986); *Dezcon, Inc*., 295 NLRB 109, 111 (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, 1107 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 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*., 334 NLRB 484, 484 (2001).

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. *Overnite Transportation Co.*, 322 NLRB 723, 723 (1996); see also *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); *Mountain States Telephone & Telegraph 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, 1210 fn. 10 (1999).

The presumption is that a single location unit is appropriate. *Hegins Corp*., 255 NLRB 1236 (1981); *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). This presumption is discussed at greater length in Chapter 13.

A petitioner's desire as to unit is always a relevant consideration but cannot be dispositive. *International Bedding Co*., 356 NLRB 1336 (2011); see also *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); *Airco, Inc.*, 273 NLRB 348 (1984), and sections 12-140, 12-300, and 13-1000. Obviously, a proposed bargaining unit based on an arbitrary, heterogeneous, or artificial grouping of employees is inappropriate. *Turner Industries Group, LLC*, 349 NLRB 428, 430 (2007); see also *Moore Business Forms, Inc*., 204 NLRB 552 (1973); *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, 60 (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, 1309 (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.

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); *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.

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 (1966), 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, Inc.*, 195 NLRB 346 (1972); *Wackenhut Corp.*, 196 NLRB 278 (1972); *Elite Protective & Security Services*, 300 NLRB 832 (1990).

At one time, the Board held that, where an employer of security guards has voluntarily recognized a mixed guard-nonguard union as its guards' representative and there is no collective-bargaining agreement in place, the 9(b)(3) restriction precluded the Board from finding unlawful a withdrawal of recognition. *Wells Fargo Corp.*, 270 NLRB 787 (1984). The Board overruled *Wells Fargo* in *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016), and held that in such circumstances, an employer cannot lawfully withdraw recognition without demonstrating the union has actually lost majority support.

See also sections 6-200 and 18-200.

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 Full Fashioned Hosiery Co.*, 241 F.2d 913 (4th Cir. 1957); *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); *Motts Shop Rite of Springfield*, 182 NLRB 172, 172 fn. 3 (1970). See also *Overnite Transportation Co.*, 322 NLRB 723, 725–726 (1996), and 325 NLRB 612, 613–614 (1998), where the Board held that a finding of different appropriate 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 of 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.

See also *Gustave Fischer, Inc.*, 256 NLRB 1069 (1981).

To obtain a better understanding of the factors which go into a unit finding, this section first considers 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. General Community of Interest Principles

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 petitioned-for employees are dissimilar from those of another group, a single unit is inappropriate. *Swift & Co.*, 129 NLRB 1391, 1394 (1961); see also *U.S. Steel Corp.*, 192 NLRB 58 (1971). But the fact that two or more groups of petitioned-for 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, 167 (3d Cir. 1986). Relevant community of interest factors include:

a. Degree of functional integration. *Casino Aztar*, 349 NLRB 603, 605 (2007); *Publix Super Markets, Inc*., 343 NLRB 1023, 1024–1025 (2004); *United Rentals, Inc.*, 341 NLRB 540, 541 (2004); *United Operations, Inc*., 338 NLRB 123, 124–125 (2002); *Seaboard Marine Ltd.*, 327 NLRB 556 (1999); *Atlanta Hilton & Towers*, 273 NLRB 87, 88 (1984); *NCR Corp*., 236 NLRB 215, 216 (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, 140–141 (1970); *Transerv Systems*, 311 NLRB 766 (1993).

b. Common supervision. *United Rentals, Inc*., 341 NLRB 540, 541–542 (2004); *Bradley Steel, Inc*., 342 NLRB 215, 216 (2004); *United Operations, Inc*., 338 NLRB 123, 125 (2002); *Associated Milk Producers*, 251 NLRB 1407, 1408 (1970); *Sears, Roebuck & Co*., 191 NLRB 398, 404–405 (1971); *Donald Carroll Metals, Inc.*, 185 NLRB 409 (1970); *Dean Witter*, 189 NLRB 785, 786 (1971); *Harron Communications*, 308 NLRB 62 (1992); *Transerv Systems*, 311 NLRB 766 (1993); *Sears, Roebuck & Co*., 319 NLRB 607 (1995).

c. The nature of employee skills and functions. *United Operations, Inc*., 338 NLRB 123, 125 (2002); *Overnite Transportation Co*., 331 NLRB 662 (2000); *Seaboard Marine Ltd*., 327 NLRB 556 (1999); *J. C. Penney Co.*, 328 NLRB 766 (1999); *Harron Communications*, 308 NLRB 62 (1992); *Hamilton Test Systems*, 265 NLRB 595 (1982); *R-N Market*, 190 NLRB 292 (1971); *Downingtown Paper Co*., 192 NLRB 310 (1971); *Phoenician*, 308 NLRB 826 (1992).

d. Interchange and contact among employees. *Casino Aztar*, 349 NLRB 603, 605–606 (2007); *United Rentals, Inc.*, 341 NLRB 540 (2004); *J. C. Penney Co.*, 328 NLRB 766, 767 (1999); *Associated Milk Producers*, 251 NLRB 1407 (1970); *Purity Supreme, Inc*., 197 NLRB 915 (1972); *Gray Drug Stores, Inc.*, 197 NLRB 924 (1972); *Michigan Bell Telephone Co*., 192 NLRB 1212 (1971).

e. Work situs. *R-N Market*, 190 NLRB 292 (1971); *Bank of America*, 196 NLRB 591 (1972); *Kendall Co.*, 184 NLRB 847 (1970).

f. General working conditions. *United Rentals, Inc.*, 341 NLRB 540 (2004); *Allied Gear & Machine Co.*, 250 NLRB 679 (1980); *Sears, Roebuck & Co*., 191 NLRB 398 (1971); *Yale University*, 184 NLRB 860 (1970); *K.G. Knitting Mills*, 320 NLRB 374 (1995).

g. Fringe benefits. *Allied Gear & Machine Co*., 250 NLRB 679 (1980); *Donald Carroll Metals, Inc.*, 185 NLRB 409 (1970); *Cheney Bigelow Wire Works, Inc.*, 197 NLRB 1279 (1972); *Publix Super Markets*, 343 NLRB 1023 (2004); *Bradley Steel, Inc*., 342 NLRB 215 (2004); *Los Angeles Water & Power Employees' Assn*., 340 NLRB 1232, 1236 (2003).

h. Employer's administrative organization. *International Paper Co*., 96 NLRB 295, 298

fn. 7 (1951); *Gustave Fischer, Inc*., 256 NLRB 1069. 1069 fn. 5 (1981).

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*, 343 NLRB 1023, 1027 (2004); *Bradley Steel, Inc*., 342 NLRB 215 (2004); *Trumbull Memorial Hospital,* 338 NLRB 900 (2003); *United Operations, Inc*., 338 NLRB 123 (2002); *Hotel Services Group*, 328 NLRB 116 (1999).

Thus, for example, a difference in the situs of employment does not in itself require establishment of separate bargaining units, especially when there is evidence of a shared community of interest between both groups. *NLRB v. Carson Cable TV*, 795 F.2d 879, 884–884 (9th Cir. 1986); *McCann Steel Co*., 179 NLRB 635, 636 (1969); *Peerless Products Co*., 114 NLRB 1586 (1956). Conversely, employees stationed away from the plant may be 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, 620 (1959); *Sheffield Corp.*, 123 NLRB 1454, 1456 (1959). As a consequence, homeworkers are generally excluded from a unit of in-plant employees. *Valley Forge Flag Co*., 152 NLRB 1550, 1563 (1965); *Terri Lee, Inc*., 103 NLRB 995, 996 (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*., 147 NLRB 228, 230 (1964); *International Bedding Co*., 356 NLRB 1336, 1337 (2011).

Similarly, difference in supervision is not a per se basis for excluding employees from an appropriate unit. *Texas Empire Pipe Line Co*., 88 NLRB 631, 632 (1950). The important consideration is still the overall community of interest among the several employees.

For typical analyses of the operative factors leading to or away from a community-of-interest finding, see *International Bedding Co*., 356 NLRB 1336, 1337 (2011), *U.S. Steel Corp*., 192 NLRB 58 (1971), *Brand Precision Services*, 313 NLRB 657 (1994), and *Aerospace Corp*., 331 NLRB 561 (2000).

b. Community of Interest Analysis When a Party Contends Additional Employees Must be Added to the Petitioned-For Unit

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Board overruled *Park Manor Care Center*, 305 NLRB 872 (1991), which had set forth a standard for determining unit appropriateness in nursing homes (see section 15-163), and clarified the standard for unit determinations when an employer contends that a petitioned-for unit is not appropriate because it excludes other employees. The Board stated that in such situations, it will first determine whether the petitioned-for unit is "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" and if the employees share a community of interest; if these criteria are met, the party contending that other excluded employees must be added must demonstrate that the excluded employees share an "overwhelming community of interest" with the petitioned-for employees. Id. at 945–946.

Specialty Healthcare emphasized that the standard articulated therein does not disturb "the various presumptions and special industry and occupation rules" the Board has developed over time. Id. at 946 fn. 29; see also *DPI Secuprint*, 362 NLRB No. 172, slip op. at 6 (2016).

The Board subsequently clarified that the "readily identifiable as a group" requirement is not another version of the community of interest test, but "means simply that the description of the unit is sufficient to specify the group of employees the petitioner seeks to include." *DPI Secuprint*, 362 NLRB No. 172, slip op. at 4 fn. 10 (2016).

In *Specialty Healthcare* itself, the Board found that a petitioned-for unit of certified nursing assistants was appropriate, and that the employer had not shown that certain other employees

(resident activity assistants, social services assistant, staffing coordinator, maintenance assistant, central supply clerk, cooks, dietary aides, medical records clerk, business office clerical, and receptionist) shared an overwhelming community of interest in them.

The Board has since applied *Specialty Healthcare* to find appropriate various types of units. In *DTG Operations, Inc.*, 357 NLRB 2122 (2011), the Board found appropriate a petitioned-for unit of rental service agents and lead rental service agents that excluded various other hourly employees. In *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015 (2011), the Board found appropriate a petitioned-for unit of employees working in the employer's E85 radiological control department that excluded other technical employees; the Board also found that the unit was appropriate under earlier precedent involving petitioned-for units of technical employees. The Fourth Circuit enforced the decision on this latter ground. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013). In *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 13–19 (2014), enfd. 824 F.3d 557 (5th Cir. 2016), pet. for reh'g en banc denied 844 F.3d 188 (5th Cir. 2016), the Board found appropriate a petitioned-for unit of cosmetics and fragrances selling employees that excluded other selling (and nonselling employees); in doing so, the Board also held that the petitioned-for unit was consistent with its precedent involving department stores. And in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 6–7 (2015), the Board found appropriate a petitioned-for unit consisting of pre-press, digital press, digital bindery, offset bindery, and shipping and receiving employees that excluded offset press employees; the Board also found that printing industry precedent did not require a different result. See also *Cristal USA, Inc.*, 365 NLRB No. 74 (2017) (denying review of finding that unit limited to warehouse employees, excluding maintenance and production employees, is appropriate under *Specialty Healthcare*); *Cristal USA, Inc.*, 365 NLRB No. 82 (2017) (finding appropriate unit limited to production employees in one of employer's two linked buildings, excluding warehouse, maintenance, and production employees at other building).

The Board has also found petitioned-for units inappropriate under *Specialty Healthcare*. In *Odwalla, Inc.*, 357 NLRB 1608 (2011), the Board found that a stipulated unit of delivery drivers, relief drivers, warehouse associates, and cooler technicians that excluded merchandisers was a "fractured" unit by virtue of the merchandisers' exclusion, and that accordingly the "overwhelming community of interest" standard had been met. And in *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 2–4 (2014), the Board found that although a petitioned-for unit of women's shoe sales associates spread over two departments was "readily identifiable as a group," these employees did not share a community of interest (and it was accordingly unnecessary to consider whether the petitioned-for employees shared an overwhelming community of interest with other selling employees). See also *A.S.V., Inc.*, 360 NLRB 1252, 1252 fn. 1 (2014) (although no party requested review of regional director's finding that petitioned-for unit of undercarriage assembly employees was inappropriate, Board agreed with regional director's subsequent application of *Specialty Healthcare* to determine the smallest appropriate unit that encompassed the petitioned-for employees).

Every Circuit Court that has taken up the issue has found the *Specialty Healthcare* framework valid, and has rejected the argument that it allows the extent of organization to control the unit determination. See *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016). The Third and Fourth Circuits, however, have suggested that the Board must consider, under the first step of *Specialty Healthcare*, whether the petitioned-for employees are distinct from other employees (not simply whether the petitioned-for employees share a community of interest with each other), and the Second Circuit in *Constellation Brands* remanded the case to the Board, finding that the Board had not adequately applied the first step to determine "whether excluded

employees had meaningfully distinct interests from members of the petitioned-for unit . . . that outweigh similarities with unit members." 842 F.3d at 787.

12-220 History of Collective Bargaining

420-1200 et seq.

In determining the appropriateness of a bargaining unit, prior bargaining history is given significant weight. *ADT Security Services Inc*., 355 NLRB 1388 (2010); *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206, 1210 (2013), incorporated by reference at 362 NLRB No. 120 (2015). 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. *Buffalo Broadcasting Co.*, 242 NLRB 1105, 1106 fn. 2 (1979); *Canal Carting, Inc.*, 339 NLRB 969, 970 (2003); *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003); *Washington Post Co*., 254 NLRB 168, 169 (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); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965); *Hi-Way Billboards*, 191 NLRB 244 (1971). The rationale for this policy is based on the statutory objective of stability in industrial relations. *Alley Drywall, Inc*., 333 NLRB 1005, 1007 (2001).

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, 453 (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, Inc.*, 339 NLRB 969 (2003); *Ready Mix USA, Inc.*, 340 NLRB 946 (2003). This heavy burden has been phrased as requiring a showing of "compelling circumstances" to overcome the significance of bargaining history. *Children's Hospital*, 312 NLRB 920, 929 (1993), enfd. sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996); *NLRB v. ADT Security Services*, 689 F.3d 628, 634 (6th Cir. 2012); *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 39 (D.C. Cir. 2015).

As in many areas of substantive law, exceptions are made to the general rule. These are:

12-221 Election Stipulation

393-6054-6750

401-5000

420-7312

The Board does not consider itself bound by a collective-bargaining history resulting from an 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, 1083 (2004); *Mid-West Abrasive Co.*, 145 NLRB 1665, 1667 (1964); *Macy's San Francisco*, 120 NLRB 69, 71–72 (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); *Westinghouse Electric Corp.*, 118 NLRB 1043, 1047 (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); *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, 1140 fn. 1 (1998).

For additional discussion of stipulations in representation cases, see sections 23-500, 23-520, and 23-530 and *Pacific Lincoln-Mercury, Inc.*, 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. See, e.g., *Mfg. Woodworkers Assn*., 194 NLRB 1122, 1123 (1972) (bargaining history on a "members only" basis); *Land Title Guarantee & Trust Co.*, 194 NLRB 148, 149 (1972) (bargaining history based solely on the sex of the employees); *Crown Zellerbach Corp*., 246 NLRB 202, 203–204 (1980) (inclusion of employees by agreement despite lack of community of interest); *A. L. Mechling Barge Lines*, 192 NLRB 1118, 1120 (1971) (same); *Liggett & Meyers Tobacco Co.*, 91 NLRB 1145, 1146 fn. 3 (1950) (bargaining history on a "members only" basis); *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.*, 340 NLRB 946, 947 (2003).

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, 312 (1971); *Heublein, Inc.*, 119 NLRB 1337, 1339 (1958); *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, 1270 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, 710 (1963); *Arcata Plywood Corp*., 120 NLRB 1648, 1651 (1958); *Joseph E. Seagram & Sons, Inc*., 101 NLRB 101, 103–104 (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, 857 (1978); *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1953), although it may be a factor in unit determination. *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); *General Electric Co.*, 100 NLRB 1489, 1493 (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); *Westinghouse Electric Corp*., 144 NLRB 455 (1963). Compare *Crown Zellerbach Corp*., 246 NLRB 202 (1979), 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, 739 (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, 278 (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*., 98 NLRB 1018 (1951), 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, 195 (1959). But the dissolution of an historical multiemployer bargaining association 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), enfd. 366 Fed. Appx. 184 (2d Cir. 2010).

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, 1666–1667 (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. *Brotherhood of Locomotive Firemen & Enginemen*, 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, 1429–1430 (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. *Mount St. Joseph's Home for Girls*, 229 NLRB 251 (1977); *Sonoma-Marin Publishing Co*., 172 NLRB 625 (1968); *Griffin Wheel Co*., 80 NLRB 1471 (1949). That said, although the Board cannot certify a one-person unit, the Act does not preclude bargaining with a union on behalf of a single employee, provided the employer is willing. *Louis Rosenberg, Inc*., 122 NLRB 1450, 1453 (1959). Still, the Board will not direct bargaining in such a unit and it is not an unfair labor practice if an employer refuses to bargain with a representative on behalf of a one-person unit. *Foreign Car Center*, 129 NLRB 319 (1961). The Board accordingly will not direct an election in such a unit under Section 9(c) or Section 8(b)(7)(C), and a union engaged in recognitional picketing in a one-person unit will not violate the Act by engaging in such picketing for more than 30 days without filing a petition. *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966); see also *Operating Engineers Local 181 (Steel Fab)*, 292 NLRB 354 (1989); *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, 141 (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, 785 fn. 3 (1997). Cf. *Seedorff Masonry, Inc.*, 360 NLRB 869, 869 fn. 1 (2014) (although employer may lawfully repudiate 8(f) agreement if there is no more than one employee in the bargaining unit, employer failed to meet burden of proof to establish the unit in question was stable one-person unit), enf. denied 812 F.3d 1158 (8th Cir. 2016).

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, 814 (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); *Donald Carroll Metals, Inc.*, 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); *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, 35 (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, 612 (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 & Rubber Co.*, 156 NLRB 454, 456 (1966); "*M" System, Inc.*, 115 NLRB 1316 (1956); *Curcie Bros., Inc.*, 146 NLRB 380 (1964); *Carter Camera & Gift Shops*, 130 NLRB 276 (1961).

12-233 Age

420-3460

Age is not a valid consideration for exclusion from a unit. *Metal Textile Corp*., 88 NLRB 1326, 1328–1329 (1950) (rejecting contention that elderly employees should be excluded from unit). Similarly, social security annuitants who limit their earnings so as not to decrease their annuity but who otherwise share a community of interest with unit employees are included. *Holiday Inns of America, Inc.*, 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, Inc.*, 106 NLRB 343 (1953); *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*., 165 NLRB 951, 952 fn. 6 (1967); 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, 490 fn. 8 (1948); *New Deal Cab Co.*, 159 NLRB 1838, 1841 (1966). See also *Andrews Industries*, 105 NLRB 946, 949 (1953); *Pioneer Bus Co.*, 140 NLRB 54 (1963); *Lindsay Newspapers, Inc.*, 192 NLRB 478, 479–480 (1971).

In *New Deal Cab Co.*, 159 NLRB 1838, 1840–1841 (1966), the Board found that two entities 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." Id. at 1841 (citing *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*., 76 NLRB 488 (1948); *Andrews Industries*, 105 NLRB 946 (1953);

Pioneer Bus Co., 140 NLRB 54 (1963)); see also *Safety Cabs, Inc*., 173 NLRB 17 (1968).

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 in 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. *Delta Mfg. Division*, 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, Inc.*, 160 NLRB 1141, 1146 (1966); *Associated Grocers, Inc.*, 142 NLRB 576, 578 (1963); *Central Coat, Apron & Linen Service*, 126 NLRB 958, 959 (1960). Nor are the union's jurisdictional limitations, standing alone, a proper determinant of bargaining unit. *Pennsylvania Garment Mfrs. Assn*., 125 NLRB 185, 198 (1959). Moreover, a jurisdictional agreement between two or more unions does not relieve the Board of its statutory duty to determine the appropriate bargaining unit. *Guy F. Atkinson*, 84 NLRB 88, 92 (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, 399 (1953).

When, however, exclusion from membership is based on invidious or discriminatory reasons, see *Handy Andy, Inc.*, 228 NLRB 447 (1977).

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, Inc.*, 171 NLRB 997, 998 (1968); see also *Building Construction Employers Assn.*, 147 NLRB 222 (1964); *John Sundwall & Co.*, 149 NLRB 1022 (1964); *Paxton Wholesale Grocery Co*., 123 NLRB 316 (1959). But see *Dundee's Seafood, Inc*., 221 NLRB 1183 (1976), in which the Board considered 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, 151 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); *Gas Service Co*., 140 NLRB 445, 447 (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, 209 (1964); *Scrantonian Publishing Co.*, 215 NLRB 296, 298 fn. 6 (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 Extent of Organization, section 12-300.

12-300 Extent of Organization

401-2562

420-8400

As mentioned at the beginning of this chapter, Section 9(c)(5) prohibits making "extent of organization" a controlling factor in bargaining unit determination. Although this requirement is essentially one of statutory origin, its application is nonetheless couched in terms of Board policy and warrants elaboration.

The Board has effectuated section 9(c)(5) by denying unit requests where the only apparent basis for the petitioned-for unit 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, 693–694 (4th Cir. 1963); *NLRB v. Metropolitan Life Insurance Co*, 380 U.S. 438, 441–443 (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 1336, 1337 (2011); *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934, 941–942 (2011). For further discussion of *Specialty Healthcare* see section 12-210.

In conformity with this statutory limitation, the Board has held that a unit based solely or essentially on extent of organization is inappropriate. *New England Power Co*., 120 NLRB 666 (1958); *John Sundwall & Co*., 149 NLRB 1022 (1964). But again, the fact that the extent to which employees have been organized cannot be the controlling determinant of the appropriateness of a proposed bargaining unit under Section 9(c)(5) does not preclude reliance on that factor in conjunction with other factors. *Metropolitan Life Insurance Co.*, 156 NLRB 1408, 1413–1418 (1966); *Central Power & Light Co.*, 195 NLRB 743, 745–746 (1972); *Mosler Safe Co*., 188 NLRB 650, 651 fn. 6 (1971); *Overnite Transportation Co*., 141 NLRB 384, 384 fn. 2 (1963).

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*., 221 NLRB 1183, 1184 (1975); *Consolidated Papers, Inc.*, 220 NLRB 1281, 1283–1284 (1975); *Dixie Belle Mills, Inc*., 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 also sections 12-140, 12-239, and 13-1000.

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, 1170 (2003); *Carl Buddig & Co.*, 328 NLRB 929, 930 (1999); *Fleming Foods*, 313 NLRB 948, 949–950 (1994); see also *Premier Plastering, Inc.*, 342 NLRB 1072, 1073 (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, therefore did not meet the test of "residual unit," and was inappropriate as a bargaining unit. *American Radiator & Standard Sanitary Corp*., 114 NLRB 1151, 1154–1155 (1956). Where, however, the petitioner is willing to proceed to an election in any unit found appropriate, an election will be directed in whatever unit the Board determines is an appropriate residual unit. *Carl Buddig & Co.*, 328 NLRB 929, 930 (1999); *Folger Coffee Co*., 250 NLRB 1, 2 (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, 1274 (1998); *International Bedding Co.*, 356 NLRB 1336, 1337 (2011); see also *United Rentals, Inc*., 341 NLRB 540, 542 fn. 11 (2004) (only unrepresented employees at facility included in unit despite sparse record of community of interest).

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 Plastering*, 340 NLRB 1169 (2003).

For other illustrations of groups found *appropriate* as "residual," see *Cities Service Oil Co*., 200 NLRB 470 (1972) (in a multiplant situation); *Weber Aircraft*, 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); *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); *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, 224 (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, 1351–1352 (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 conditions afforded represented clericals." *Chrysler Corp*., 173 NLRB 1046, 1047 (1969).

12-410 Residual Units in the Health Care Industry

470-880

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); Rules sec. 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, Inc.*, 219 NLRB 327 (1975). Thereafter, in *Kaiser Foundation Health Plan of Colorado*, 333 NLRB 557 (2001), the Board applied this new policy to a nonacute care health facility. See also section 15-160.

In *St. Vincent Charity Medical Center*, 357 NLRB 854 (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 employees at the employer's acute care hospital. The Board majority held that the Healthcare Rule left these issues to adjudication and ordered a self-determination election. See also *Rush University Medical Center v. NLRB*, 833 F.3d 202 (D.C. Cir. 2016) (approving application of *St. Vincent Charity Medical Center* to find that a self-determination election was appropriate to decide whether some, but not all, of the employer's unrepresented nonprofessional employees wished to join a preexisting nonconforming unit consisting of some, but not all, of the nonprofessional and skilled maintenance employees).

For a more extensive discussion of the type of elections accorded residual groups, see chapter 21.

12-420 One Person Residual Units

The Board is reluctant to leave a single employee out of a unit where that would result in that employee being unable to exercise Section 7 rights to representation. *Klochko Equipment Rental*, 361 NLRB No. 49, slip op. at 1 fn. 1 (2014); *Vecellio & Grogan*, 231 NLRB 136, 136–137 (1977); *Victor Industries Corp. of California*, 215 NLRB 48, 49 (1974).

12-500 Accretions to Existing Units

316-3301-5000

347-4050-1733

385-7533-4080

440-6701

"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 183, 186 (1997). 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).

In *Safeway Stores, Inc.*, 256 NLRB 918 (1981), the Board described its test for accretion 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." See also *E. I. Du Pont Inc.*, 341 NLRB 607, 608 (2004). The Fourth Circuit agreed with this rule but disagreed with how the Board applied it. *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 428–432 (4th Cir. 2001).

"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); *Melbet Jewelry Co*., 180 NLRB 107, 110 (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"); 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 Retirement & Health Center*, 313 NLRB 1216, 1218 (1994); *Beverly Manor-San Francisco*, 322 NLRB 968, 972 (1997).

For additional discussion of accretion, see section 11-220.

An accretion issue may arise in three different representational contexts: contract bar, a petition for certification, or a petition for unit clarification. The issue may also arise in unfair labor practice cases. See, e.g., *Ryder Integrated Logistics, Inc.*, 329 NLRB 1493 (1999); *Essex Wire Corp.*, 130 NLRB 450 (1961).

In the contract bar context, 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, 1123 (1968); *Public Service Co. of New Hampshire*, 190 NLRB 350 (1971).

In the petition for certification context, such a petition will be dismissed if the petitioned-for employees are found to be an accretion to another unit. A petition for certification of a group found to be an accretion is, of course, dismissed, *Granite City Steel Co.*, 137 NLRB 209 (1962), although under certain circumstances a petition for certification that should otherwise be dismissed may be treated as a request to clarify an existing unit. *Radio Corp. of America*, 141 NLRB 1134 (1963). Likewise, employees accreted to an existing unit are not accorded a self-determination election. *Borg-Warner Corp.*, 113 NLRB 152, 154 (1955); *Goodyear Tire & Rubber Co.*, 147 NLRB 1233, 1234 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.

And in the petition for unit clarification context, the petition is granted if the disputed employees are an accretion to the unit. *Printing Industry of Seattle, Inc.*, 202 NLRB 558 (1973). Note, however, that when a unit clarification petition involves a new classification that is performing the same work the unit classification had historically performed, that classification is viewed as part of the unit, not as an accretion. *Premcor, Inc.*, 333 NLRB 1365 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001); see also *AT Wall Co.*, 361 NLRB No. 62, slip op. at 3–4 (2014) (distinguishing *Premcor* situation from accretion analysis). Also note that not all unit clarification petitions raise an accretion issue. For a complete discussion of unit clarification petitions, see section 11-200.

Resolution of an accretion issue 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.*, 341 NLRB 607 (2004). 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). As indicated at the outset of this section, however, the ultimate test is whether the employees asserted to be an accretion share an "overwhelming community of interest" with the existing unit. *Safeway Stores, Inc.*, 256 NLRB 918 (1981).

The factors commonly used to determine whether the group of employees in question constitutes an accretion include the following:

12-510 Interchange

420-5027

420-5034

Absence or infrequency of interchange among the new employees and those in the existing unit. *Plumbing Distributors, Inc.*, 248 NLRB 413 (1980); *Combustion Engineering*, 195 NLRB 909, 912 (1972).

The Board place particular emphasis on this factor, describing it as one of the two "critical" factors to an accretion finding. *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1271 (2005); *NV Energy, Inc*., 362 NLRB No. 5, slip op. at 4 (2015).

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, 453 (1961).

See also *Towne Ford Sales*, 270 NLRB 311 (1984); *Super Value Stores*, 283 NLRB 134, 136–137 (1987); *Judge & Dolph, Ltd*., 333 NLRB 175, 183–185 (2001).

12-520 Supervision and Conditions of Employment

420-2900

Common supervision and similar terms and conditions of employment. *Western Cartridge Co.*, 134 NLRB 67 (1962); *Western Wirebound Box Co*., 191 NLRB 748 (1971).

Common day-to-day supervision is the second factor the Board has identified as "critical" to an accretion finding. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005); *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 4 (2015).

For other cases assessing this factor, see *Towne Ford Sales*, 270 NLRB 311 (1984); *Plumbing Distributors, Inc.*, 248 NLRB 413 (1980); *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992); *Judge & Dolph, Ltd.*, 333 NLRB 175, 185–186 (2001).

12-530 Job Classification

385-7533-2000

Substantially similar job classifications. *Gillette Motor Transport, Inc.*, 137 NLRB 471 (1962); *Printing Industry of Seattle, Inc.*, 202 NLRB 558 (1973); *Plough, Inc*., 203 NLRB 818

(1973).

In *Printing Industry of Seattle, Inc.*, 202 NLRB 558, 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.*, 137 NLRB 209, 212 (1962); *Combustion Engineering*, 195 NLRB 909, 911 (1972).

Occasional use of similar work measurement techniques does not constitute functional integration and will not, by itself, warrant an accretion finding. *General Electric Co.*, 204 NLRB 576, 577 (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); see also *Libby, McNeill & Libby*, 159 NLRB 677 (1966) (finding functional changes meant that operation that was once part of one unit now properly belonged in another). See also section 11-220 for a discussion of transfers, mergers, and functional integration in unit clarification contexts.

12-550 Geographic Proximity

420-6700

Geographic remoteness was among the factors militating against an accretion finding in *Rollins-Purle, Inc.*, 194 NLRB 709, 710 (1972); see also *Granite City Steel Co.*, 137 NLRB 209, 212 (1962); *Super Value Stores*, 283 NLRB 134, 136 (1987); *Bryant Infant Wear*, 235 NLRB 1305, 1306 (1978); *Judge & Dolph, Ltd.*, 333 NLRB 175, 181 (2001). Compare *Arizona Public Service Co.*, 256 NLRB 400 (1981) (accretion found despite 55 mile distance); *Retail Clerks Local 870 (White Front Stores)*, 192 NLRB 240 (1971) (accretion despite 19 miles).

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, 268 (2004).

12-560 Role of New Employees

420-2380

The role of the new employees in the operations of the existing unit is a factor in accretion analysis. *Granite City Steel Co.*, 137 NLRB 209, 212 (1962). 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.*, 333 NLRB 1365 (2001); *Developmental Disabilities Institute*, 334 NLRB 1166 (2001), discussed in section 12-530.

12-570 Community of Interest

401-7550

It is worth reiterating here that the foregoing factors are, in essence, part of the ultimate determination as to whether the employees asserted to be an accretion share a community of interest with the employees in the existing unit. See, e.g., *Boeing Co.*, 349 NLRB 957, 958 (2007). As emphasized above, this community of interest must be "overwhelming" to warrant an accretion finding. *Dennison Mfg. Co.*, 296 NLRB 1034, 1036 (1989). Virtually any of the foregoing cases in this chapter serve to illustrate the Board's concern with analyzing the

community of interest in accretion cases, but for additional examples see *Firestone Synthetic Fibers Co*., 171 NLRB 1121, 1123 (1968); *Earthgrains Co*., 334 NLRB 1131 (2001); *U.S. Steel Corp*., 187 NLRB 522 (1971); *CF&I Steel Corp*., 196 NLRB 470 (1972); *Giant Eagle Markets,* 308 NLRB 206 (1992); *AT Wall Co.*, 361 NLRB No. 62, slip op. at 4–5 (2014); *Pepsi Beverage Co.*, 362 NLRB No. 25, slip op. at 6–7 (2015). Cf. *Armstrong Rubber Co*., 180 NLRB 410 (1970); *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, Inc.*, 191 NLRB 786 (1971), noting a long history of inclusion of related employees in the unit which warranted finding of accretion. Compare *Safeway Stores, Inc*., 256 NLRB 918, 928 fn. 19 (1981), where a jurisdictional clause in a contract with another union precluded accretion. In *Massachusetts Electric Co*., 248 NLRB 155, 157–158 (1980), 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); *ATS Acquisition Corp*., 321 NLRB 712 (1996).

As the foregoing cases show, the Board generally places great weight on collective-bargaining history. The Board will, however, clarify a historical unit where "recent, substantial changes have rendered that unit inappropriate." *Lennox Industries*, 308 NLRB 1237, 1238 (1992). Thus, the Board has clarified a combined single unit into a two-plant unit based on changes in the organizational structure and operations of the employer's plant (due to the sale to separate operating divisions of the purchaser). *Rock-Tenn Co.*, 274 NLRB 772, 773 (1985) (stating particular facts of the case, constituted "compelling circumstances" for disregarding the two-plant bargaining history). Compare *Batesville Casket Co.*, 283 NLRB 795, 797 (1987) (declining to clarify an existing two-company single unit into separate units where there were no "recent substantial changes").. See also *Ameron, Inc.*, 288 NLRB 747 (1988) (clarifying single unit into two units under *Rock-Tenn* principles); *Delta Mills*, 287 NLRB 367 (1987) (rejecting contention that changed circumstances warranted splitting an existing unit into two units); *Mayfield Holiday Inn*, 335 NLRB 38 (2001) (allowing 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 & Sandblasting 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). See also *Pepsi Beverage Co.*, 362 NLRB No. 25, slip op. at 7 (2015).

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. *Aerojet-General Corp*., 185 NLRB 794, 797

(1970); see also *E. I. Du Pont Inc*., 341 NLRB 607, 609 (2004) (assessing comparative skills in finding accretion was not warranted).

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 and 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. Id. at 1175; see also *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000); *Mercy Health Services North*, 311 NLRB 367 (1993); *ATS Acquisition Corp*., 321 NLRB 712 (1996); *Coca-Cola Bottling Co. of Buffalo*, 325 NLRB 312 (1998). Cf. *Rock Bottom Stores*, 312 NLRB 400 (1993) (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 than is an unfair labor practice proceeding.

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.

Of relevance to multilocation employers, the Board has stated that a petitioned-for single-facility unit is presumptively appropriate, see, e.g., *Hilander Foods*, 348 NLRB 1200 (2006), as is an employerwide unit. *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998). Both presumptions are rebuttable (because the scope of the unit sought by the petitioner, while relevant, cannot be determinative of the unit, see section 13-1000), and it is the burden of the party seeking to deviate from the presumptively appropriate unit to rebut the presumption. See *Hilander Foods*, 348 NLRB 1200 (2006); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998). Cf. *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017) (remanding case based on finding Board had disregarded contrary evidence in employer's offer of proof in approving petitioned-for wall-to-wall unit).

When a petitioner seeks a single location unit, the "single-facility" presumption can be rebutted by a showing that the petitioned-for unit has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Hilander Foods*, 348 NLRB 1200 (2006). To determine whether the presumption has been rebutted, the Board examines factors such as central control over daily operations and labor relations, similarity of employee skills, functions, and working conditions, the degree of employee interchange, the distance between locations, and bargaining history, if any. *J&L Plate*, 310 NLRB 429 (1993).

For cases in which the presumption was rebutted, see *Trane*, 339 NLRB 866, 868 (2003); *Budget Rent A Car Systems*, 337 NLRB 884, 885 (2002); *Dattco, Inc*., 338 NLRB 49, 50 (2002); *Waste Management Northwest*, 331 NLRB 309 (2000); *Novato Disposal Services*, 328 NLRB 820 (1999); *R & D Trucking*, 327 NLRB 531 (1999); *Kendall Co.*, 184 NLRB 847 (1970); *Kent Plastics Corp*., 183 NLRB 612 (1970); *Prince Telecom*, 347 NLRB 789 (2006).

For cases in which the presumption was *not* rebutted, see *North Hills Office Services*, 342 NLRB 437 (2004); *New Britain Transportation Co*., 330 NLRB 397 (1999); *Centurion Auto Transport*, 329 NLRB 394, 400 (1999); *National Cash Register Co*., 166 NLRB 173 (1967); *RB Associates*, 324 NLRB 874 (1997); *O'Brien Memorial*, 308 NLRB 553 (1992); *Executive Resources Associates*, 301 NLRB 400, 401–403 (1991); *Esco Corp.*, 298 NLRB 837, 839 (1990); *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988); *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 3–5 (2017). Cf. *Passavant Retirement & Health Center*, 313 NLRB 1216 (1994) (presumption not rebutted in accretion case).

The single-facility presumption does not apply, however, where a petitioner seeks a multifacility unit, even if the employer contends that a single-facility unit is appropriate. *Capital Coors Co.*, 309 NLRB 322, 322 fn. 1 (1992), citing *NLRB v. Carson Cable TV*, 795 F.2d 879, 886–887 (9th Cir. 1986).

Instead, when presented with a petitioned-for multifacility unit, the Board will determine whether the unit is appropriate based on a variant of the community of interest test, examining the following factors: employees' skills, duties, and working conditions; functional integration of business operations, including employee interchange; geographic proximity; centralized control

of management and supervision; bargaining history; and extent of union organizing and employee choice. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 2 (2016); see also *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1081–1082 (2004); *Bashas', Inc.*, 337 NLRB 710 (2002); *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *NLRB v. Carson Cable TV*, 795 F.2d 879, 884 (9th Cir. 1986). The Board will find a petitioned-for multifacility unit inappropriate if the petitioned-for group does not share a community of interest distinct from that shared with employees at other, excluded locations. *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1082 (2004); see also *Acme Markets, Inc.*, 328 NLRB 1208 (1999). Compare *Panera Bread*, 361 NLRB No. 142, slip op. at 1 fn. 1 (2014). For a discussion of multisite units in the construction industry, see *Oklahoma Installation Co.*, 305 NLRB 812 (1991).

Cases involving retail chain store operations commonly involve analysis of the single-facility presumption or a petitioned-for multifacility unit. At one time the Board held that the appropriate unit in a retail chain generally "embrace[d] employees of all stores located within an employer's administrative division or geographic area." *Daw Drug Co.*, 127 NLRB 1316, 1319 (1960). But *Sav-On Drugs*, 138 NLRB 1032 (1962), modified the policy and held that a petitioned-for unit limited to one or several stores in an employer's 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." Id. at 1033 fn. 4.

As part of this policy, a single-store unit is, as in other single-facility cases, presumptively appropriate unless it is established that it has been effectively merged into a more comprehensive unit so as to have lost its individual identity. *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551, 551 fn. 1 (1964). For retail cases finding the presumption was rebutted, see *V.I.M. Jeans*, 271 NLRB 1408 (1984); *Twenty-First Century Restaurant*, 192 NLRB 881 (1971); *McDonalds*, 192 NLRB 878 (1971). For cases in which the presumption was not rebutted, see *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551 (1964); *Walgreen Co.*, 198 NLRB 1138 (1972); *Haag Drug Co.*, 169 NLRB 877 (1968).

Similarly, petitioned-for units of multiple retail stores are examined under the Board's usual test for multifacility units. See, e.g., *Verizon Wireless*, 341 NLRB 483, 485 (2004) (finding unit of Bakersfield stores appropriate, even though employer's preferred distinct wide unit might also be appropriate). For other cases involving petitioned-for multistore units, see *Gray Drug Stores*, 197 NLRB 924 (1972) (rejecting petitioned-for unit limited to stores in one county, also rejecting employer's assertion only statewide unit was appropriate, and directing election in stores in two counties); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965) (finding petitioned-for 20-store unit appropriate); *Bashas', Inc.*, 337 NLRB 710 (2002) (petitioned-for unit of 17 stores in particular count found inappropriate); see also *Haag Drug Co.*, 169 NLRB 877, 878 fn. 4 (1968) (stating that unit of two or more retail outlets would be appropriate if there is a sufficient degree of geographic or administrative coherence and common interests of employees in both outlets).

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, 600–601 (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.*,147 NLRB 551, 552–553 (1964).

The bulk of the remainder of this chapter discusses the individual factors that the Board has discussed in cases involving 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 a multilocation determination. *Budget Rent A Car Systems*, 337 NLRB 884, 885 (2002); *Dattco, Inc*., 338 NLRB 49, 50–51 (2002); *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); *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*, 347 NLRB 789, 790 (2006); *Novato Disposal Services*, 328 NLRB 820 (1999); *R & D Trucking, Inc.*, 327 NLRB 531 (1999); *Twenty-First Century Restaurant*, 192 NLRB 881 (1971); *Mary Carter Paint Co*., 148 NLRB 46, 47 (1964); *Universal Metal Products Corp.*, 128 NLRB 442, 444–445 (1960). See also *Waste Management Northwest*, 331 NLRB 309, 310 (2000). Compare *Red Lobster*, 300 NLRB 908, 911 (1990); *Cargill, Inc*., 336 NLRB 1114 (2001). In *Twenty-First Century Restaurant*, 192 NLRB 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.

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, 47 (1st Cir. 2002); *Hilander Foods*, 348 NLRB 1200, 1202–1205 (2006); *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, 969–970 (1964); *Thompson Ramo Wooldridge, Inc*., 128 NLRB 236, 238 (1960); *D&L Transportation*, 324 NLRB 160 (1997); *New Britain Transportation Co*., 330 NLRB 397 (1999). In *Angelus Furniture*, 192 NLRB at 993, the individual store manager could be 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, 232 (1969); *Red Lobster*, 300 NLRB 908 (1990). Compare *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *V.I.M. Jeans*, 271 NLRB 1408, 1409–1410 (1984); *R & D Trucking*, 327 NLRB 531, 532 (1999).

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, Inc.*, 197 NLRB 924 (1972); *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*, 297 F.3d 41, 46–47 (1st Cir. 2002); *Hilander Foods*, 348 NLRB 1200, 1203–1204 (2006); *J. W. Mays, Inc*., 147 NLRB 968, 970. For other assessments of interchange, see *Cargill, Inc*., 336 NLRB 1114 (2001); *Van Lear Equipment, Inc*., 336 NLRB 1059, 1061 (2001); *Bowie Hall Trucking*, 290 NLRB 41, 42–43 (1988); *Globe Furniture Rentals*, 298 NLRB 288 (1990); *Courier Dispatch Group*, 311 NLRB 728 (1993); *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *Trane*, 339 NLRB 866, 867 (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 diminished the significance of the functional integration and distance between the facilities. See also *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000); *RB Associates*, 324 NLRB 874, 878 (1997). Compare *First Security Services Corp*., 329 NLRB 235 (1999). For other cases assessing interchange, see *R & D Trucking*, 327 NLRB 531, 532 (1999); *Novato Disposal Services*, 328 NLRB 820 (1999); *Macy's West, Inc*., 327 NLRB 1222, 1223 (1999); *New Britain Transportation Co*., 330 NLRB 397, 398 (1999); *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004); *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 4–5 (2016); *NLRB v. Klochko Equipment Rental Co.*, 657 Fed. Appx. 441 (6th Cir. 2016).

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, Inc.*, 197 NLRB 1279 (1972); see also *Dattco, Inc*., 338 NLRB 49, 51 (2002); *R & D Trucking*, 327 NLRB 531, 532 (1999); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998); *Waste Management Northwest*, 331 NLRB 309 (2000); *Exemplar, Inc*., 363 NLRB No. 157, slip op. at 3–4 (2016).

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, 793 (2006). A difference in working hours in each store was one among a number of factors considered. *V. J. Elmore 5¢, 10¢ and $1.00 Stores, Inc.*, 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 the 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.*, 338 NLRB 49, 50 (2002); *Stormont-Vail Healthcare, Inc.*, 340 NLRB 1205 (2003); *Globe Furniture Rentals*, 298 NLRB 288 (1990), finding a multilocation unit appropriate. See also *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998); *Novato Disposal Services*, 328 NLRB 820, 823 (1999); *NLRB v. Klochko Equipment*

Rental Co., 657 Fed. Appx. 441 (6th Cir. 2016).

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, Inc.*, 150 NLRB 1523, 1527 (1965); see also *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000); *Penn Color, Inc*., 249 NLRB 1117 (1980); *Renzetti's Market*, 238 NLRB 174 (1978); *First Security Services Corp.*, 329 NLRB 235 (1999); *Courier Dispatch Group*, 311 NLRB 728 (1993). Compare *Dattco, Inc.*, 338 NLRB 49, 50–51 (2002); *Trane*, 339 NLRB 866, 868 (2003); *Novato Disposal Services*, 328 NLRB 820 (1999); *Macy's West, Inc*., 327 NLRB 1222, 1223 (1999); *Exemplar, Inc*., 363 NLRB No. 157, slip op. at 4 (2016).

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, Inc.*, 139 NLRB 629, 632 (1962); see also *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001); *D&L Transportation*, 324 NLRB 160 (1997); *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999). Compare *Barber-Colman Co*., 130 NLRB 478, 479 (1961), 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*, 338 NLRB 866, 868 (2003); *Novato Disposal Services*, 328 NLRB 820 (1999); *Macy's West, Inc*., 327 NLRB 1222, 1223 (1999); *NLRB v. Klochko Equipment Rental Co.*, 657 Fed. Appx. 441 (6th Cir. 2016). But see *Esco Corp*., 298 NLRB 837, 840 (1990).

In *Capital Coors Co*., 309 NLRB 322, 325 (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.

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." Id. 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. Id. It should be noted parenthetically that the latter two factors reflect a constant refrain in unit determinations. See, e.g., *NLRB v. Carson Cable TV*, 795 F.2d 879, 886 (9th Cir. 1986). But see *Eastman West*, 273 NLRB 610, 613–614 (1984). See also *Lawson Mardon U.S.A.*, 332 NLRB 1282, 1283 (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. See *Dixie Belle Mills, Inc.*, 139 NLRB 629, 632 (1962); *J&L Plate*, 310 NLRB 429 (1993). Conversely, a lack of functional integration between two petitioned-for locations may be offset by other factors favoring a unit of employees at both locations. See *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 4–5 (2016).

The highly integrated nature of particular industries has caused the Board to find that a broader unit is optimal. See *New England Telephone Co*., 280 NLRB 162, 164 (1986) (systemwide unit for each department in public utility); *Inter-Ocean Steamship Co*., 107 NLRB 330, 332 (1954) (fleetwide unit in the maritime industry). With respect to maritime, see also *Moore-McCormack Lines, Inc.*, 139 NLRB 796, 798–799 (1962), in which special circumstances supported a finding that a fleetwide unit was not appropriate. See also *Keystone Shipping Co*., 327 NLRB 892, 895–896 (1999). For more on the maritime industry and public utilities, see sections 15-210 and 15-230.

For a discussion of functional integration in automobile rental industry, see *Alamo Rent-A-Car*, 330 NLRB 897 (2000)**.**

See also section 15-270 for a discussion of the effect of integration on unit determinations involving warehouse employees.

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. For example, a history of bargaining in citywide units of retail store employees in other cities was accorded considerable weight in arriving at the unit determination. *Spartan Department Stores*, 140 NLRB 608, 610 (1963). Similarly, a bargaining history on a chainwide basis militated in favor of the more comprehensive bargaining unit. *Meijer Supermarkets, Inc.*, 142 NLRB 513, 514 (1963). By contrast, 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, 68 (1988). And bargaining history has been relied on as a significant factor in finding the single-facility presumption has been rebutted. *Southern Power Co.*, 353 NLRB 1085 (2009) (two Member decision), incorporated by reference at 356 NLRB 201 (2010). See also *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 5 (2016) (prior bargaining history on two-location basis had little relevance due to intervening 4-year period where petitioner did not represent employees at one location, but voluntary recognition and fledging collective-bargaining relationship at one location not sufficiently settled or established to significantly affect multifacility analysis).

In *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 42 (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, 829 (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, 65 (6th Cir. 1964). See also the Ninth Circuit opinion in *NLRB v. Carson Cable TV*, 795 F.2d 879, 886 (9th Cir. 1986).

Finally, this issue reached the highest court. In *NLRB v. Metropolitan Life Insurance Co. v.*, 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 indication that it has exercised the discretion with which Congress has empowered it." Id. at 443. 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.'" Id. at 443 fn. 6.

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, 930 (1966).

Where a petitioner seeks a multifacility unit, the fact that the petitioner's showing of interest is based solely on employees at one of the facilities does not necessarily influence the weight of this factor, nor does it foreclose direction of an election in the petitioned-for multifacility unit. See *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 5 (2016).

For additional discussion see sections 12-140, 12-239, and 12-300.

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 versus single-location unit questions. In *Manor Healthcare Corp*., 285 NLRB 224, 225 (1987), and *California Pacific Medical Center*, 357 NLRB 197 (2011), the Board applied the single-facility presumption in health care. See also *Visiting Nurses Assn. of Central Illinois*, 324 NLRB 55 (1997); *Mercy Health Services North*, 311 NLRB 367 (1993); *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 46 (1st Cir. 2002). 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, 1116 (1988). In that case, the Board found a single facility appropriate. Compare *West Jersey Health System*, 293 NLRB 749, 751–752 (1989); *St. Luke's Health System, Inc.*, 340 NLRB 1171 (2003); *Stormont-Vail Healthcare, Inc.*, 340 NLRB 1205 (2003). Under the Board's Rules on health care bargaining units, this issue is left to adjudication. 284 NLRB 1527, 1532 (1989).

See other health care issues discussed and cross-referenced in section 15-160.

14. MULTIEMPLOYER, SINGLE EMPLOYER, AND JOINT EMPLOYER UNITS

177-1642 et seq.

420-9000

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." The Board has long construed "employer unit" to include multiemployer 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 exists 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." *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 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, as is the topic of alter ego.

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, 96 (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 "unequivocal intent to be governed by joint action." *Rock Springs Retail Merchants Assn.*, 188 NLRB 261, 261–262 (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); *Van Eerden Co*., 154 NLRB 496, 499 (1965).

In *Weyerhaeuser Co.*, 166 NLRB at 300, 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 "[s]ubstance 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. See *Makins Hats, Ltd.*, 332 NLRB 19 (2000). Compare *Accetta Millwork*, 274 NLRB 141 (1985), where the Board found no intent to be bound by group action based on acquiescence to individual bargaining.

14-200 The General Rule

420-9000

440-1729-0133

440-5033

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530-8023-9500

The general rule is that a single-employer unit is presumptively appropriate. Thus, where a party advocates a single-employer unit, and another party asserts that a multiemployer unit is required, a controlling history of collective bargaining on a multiemployer basis must be shown. *Central Transport, Inc*., 328 NLRB 407, 408 (1999); see also *Chicago Metropolitan Home Builders Assn*., 119 NLRB 1184, 1186 (1958); *Cab Operating Corp*., 153 NLRB 878, 879–880 (1965); *Bennett Stone Co*., 139 NLRB 1422, 1424 (1962); *Sands Point Nursing Home*, 319 NLRB 390 (1995); *St. Luke's Hospital*, 234 NLRB 130 (1978).

For examples of cases in which the Board found a bargaining history on a multiemployer basis, see *Meat Packers Assn*., 223 NLRB 922, 924 (1976); *John J. Corbett Press Corp*., 172 NLRB 1124 (1968); *B. Brody Seating Co*., 167 NLRB 830 (1967); *United Metal Trades Assn*., 172 NLRB 410, 411–412 (1968); *Tom's Monarch Laundry & Cleaning Co*., 168 NLRB 217 (1968). Compare *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, 557–558 (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*., 154 NLRB 496, 499 (1965).

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, 1299 (2005); *Hunts Point Recycling Corp*., 301 NLRB 751, 752 (1991); *Kroger Co*., 148 NLRB 569, 572–573 (1964); *Morgan Linen Service*, 131 NLRB 420, 422 (1961); *Artcraft Displays*, 262 NLRB 1233, 1236 (1982).

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. *American Publishing Corp.*, 121 NLRB 115, 122–123 (1958); *Architectural Contractors Trade Assn.*, 343 NLRB 259 (2004); *Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004); *Krist Gradis*, 121 NLRB 601, 609–612 (1958); *Hi-Way Billboards*, 191 NLRB 244, 245 (1971).

Thus, in *American Publishing Corp*., 121 NLRB 115, 122–123 (1958), 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. See also

Belleville Employing Printers, 122 NLRB 350, 353 (1959) (intent manifested despite lack of formal organization and in absence of agreement to be bound); *Quality Limestone Products, Inc.*, 143 NLRB 589, 591 (1963) (intent manifested despite retention of individual employers of right to approve or disapprove agreement).

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). Similarly, 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*., 148 NLRB 569, 573–574 (1964); see also *Bennett Stone Co*., 139 NLRB 1422, 1425 (1962).

By contrast, "[t]he mere adoption of an areawide contract, which includes a 'one unit' clause," is not sufficient to demonstrate unequivocal intent. See *Architectural Contractors Trade Assn.*, 343 NLRB 259, 260 (2004); *Arbor Construction Personnel, Inc.*, 343 NLRB 257, 258 (2004). Similarly, 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, 916–917 (1969).

By way of illustration, in *IATSE, Local 659*, 197 NLRB 1187, 1189 (1972), 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. See also *Texas Cartage Co.*, 122 NLRB 999 (1959); *Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543, 545–546 (1959); *Ruan Transport Corp*., 234 NLRB 241, 242–243 (1978); *Rock Springs Retail Merchants Assn.*, 188 NLRB 261 (1971). Compare *Custom Color Contractors*, 226 NLRB 851 (1976).

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, has been found insufficient to establish a multiemployer unit binding upon the union. *Operating Engineers Local 701 (Cascade Employers Assn.)*, 132 NLRB 648, 649 (1961).

The existence of a multiemployer agreement which establishes an administrative organization to speak for the employers in matters such as the management of trusts and health and welfare funds will not be construed as committing an employer to a multiemployer bargaining relationship, absent a clear intention to be bound. *Averill Plumbing Corp.*, 153 NLRB 1595, 1596 (1965).

As the foregoing cases indicate, the question of intent may be fact-specific. It bears emphasis that certain types of considerations are not dispositive in such cases.

Thus, for example, fluctuating membership in a multiemployer group does not necessarily render the multiemployer unit inappropriate. *Quality Limestone Products, Inc.*, 143 NLRB 589, 591 (1963).

Similarly, 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*., 121 NLRB 115, 118–119 (1958). 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*., 148 NLRB 569, 573 (1964).

Likewise, 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*, 121 NLRB 601, 609 (1958); see also *Belleville Employing Printers*, 122 NLRB 350, 353 (1958). 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*., 121 NLRB 115, 119 (1958). 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, 17 (1958).

The exercise of a mutually recognized privilege to bargain individually on limited matters is also not necessarily inconsistent with the concept of collective bargaining in a multiemployer unit. *Kroger Co.*, 148 NLRB 569, 573–574 (1964). "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. Joint Council 13, United Shoe Workers of America*, 341 F.2d 482, 489 (2d Cir. 1966).

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, 982 (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 & Cleaners Assn*., 125 NLRB 256, 257 (1960); *Alliance of Television Film Producers, Inc.*, 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 Metropolitan 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, 72 (1958). Compare *St. Luke's Hospital*, 234 NLRB 130, 130 fn. 6 (1978).

14-350 The 8(f) Relationships-Construction Industry

420-9000

440-5001

In *Comtel Systems Technology*, 305 NLRB 287, 289–290 (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. But in *Building Contractors Assn.*, 364 NLRB No. 74 (2016), the Board held that member-employers of a multiemployer bargaining association had indicated their "unequivocal intent" to participate in and be bound by group bargaining and that although bargaining with the petitioner had to date been on an 8(f) basis, an election in a multiemployer unit was nevertheless appropriate because, inter alia, the membership agreement did not distinguish between 8(f) and 9(a) agreements.

14-360 Nonbeneficial Bargaining History

420-1708

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 inured to the unit employees. *Burns International Security Service*, 257 NLRB 387, 388 (1981); *Maramount Corp*., 310 NLRB 508, 511 (1993).

14-370 Brief Duration of Multiemployer Bargaining

440-5033-2000

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 for a broader discussion of bargaining history.

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 withdrawal 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, Inc.*, 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, 906–907 (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, Inc.*, 120 NLRB 388, 395 (1958); *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, Inc.*, 185 NLRB 1000, 1001 (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, Inc.*, 120 NLRB 388, 395; *Kroger Co.*, 148 NLRB 569, 574–575 (1964); *Sheridan Creations, Inc.*, 148 NLRB 1503, 1513 (1964), enfd. 357 F.2d 245 (2d Cir. 1966); *Union Fish Co.*, 156 NLRB 187, 193 (1966); *Los Angeles-Yuma Freight Lines*, 172 NLRB 328, 331 (1968); *Hi-Way Billboards, Inc.*, 191 NLRB 244, 245 (1971).

An example of "unusual circumstances" may be found in *U.S. Lingerie Corp.*, 170 NLRB 750, 751 (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 "inherently more 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 multiemployer association fails, either deliberately

or otherwise, to inform its employer-members of the start of negotiations. See also *D. A. Nolt, Inc.*, 340 NLRB 1279, 1281–1282 (2004). 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. Circuit 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, 671 (1988).

The Board has consistently rejected impasse as an "unusual circumstance" which would prompt withdrawal from multiemployer bargaining. *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973); *Charles D. Bonnano Linen Service v. NLRB*, 454 U.S. 404 (1982); see also *El Cerrito Mill & Lumber Co*., 316 NLRB 1005, 1006 (1995). Compare *Ice Cream, Frozen Custard Employees, Local 717 (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."

The Board has also rejected alleged bad-faith bargaining and a contention that the association did not represent the interests of the withdrawing employer. *Atlas Transit Mix Corp.*, 323 NLRB 1144, 1148–1149 (1997).

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 *Dittler Bros.*, the attempted withdrawal took place while the multiemployer association was negotiating a new multiemployer contract with the incumbent union. The *Dittler Bros.* 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, 1346 (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, Inc.*, 148 NLRB 27 (1964).

In *Atlas Sheet Metal Works*, 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. 148 NLRB at 29; see also *C & M Construction Co.*, 147 NLRB 843, 845–846 (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, 1089 (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, 906 (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, 133 (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, 248 (1990).

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 of Pennsylvania, Inc.*, 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 relation
(3) Common management
(4) Common ownership or financial control

See *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 fn. 3 (1976); *Spurlino Materials, LLC*, 357 NLRB 1510, 1515 (2011); *Mercy Hospital of Buffalo*, 336 NLRB 1282,

1283–1284 (2001); *Grass Valley Grocery Outlet*, 332 NLRB 1449 (2000); *Mercy General Health Partners*, 331 NLRB 783 (2000); *Centurion Auto Transport*, 329 NLRB 394, 395 (1999); *Denart Coal Co.*, 315 NLRB 850, 851 (1994); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979); *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991); *Alexander Bistritzky*, 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. *Mercy General Health Partners*, 331 NLRB 783, 784 (2000); see *AG Communication Systems Corp.*, 350 NLRB 168, 169 (2007); *Grass Valley Grocery Outlet*, 332 NLRB 1449 (2000); *Western Union Corp*., 224 NLRB 274, 276 (1976); *Alabama Metal Products*, 280 NLRB 1090, 1097 (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, 722 (2007), the Board found single-employer status for four commonly-owned corporations—two American and two Mexican—notwithstanding the absence of evidence of centralized control 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. See also *Morris Road Partners, LLC v. NLRB*, 637 Fed. Appx. 682 (3d Cir. 2016) (enforcing single-employer finding, notwithstanding lack of evidence of centralized control of labor relations, and noting that this factor was not determinative or controlling).

For other cases presenting single-employer issues, see *Soule Glass & Glazing Co*., 246 NLRB 792 (1980), enfd. 652 F.2d 1055 (1st Cir. 1981); *George V. Hamilton, Inc*., 289 NLRB 1335 (1988); *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Francis Building Corp*., 327 NLRB 485 (1998); *Grane Health Care v. NLRB*, 712 F.3d 145 (3d Cir. 2013); *Lederach Electric, Inc.*, 362 NLRB No. 14 (2015); *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3–7 (2015); *Alcoa, Inc. v. NLRB*, 849 F.3d 250 (5th Cir. 2017).

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); *Edenwald Construction Co*., 294 NLRB 297 (1989); see also *Lawson Mardon U.S.A.*, 332 NLRB 1282, 1285–1286 (2000) (Board applies traditional presumption involving separate locations even in single-employer cases).

Where the Board determined on review that the regional director had incorrectly found that two healthcare institutions were a single employer, and the election had already been held, the Board found that the ballot had misidentified the employer and therefore a second election was warranted. *Mercy General Health Partners*, 331 NLRB 783 (2000).

14-600 Joint Employer

177-1650

420-7330

530-4825-5000

The distinction between single and joint employer is often blurred. In *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1122 (1982), the Third Circuit described the distinction between these two concepts:

> 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." *NLRB v. Checker Cab Co.*, 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. *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (2014); *N. K. Parker Transport*, 332 NLRB 547, 548–549 (2000); *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964); *Frostco Super Save Stores, Inc.*, 138 NLRB 125, 128 (1962); *O'Sullivan, Muckle, Kron Mortuary*, 246 NLRB 164 (1980); *Rawson Contractors*, 302 NLRB 782 (1991); *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); *Executive Cleaning Services*, 315 NLRB 227 (1994).

The current lead case in this area is *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). As explained in that case, the test for joint employer status is whether the putative joint employers "share or codetermine those matters governing the essential terms and conditions of employment." Id., slip op. at 2 (quoting *Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d at 1123). To determine if an employer meets this standard, "the initial inquiry is whether there is a common-law employment relationship with the employees in question"; if so, "the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." Id. In articulating this standard, the Board overruled cases requiring that a joint employer both possess and exercise the authority to control employees' terms and conditions of employment, as well as cases requiring that control be exercised directly and immediately. Id., slip op. at 16; see *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984); *TLI, Inc.*, 271 NLRB 798 (1984); *Airborne Express*, 338 NLRB 597 (2002); *AM Property Holding Corp.*, 350 NLRB 998 (2007). For a subsequent application of *BFI Newby Island*, see *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 3–4 (2016);

As noted, joint-employer issues are more commonly presented in unfair labor practice cases, although they do arise in representation cases. See, e.g., *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015); *Quantum Resources Corp.*, 305 NLRB 759 (1991).

A particular representation context that touches on the joint employer issue arises when a petitioned-for unit combines the employees employed solely by a user employer as well as employees jointly employed by the user employer and a supplier employer. In *Lee Hospital*, 330 NLRB 947, 948 (1990), the Board—citing *Greenhoot, Inc.*, 205 NLRB 250 (1973)—held that the employer must consent to bargaining in such a unit. Subsequently, the Board overruled *Lee Hospital* in *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1308 (2000). *M.B. Sturgis* was subsequently applied in *Holiday Inn City*, 332 NLRB 1246 (2000); *Professional Facilities Management, Inc.*, 332 NLRB 345 (2000); and *Engineered Storage Products Co.*, 334 NLRB 1063 (2001). *M.B. Sturgis* was itself overruled in *Oakwood Care Center*, 343 NLRB 659 (2004). And *Oakwood Care Center* was overruled—and *M.B. Sturgis* reinstated—in *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016).

14-700 Alter Ego

177-1633-7500

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. The Board has commented that single employer and alter ego are related, but separate, concepts. *Johnstown Corp.*, 322 NLRB 818 (1997).

Two enterprises will be found to be alter egos where they "have 'substantially identical' management, business purpose, operation, equipment, customers and supervision as well as ownership." *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric*, 268 NLRB 1001,

1002 (1984). 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). *APF Carting, Inc*., 336 NLRB 73, 73 fn. 4 (2001); *Dupont Dow Elastomers LLC*, 332 NLRB 1071, 1071 fn. 1 (2001); *NYP Acquisition Corp*., 332 NLRB 1041, 1044 (2001). Though relevant, such motive is not required for an alter ego finding. *Fallon-Williams, Inc*., 336 NLRB 602, 603 (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 170 (2010). The absence of common ownership may defeat an alter ego contention. *Summit Express, Inc.*, 350 NLRB 592, 594 (2007); *US Reinforcing, Inc.*, 350 NLRB 404; 406–407 (2007).

The Board will also consider alter ego allegations in representation proceedings. *Elec-Comm, Inc*., 298 NLRB 705 (1990); *All County Electric Co*., 332 NLRB 863 (2000).

In *D & B Contracting Co*., 305 NLRB 765, 766 (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.

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. This chapter provides a selective overview of unit determinations involving particular industries or categories of employees that have been affected by particular policies, that have constituted problem areas, or that have been the subject of more-than-casual litigation. For convenience, the following categories and industries are arranged 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, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1050–1051 (1971), 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, Owings & Merrill*, 192 NLRB 920, 921 (1971), 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.

15-110 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, 1506 (1966); *Central Valley National Bank*, 154 NLRB 995 (1965); *Banco Credito y Ahorro Ponceno v. NLRB*, 390 F.2d 110, 112 (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*, 160 NLRB 1504, 1506 (1966).

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*, 245

NLRB 943, 945 (1979). For an example of inclusion of various classifications in a branch unit, see *Banco Credito y Ahorro Ponceno*, 160 NLRB 1504, 1513–1514 (1966).

15-120 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 subsequent cases, the Board has found appropriate various types of construction employee groupings: separate units of plumbers and gasfitters, pipefitters, and drain layers (*Denver Heating, Piping & Air Conditioning Contractors*, 99 NLRB 251, 254 (1951)); a unit of plumbers, steamfitters, pipefitters, refrigeration men, and their apprentices (*Automatic Heating & Equipment Co.*, 100 NLRB 571 (1951)); separate units of plumbers and pipefitters (*Heating, Piping & Air Conditioning Contractors*, 110 NLRB 261, 263–264 (1955)); riggers (*Machinery Movers & Erectors Div.*, 117 NLRB 1778, 1780–1782 (1957)); lathers (*Employing Plasterers Assn.*, 118 NLRB 17 (1957)); a unit combining plumbers and pipefitters (*Daniel Construction Co.*, 133 NLRB 264, 266 (1961)); truckdrivers (*Graver Construction Co.*, 118 NLRB 1050 (1957)); laborers (*R. B. Butler, Inc.*, 160 NLRB 1595, 1599–1600 (1966)); carpenters (*Dezcon, Inc.*, 295 NLRB 109, 111–112 (1989)); and a unit of fitters, system representatives, preventative maintenance inspectors, and service specialists (of an employer that sold, installed, and serviced building environmental control and fire and security systems) (*Johnson Controls, Inc.*, 322 NLRB 669, 670–672 (1996)).

In *R. B. Butler, Inc.*, 160 NLRB 1595 (1966), the Board found the laborers unit appropriate because the laborers constituted "a readily identifiable and homogeneous group with a community of interests separate and apart from the other employees" (as they performed different work from other employees and had traditionally been represented in the same type of unit). Id. at 1600. Thus, although a craft unit or departmental unit is appropriate in the construction industry, such a unit is not required so long as the petitioned-for employees are a clearly identifiable and homogeneous group with a distinct community of interest. *Del-Mont Construction Co.*, 150 NLRB 85, 87 (1965) (separate units of heavy equipment operators and laborers and truckdrivers appropriate); *New Enterprise Stone & Lime Co.*, 172 NLRB 2157 (1968) (unit of heavy equipment operators, mechanics, and oilers). Compare *Brown & Root, Inc.*, 258 NLRB 1002 (1981); *Brown & Root Braun*, 310 NLRB 632, 635 (1993).

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, 1415 (1978); see also *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308–1309 (1994). Similarly, the fact that other employees perform some of the same tasks as the petitioned-for employees does not render the unit inappropriate. *Charles H.*

Tompkins Co., 185 NLRB 195, 196 (1970).

The upshot of these principles is that "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." *R. B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966); see also *Hydro Constructors*, 168 NLRB 105 (1968) (separate unit of laborers, excluding truckdrivers, found appropriate).

But 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*., 267 NLRB 175 (1983). 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, 210 (1989).

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, 1073 (2004). Compare *Oklahoma Installation Co*., 305 NLRB 812, 813 (1991), where the Board found a multisite unit appropriate, reaffirmed the use of traditional community-of-interest standards for deciding single versus multisite unit issues, and also rejected a contention that the unit should include work in a county in which the employer had never conducted business.

Bargaining history pursuant to Section 8(f) may also be relevant in construction industry unit determinations, but it is not conclusive. *Turner Industries Group, LLC*, 349 NLRB 428, 430–431 (2007); *Barron Heating & Air Conditioning*, 343 NLRB 450, 453 (2004).

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board noted that in cases where an employer withdraws from a multiemployer 8(f) bargaining relationship, notwithstanding the history of 8(f) bargaining on a broader basis, "single employer units will normally be appropriate." Id. 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.

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, 110–111 (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, 485 (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, 151 (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 stipulated to common conditions of employment and centralized labor relations among multicounty worksites. Compare *Longcrier Co*., 277 NLRB 570 (1985), in which the evidence supported separate project units.

For a discussion of other construction industry issues, see sections 5-210, 9-211, 9-1000, 10-600 and 10-700.

15-130 Drivers

15-131 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, *Valley of Virginia Cooperative Milk Producers Assn*., 127 NLRB 785, 787 (1960)).

But in *Plaza Provision Co*., 134 NLRB 910, 911–912 (1962), a case involving driver-salesmen, the Board reconsidered the policy, and in *E. H. Koester Bakery Co*., 136 NLRB 1006 (1962), which involved truckdrivers as well as driver-salesmen, fully set forth new policies for unit determinations involving drivers.

Given the wide variation in employment conditions for drivers, the Board recognized that the complexity of modern industry generally precludes the application of fixed rules for the unit placement of truckdrivers. Id. at 1010. Accordingly, the Board stated that unit determinations involving drivers would now 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.

Id. at 1011. If the interests shared with other employees are sufficient to warrant their inclusion, the truckdrivers are included in the more comprehensive unit. But 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); *Chin Industries*, 232 NLRB 176 (1977). See also *Overnite Transportation Co.*, 331 NLRB 662 (2000) (reversing finding that petitioned-for unit of dockworkers should include truckdrivers.

In *Marks Oxygen Co*., 147 NLRB 228, 230 (1964), the Board further clarified that *Koester* 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 *Airco, Inc.*, 273 NLRB 348, 348 fn. 1 (1984) (petitioner's desires are relevant); *Overnite Transportation Co*., 325 NLRB 612 (1998) (petitioner's desires may be considered); *Publix Super Markets*, 343 NLRB 1023 (2004) (more than one truckdriver unit may be appropriate and union can seek election in any appropriate unit). But see *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (as *Marks Oxygen* involved issue of whether a requested unit of drivers and production and maintenance employees was an appropriate unit, it does not apply when issue is whether a separate unit of drivers excluding mechanics is inappropriate). For further discussion of *Marks Oxygen*, see *Tallahassee Coca-Cola Bottling Co*., 168 NLRB 1037 (1968), enfd. 409 F.2d 201 (5th Cir. 1969) (petitioned-for unit of production and maintenance employees, including driver-salesmen, found appropriate); *Fayette Mfg. Co.*, 193 NLRB 312 (1971) (overruling *Container Research Corp.*, 188 NLRB 586 (1971), as inconsistent with *Marks Oxygen*)); *International Bedding Co.*, 356 NLRB 1336, 1337 (2011) (petitioned-for unit of production, warehouse drivers and yard jockeys found appropriate).

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, 1228 (1964); see also *Philco Corp*., 146 NLRB 867 (1964); *Donald Carroll Metals, Inc.*, 185 NLRB 409 (1970); *Trans-American Video, Inc.*, 198 NLRB 1247 (1972); *Levitz Furniture Co*., 192 NLRB 61 (1971); *Calco Plating*, 242 NLRB 1364 (1979).

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." Id. at 815; see also *National Broadcasting Co.*, 231 NLRB 942 (1977).

Summing up the flexibility which exists in this policy area, the Board in *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1972), 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), rehearing denied 322 NLRB 723 (1996). For expanded discussion of these determinations, see *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 sufficiently distinct interests to warrant separate unit, and at most spent 30–40 percent of their time performing non-driver functions).

In a series of cases applying the Board's unit determination standard articulated in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (see section 12-210), three circuit courts enforced the Board's determination that a unit of drivers, excluding dockworkers, is an appropriate unit. *NLRB v. Fedex Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016).

15-132 Scope of Driver Units

440-1760-6200

440-3300

Single-terminal units are presumptively appropriate. *Groendyke Transport, Inc.*, 171 NLRB 997, 998 (1968); see also *Alterman Transport Lines*, 178 NLRB 122, 126 (1969) (separate terminal units appropriate based on distance between them, sufficient autonomy vested in managers of individual terminals, and absence of history of bargaining at any of the terminals involved); *Wayland Distributing Co*., 204 NLRB 459 (1973) (separate unit appropriate given little temporary interchange of drivers, few transfers, no prior bargaining history, and no labor organization sought to represent drivers on any other basis); *Bowie Hall Trucking*, 290 NLRB 41 (1988) (presumption not rebutted given lack of interchange, absence of bargaining history, no labor organization seeking broader unit, some local managerial autonomy, and geographic separation). Compare *Dayton Transport Corp*., 270 NLRB 1114 (1984) (finding presumption had been rebutted).

But although a single-terminal unit may be appropriate, a broader petitioned-for unit may also be appropriate. See *Tryon Trucking*, 192 NLRB 764, 766 (1971) (requested employerwide 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"). See also chapter 14 for further multilocation unit principles, which are equally germane to unit issues

arising in the transportation industry.

15-133 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, Inc.*, 150 NLRB 1649, 1651 (1965); *Alterman Transport Lines*, 178 NLRB 122, 126 (1969); see also *Jocie Motor Lines, Inc.*, 112 NLRB 1201, 1204 (1955); *Gluck Bros., Inc.*, 119 NLRB 1848, 1849–1850 (1958). Compare *Carpenter Trucking*, 266 NLRB 907 (1983).

15-134 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); *Downingtown Paper Co*., 192 NLRB 310 (1971); *Memphis Furniture Mfg. Co*., 259 NLRB 401 (1981). For example, in *Downingtown Paper Co*., 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. Id. at 312. 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. Id.

As is generally true of severance policy when the Board's requirements are not met, the request for a self-determination election is denied. *Los Angeles Herald-Examiner*, 200 NLRB 475, 476 (1973); *A. O. Smith Corp*., 195 NLRB 955, 956 (1972) (dismissal based on drivers spending substantial amount of time performing in-plant work and sharing same immediate supervisor); *Western Pennsylvania Carriers Assn*., 187 NLRB 371, 374 (1971) (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) (drivers spent significant time performing work of other employees and had same compensation, benefits, and supervision); *Rockingham Poultry Marketing Cooperative, Inc.*, 174 NLRB 1278, 1279 (1969) (over- the-road drivers performed duties of other drivers not sought for severance, had similar working conditions, benefits, and supervision, and there was history of bargaining in overall unit); *Fernandes Super Markets, Inc.*, 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").

For a discussion of severance in its broader context involving crafts and departmental units, see chapter 16.

15-135 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, 911–912 (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, 1615–1616 (1962). Compare *Wilson Wholesale Meat Co*., 209 NLRB 222 (1974) (driver-salespersons included with production employees because spent considerable time each day doing in-plant work and can perform many production employee functions).

See also *Southern Bakeries Co*., 139 NLRB 62 (1962) (driver-salespersons excluded from a unit of transport drivers); *E. Anthony & Sons, Inc.*, 147 NLRB 204 (1964) (separate units of (1) "district managers" who promoted sales and serviced subscriptions and (2) 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, Inc.*, 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); *Dr Pepper Bottling Co*., 228 NLRB 1119, 1120 (1977) (separate driver-salesperson unit appropriate based on lack of significant interchange and limited contact with other employees, as well as strong community of interest among the driver-salespersons).

15-136 Health Care Institution Drivers

470-1795

470-8300

Drivers are not one of the units found appropriate in the health care rules. See section 15-160 and Health Care Rulemaking, as reported at 284 NLRB 1516; see also Rules section 130.30. 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 a sufficient community of interest to warrant inclusion in another unit. Compare *Michael Reese Hospital*, 242 NLRB 322 (1979) (directing election in unit of chauffer-drivers in external transportation department), with *North Memorial Medical Center*, 224 NLRB 218, 220 (1976) (dismissing petition for unit of EMTs, including ambulance drivers, because interests were too closely linked to those of other hospital employees), both decided prior to the health care unit rules. In *Duke University*, 306 NLRB 555, 558 (1992), decided after the rules, the Board concluded that busdrivers were not health care employees, their representational interests were not affected by the Health Care Rule, and that accordingly they constituted a separate appropriate unit.

15-140 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 Memorial 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 & Son, Inc*., 636 F.2d 1014, 1016–1017 (5th Cir. 1981). Compare *Oritz Funeral Home Corp*., 250 NLRB 730, 738–740 (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.

15-150 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, e.g., *Hotel La Concha*, 144 NLRB 754 (1963)), and thereafter directly, regardless of hotel affiliation (*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 gaming 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." Id. at 839. Compare *Holiday Hotel*, 134 NLRB 113, 116–117 (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) (petitioned-for unit of casino, hotel, and maintenance employees appropriate).

Generally speaking, however, separate units limited to all gaming employees and all maintenance employees, respectively, are appropriate. *Silver Spur Casino*, 192 NLRB 1124 (1971); *El Dorado Club*, 151 NLRB 579, 584 (1965). Compare *Harrah's Club*, 187 NLRB 810, 812–813 (1971) (unit limited to maintenance employees inappropriate where employees in other departments also performed maintenance functions).

Although in one case slot machine mechanics were found skilled craftspersons, therefore constituting an appropriate unit, excluding all other employees (*Freemont Hotel, Inc.*, 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); *Aladdin Hotel*, 179 NLRB 362 (1969)). Thus, it was pointed out in *Aladdin Hotel*, for example, that the facts in *Freemont Hotel* 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, Inc.*, 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); *Harold's*

Club, Inc., 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); *El Conquistador Hotel, Inc.*, 186 NLRB 123, 125–126 (1970).

In *Bally's Park Place, Inc.*, 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.

In *Wheeling Island Gaming, Inc*., 355 NLRB 637 (2010), the Board held that the smallest appropriate unit consisted of all table game dealers, rejecting a contention that a unit limited to poker dealers was appropriate.

In *Florida Casino Cruises*, 322 NLRB 857 (1997), the Board affirmed a finding that a unit of the ship's marine crew personnel was appropriate on a casino cruise ship. The employer had sought a "wall to wall" unit including the gaming and food personnel.

15-160 Health Care Institutions

470-0000

15-161 Acute Care Hospitals

177-9712

470-0100

On April 21, 1989, the Board set out the appropriate units for acute care hospitals in a rulemaking proceeding, reported at 284 NLRB 1515. The Health Care 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 Health Care Rule provides that "various combinations of units may also be appropriate." Rules sec. 103.30(a). Thus, 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. For a discussion of combinations, see *Dominican Santa Cruz Hospital*, 307 NLRB 506, 507–508 (1992).

Where extraordinary circumstances exist, the Board determines appropriate units by adjudication. Rules sec. 103.30(b). The Health Care Rule provides one example of an extraordinary circumstance: a unit of five or fewer employees. Rules sec. 103.30(a). Note that deciding the unit by adjudication does not mean that the Board's ultimate unit determination will necessarily be at variance with the enumerated appropriate units.

A party urging other "extraordinary circumstances" bears a "heavy burden." *St. Margaret Memorial Hospital*, 303 NLRB 923 (1991). In *Child's Hospital*, 307 NLRB 90, 92 (1992), the Board found extraordinary circumstances where there was a physical joinder of a nursing

home and a hospital.

The Health Care Rule also excepts from its coverage "existing nonconforming units." Rules sec. 103.30(a). See *Crittenton Hospital*, 328 NLRB 879, 880 (1999), for a discussion of the meaning of this exception. In *Pathology Institute*, 320 NLRB 1050, 1051 (1996), the Board found a nonconforming unit and evaluated it, not under the Health Care Rule, but under "traditional representation principles."

For a discussion of residual units under the Health Care Rule, see section 12-400.

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 Health Care Rule. The decision also illustrates various unit placement issues (i.e., whether certain employees are professionals, whether others are guards, whether others are skilled maintenance, whether others are technical, whether others are business office clericals, and the proper placement for students).

15-162 Other Hospitals

177-9700

470-0100

The Board did not include psychiatric and rehabilitation hospitals in the Health Care Rule. See Rules sec. 103.30(f)(2). Thus, determination as to appropriate units in these health care institutions is left to adjudication on a case-by-case basis. The Board's Health Care 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." *Virtua Health, Inc.*, 344 NLRB 604, 608 (2005) (citing 284 NLRB at 1522, 1536). But the considerations that apply in acute care circumstances do not necessarily carry over to other health care settings. Thus, for example, prior to the Health Care Rule, 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.

In *Park Manor Care Center*, 305 NLRB 872, 875 (1991), a case that dealt specifically with a nursing home, the Board indicated that in nonacute health care facilities, the Board would apply a "pragmatic" or "empirical" community-of-interest test (see 875 fn. 16) under which it would consider traditional community-of-interest factors, as well as factors considered relevant during the Health Care Rulemaking and prior cases involving either the type of facility in dispute or the type of unit sought. The Board subsequently made clear that *Park Manor* applied to all health care facilities not covered by the Health Care Rule. *McLean Hospital Corp.*, 309 NLRB 564, 564 fn. 1 (1992); see also *Holliswood Hospital*, 312 NLRB 1185, 1195 (1993); *Virtua Health, Inc.*, 344 NLRB 604, 606 (2005). *Park Manor* was applied to psychiatric hospitals in *McLean Hospital Corp*., 309 NLRB 564, 564 fn. 1 (1992); *Brattleboro Retreat*, 310 NLRB 615 (1993); and *McLean Hospital Corp*., 311 NLRB 1100 (1993).

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 938 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013)—another nursing home case—the Board overruled *Park Manor* and stated that it would henceforth "apply our traditional community-of-interest standards in this case and others like it."

15-163 Nursing Homes & Other Nonacute Facilities

177-9762 et seq.

The Board once distinguished between proprietary and nonproprietary nursing homes, but this distinction had been eliminated by 1970. *Drexel Home*, 182 NLRB 1045 (1970).

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.

As discussed in the previous section, however, in *Park Manor Care Center*, 305 NLRB 872, 875 (1991), the Board stated it would apply its "empirical" or "pragmatic" community of interest test to nursing homes, and accordingly would consider "background information gathered during rulemaking and prior precedent" while still deciding units by adjudication. See also *Hebrew Home & Hospital*, 311 NLRB 1400 (1993).

Park Manor was overruled in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 938 (2011), however, and the Board stated that it would apply its traditional community-of-interest standards in such cases.

With *Park Manor*'s overruling, the Board's traditional community-of-interest test presumably applies in other types of nonacute health care settings. Note that the Board previously applied, or at least mentioned, *Park Manor* in unit determinations in various types of nonacute health care employers. See, e.g., *Lifeline Mobile Medics*, 308 NLRB 1068 (1992) (ambulance service); *Upstate Home for Children*, 309 NLRB 986 (1992) (residential home for developmentally disabled children); *CGE Caresystems, Inc.*, 328 NLRB 748 (1999) (medical equipment and clinical services facility).

15-164 Application of the Health Care Rule

Shortly after the Supreme Court affirmed the Health Care Rule (see *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991)), the General Counsel issued two memoranda: GC Memo 91-3, "Health Care Unit Placement Issues" (June 5, 1991), gave the Regions procedural guidance on the procedures to be followed under the Rule; GC Memo 91-4, "Guideline Concerning Application of Health Care Rule" (May 9, 1991), summarized case law on health care unit placement. These memos are available on the Board's website.

In *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), the Board addressed the application of the Health Care Rule to preexisting nonconforming units. The petitioner in that case sought to sever skilled maintenance employees from a nonprofessional unit. The Board held that the Rule only applies to a "new unit of previously unrepresented employees which would be an addition to the existing units at a facility." Id. at 934. 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 (1966); see section 16-100).

15-165 Registered Nurse Units

470-1733

As noted earlier, the Board's Health Care Rule finds that units of registered nurses are appropriate in an acute care setting. 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 has 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).

Salem Hospital, 333 NLRB 560, 560 (2001).

In *Stormont-Vail Healthcare*, 340 NLRB 1205 (2003), the Board indicated 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 the psychiatric RNs at outlying facilities in a unit of RNs (including other psychiatric RNs) at a central facility.

The Board has also found appropriate a unit of RNs in a nonacute facility. *South Hills Health System Agency*, 330 NLRB 653 (2000).

15-166 Other Health Care Issues

For discussions of other health care issues, see sections 1-315 (Jurisdiction), 12-400 (Residual Units), 13-1100 (Health Care), 15-136 (Health Care Institution Drivers), 16-300 (Skilled Maintenance-Health Care), 17-550 (Health Care Supervisory Issues), 19-460 (Business Office Clerical-Health Care), and 19-510 (Technical Employees-Health Care).

For a discussion of eligibility issues relating to health care employees involved in research funded by outside sources, see *Rhode Island Hospital*, 313 NLRB 343 (1993).

15-170 Hotels and Motels

440-1760-9400-7011

The Board first asserted jurisdiction over enterprises in the hotel and motel industry in 1959. *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261 (1959). Initially, the Board held 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, 404 (1960)).

This rule was subsequently 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, e.g., *Water Tower Inn*, 139 NLRB 842, 846–847 (1962); *Mariemont Inn*, 145 NLRB 79, 80 (1964). Further, a motel unit was approved that excluded office clerical employees based in part on area practice, even though there was no bargaining history in the particular unit selected. *LaRonde Bar & Restaurant, Inc.*, 145 NLRB 270 (1963); see also *Columbus Plaza Motor Hotel*, 148 NLRB 1053 (1964).

Ultimately, in 1966, the Board overruled *Arlington Hotel Co.* and 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. *77 Operating Co.*, 160 NLRB 927, 930 (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).

Under *Arlington Hotel Co.*, the Board had indicated that a difference exists between clerical employees and manual operating personnel. See 126 NLRB at 404; see also *Water Tower Inn*, 139 NLRB 842, 848 fn. 10 (1962); *Mariemont Inn*, 145 NLRB 79, 81 (1964); *LaRonde Bar & Restaurant, Inc.*, 145 NLRB 270, 271–272 (1963); *Columbus Plaza Motor Hotel*, 148 NLRB 1053, 1054–1055 (1964). Even so, *Arlington Hotel* announced a policy of not excluding hotel "clerical" classifications as office clerical employees from units of "operating personnel." In *Regency Hyatt House*, 171 NLRB 1347, 1348 (1968), the Board explained that although *77 Operating Co.*, 160 NLRB 927 (1966), had not overruled this "subsidiary policy," it relegated generic classification to the status of just one, non-controlling factor among the many others considered in making hotel unit findings, and is not any more controlling than it would be in the determination of an industrial unit. *Regency Hyatt House*, 171 NLRB 1347, 1348 (1968).

For other examples of the current case-by-case approach see *Westin Hotel*, 277 NLRB 1506, 1507–1508 (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*, 283 NLRB 475 (1987), and *Hilton Hotel Corp.*, 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, 90–91 (1984) (same).

15-180 Insurance Industry

440-1760-9400-6411

440-3375-8750-6411

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 *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965) (see section 13-1000 for a discussion of that case in the context of the effect of the "extent of organization" on multilocation unit determinations). 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.*, 156 NLRB at 1418; *Western & Southern Life Insurance Co*., 163 NLRB 138, 140 (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's *Metropolitan Life* decision. *State Farm Mutual Automobile Insurance Co*., 158 NLRB 925, 929 (1966); see also *American Automobile Assn*., 172 NLRB 1276, 1277 (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. See id. at 983

In setting out the principles governing its unit determinations in the insurance industry, the Board noted in *Metropolitan Life Insurance Co.*, 156 NLRB 1408, 1415 (1966), 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, 145 (1968); see also *State Farm Mutual Automobile Insurance Co*., 158 NLRB 925, 930 (1966). Compare *American Automobile Assn*., 242 NLRB 722, 725 (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, 986 (1969); see also *Fireman's Fund Insurance Co*., 173 NLRB 982 (1969); *North Carolina Mutual*, 109 NLRB 625, 627 (1954); *Farmers Insurance Group*, 164 NLRB 233

(1967). Compare *Empire Mutual Insurance Co*., 195 NLRB 284 (1972), in which an all-employee unit, including clerical employees, was found to be appropriate.

15-190 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 Co. Neighborhood 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, 1276 (1978).

Employees who are law school graduates but not as yet admitted to the bar have been held to be professional employees. *Wayne Co. Neighborhood Legal Services*, 229 NLRB 1023, 1024 (1977). Law students, however, 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, 488 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*, 236 NLRB 1269 (1978). Whether or not they are included in a clerical unit depends on their community of interest with those employees. In both *20th Century-Fox Film Corp*., 234 NLRB 172 (1978), and *Stroock & Stroock & Lavan*, 253 NLRB 447, 448 (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.

15-200 Licensed Departments

15-201 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 may arise in other settings.

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, 298 (1965); *Spartan Department Stores*, 140 NLRB 608, 609 (1963); *Frostco Super Save Stores, Inc.*, 138 NLRB 125, 128 (1962); *Pergament United Sales*, 296 NLRB 333, 342–343 (1989). For the

corollary, where the licensors had not exercised substantial control of the licensees' labor policies and were therefore not joint employers, see, e.g., *S.A.G.E., Inc*., 146 NLRB 325 (1964); and *Esgro Anaheim, Inc*., 150 NLRB 401, 404–406 (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. See, e.g., *Spartan Department Stores*, 140 NLRB 608, 609–610 (1963); *Grand Central Liquors*, 155 NLRB 295, 296–297 (1965).

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, Inc.*, 189 NLRB 456, 458–459 (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*., 146 NLRB 325, 327–328 (1964).

Where the lessor explicitly reserves such control in its lease arrangements, a joint-employer finding invariably results. See, e.g., *K-Mart Div. of S. S. Kresge Co*., 161 NLRB 1127, 1129 (1966); *Jewel Tea Co*., 162 NLRB 508, 510 (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, 607 (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*]—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.

Both *Value Village* and *Globe Discount City* were later distinguished in *Disco Fair Stores, Inc*., 189 NLRB 456, 459 (1979), 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 Fair Stores* 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.

15-202 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*, 161 NLRB 603, 608 (1966). 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 *United Stores of America*, 138 NLRB 383, 385 (1962); *Frostco Super Save Stores, Inc.*, 138 NLRB 125, 129–130 (1962).

15-210 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, Inc.*, 139 NLRB 796, 799 (1962), and *Keystone Shipping Co.*, 327 NLRB 892, 895–896 (1999), the Board found a less than fleetwide unit appropriate.

While not necessarily a maritime industry case as such, in *Florida Casino Cruises*, 322 NLRB 857 (1997), the Board found a unit of the ship's marine crew personnel appropriate, rejecting a request for a "wall to wall" unit (which would have included the ship's gaming and other employees).

15-220 Newspaper Units

440-1720-3300

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, 1412–1413 (1951); *Lowell Sun Publishing Co*., 132 NLRB 1168, 1169 (1961); *Minneapolis Star & Tribune Co*., 222 NLRB 342, 343 (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, 424–425 (1963); *Minneapolis Star & Tribune Co*., 222 NLRB 342, 343 (1976). 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, Inc.*, 117 NLRB 708, 708–709 (1957); *Lowell Sun Publishing Co*., 132 NLRB 1168, 1169 (1961); see also *Salt Lake Tribune Publishing Co*., 92 NLRB 1411, 1412–1413 (1951).

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, Inc.*, 117 NLRB 708, 708 fn. 1 (1957). 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. *Daily Press, Inc.*, 110 NLRB 573, 579 (1954); see also *Chicago Daily News, Inc.*, 98 NLRB 1235, 1237 (1951). Single major departments which have been held to constitute appropriate units are the news department (*Daily Press, Inc.*, 112 NLRB 1434 (1955)), and the circulation department (*Times Herald Printing Co*., 94 NLRB 1785, 1787 (1951)). See also *Evening News*, 308 NLRB 563, 567 (1992), and *Leaf Chronicle Co*., 244 NLRB 1104, 1105–1106 (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, Inc.*, 171 NLRB 43, 44 (1968); *Garden Island Publishing Co*., 154 NLRB 697, 698 (1965). These units, however, may be joined

where they share a sufficient community of interest. *Evening News*, 308 NLRB 563, 567 (1992); *Leaf Chronicle Co.*, 244 NLRB 1104, 1105–1106 (1979). 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, Inc.*, 171 NLRB 43, 44 (1968).

A combination of departments may constitute an appropriate unit when the departments perform closely related functions calling for similar skills (*Dayton Newspapers, Inc.*, 119 NLRB 566, 567–568 (1958); *Bethlehems' Globe Publishing Co.*, 74 NLRB 392 (1947)), and where there has been a history of bargaining for the employees of dissimilar departments (*Sacramento Publishing Co.*, 57 NLRB 1636, 1639 (1944)), or where no union seeks to represent nonmechanical employees on a broader basis (*Philadelphia Daily News, Inc.*, 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, 1684 (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. Id. at 1684; *Suburban Newspaper Publications, Inc.*, 226 NLRB 154, 156 (1976).

15-221 Printing Industry

440-1760-9167-4000

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, LLC*, 350 NLRB 538, 540 (2007); see also *DPI Secuprint*, 362 NLRB No. 172, slip op. at 6 (2015).

15-230 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, 848 (1973); *Deposit Telephone Co.*, 328 NLRB 1029, 1030 (1999); *Louisiana Gas Service Co.*, 126 NLRB 147, 149 (1960); *Montana-Dakota Utilities Co.*, 115 NLRB 1396, 1398 (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.*, 202 NLRB 847, 848 (1973). However the Board noted in *Deposit Telephone Co.*, 328 NLRB 1029, 1030 (1999), "this policy does not require multi-departmental units in all instances." And, in *Verizon Wireless*, 341 NLRB 483, 484–485 (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. See also *Central Power & Light Co.*, 195 NLRB 743, 746 (1972) ("Before bargaining can occur on the basis of a systemwide unit, there must be a systemwide organization of employees," and as nothing in the Act or Board policy requires petitioner to seek optimum unit, a less-than-systemwide unit was found appropriate).

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, 24 (1969); *Pacific Northwest Bell*, 173 NLRB 1441, 1442 (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, 1080–1082 (1997); *Monongahela Power Co*., 176 NLRB 915, 917 (1969); *Michigan Wisconsin Pipe Line Co*., 164 NLRB 359, 360–361 (1967); *Sanborn Telephone Co.*, 140 NLRB 512, 514–515 (1963); *Mountain States Telephone & Telegraph Co*., 126 NLRB 676, 677–678 (1960); *Western Light & Telephone Co*., 129 NLRB 719, 721–722 (1961); *Southern California Water Co*., 220 NLRB 482, 483 (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*., 328 NLRB 1029, 1031 (1999); *Michigan Bell Telephone Co*., 192 NLRB 1212, 1213 (1971). *Deposit Telephone* reversed *Red Hook Telephone Co.*, 168 NLRB 260 (1967), and *Fidelity Telephone Co.*, 221 NLRB 1335 (1976), which placed controlling weight on the size of the employee contingent and the geographic service area.

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.*, 322 NLRB 1074, 1079 (1997); *Mountain States Telephone & Telegraph Co*., 126 NLRB 676, 678 (1960)), which reflect geographical lines of demarcation (*Philadelphia Electric Co*., 110 NLRB 320, 323 (1955)), and which reflect operational integration of the subdivision as a separate administrative entity (*Montana-Dakota Utilities Co.*, 115 NLRB 1396, 1398 (1956)). See also *Connecticut Light & Power Co*., 222 NLRB 1243, 1245 (1976); *Southern California Water Co*., 220 NLRB 482, 483 (1975); *New England Telephone & Telegraph 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); *Southwest Gas Corp*., 199 NLRB 486 (1972); *Southern California Water Co*., 220 NLRB 482, 483 (1975).

In *United Gas*, 190 NLRB 618, 618–619 (1971), 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); *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 & Telegraph Co. v. NLRB*, 310 F.2d 478, 480 (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. Id. at 470.

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, 446 (1959); *Houston Corp*., 124 NLRB 810, 812 (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, 849 (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); *Natural Gas Pipeline Co. of America*, 223 NLRB 1439, 1441 (1976).

By way of contrast, there was no problem of "fragmentization'' in *Idaho Power Co*., 179 NLRB 22, 24 (1969), 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, 1080 (1997), the Board found appropriate 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, 809–810 (2006), the Board held that it would apply the presumption of a systemwide unit to a crude oil pipeline whether or not it is considered a public utility.

In *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 5–7 (2015), the Board held that in the context of accretion analysis, the Board's preference for systemwide units in the public utility industry is not dispositive, and cannot dictate a different result where the two "critical" accretion factors (common day-to-day supervision and interchange—see sections 12-510 and 12-520) are lacking.

15-240 Retail Store Operations

15-251 Scope

440-1720

440-3300

As discussed in Chapter 13, in *Sav-On Drugs, Inc.*, 138 NLRB 1032 (1962), the Board abandoned a per se rule in unit determinations and instead held that a proposed retail unit would be found appropriate or not depending on the circumstances of each case.

Thus, the basic rule now 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.

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, 19 (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, 1054 (1984); *Big Y Foods, Inc.*, 238 NLRB 860, 861 (1978). The presumption was not rebutted in *Foodland of Ravenswood*, 323 NLRB 665, 666 (1997).

See also the introductory discussion to Chapter 13.

15-241 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, 790 (1965); *Lord & Taylor*, 150 NLRB 812, 816 (1966).

In *Stern's, Paramus*, 150 NLRB 799, 803 (1965), the Board stated 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)). Partly on this basis, the Board—in a case that also involved the application *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011)—found appropriate a unit limited to selling employees in a cosmetics and fragrances department and rejected the argument that the smallest appropriate unit was one of all selling employees. *Macy's Inc.*, 361 NLRB No. 4 (2014), enfd. 824 F.3d 557 (5th Cir. 2016). Cf. *Bergdorf Goodman*, 361 NLRB No. 11 (2014) (finding that petitioned-for unit of women's shoe sales associates spread over two departments did not share a community of interest).

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. *The Grand*, 197 NLRB 1105, 1106 (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 *The Grand*, 197 NLRB 1105, and *Levitz Furniture*, 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, 406 (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*., 196 NLRB 708, 709 (1972); *Montgomery Ward & Co*., 225 NLRB 547, 548 (1976); *Sears, Roebuck & Co*., 261 NLRB 245, 247 (1982); *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.

15-242 Bargaining History in Retail Industry

420-1281

440-1760-7400

A common thread which runs through retail unit discussions is bargaining history. 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, Inc.*, 99 NLRB 1029, 1030 (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.*, 126 NLRB 953 (1960), 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, 630 (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, Inc.*, 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, 54 (1970); *Drug Fair—Community Drug Co.*, 180 NLRB 525, 527 (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, Inc.*, 199 NLRB 721, 722 (1972).

15-243 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 interests 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, 1082 (1951); see also *Loveman, Joseph & Loeb*, 147 NLRB 1129, 1133 (1964).

Bakery employees employed in a department store. *Rich's, Inc.*, 147 NLRB 163, 165 (1964). Compare *Jordan Marsh Co.*, 174 NLRB 1265, 1266 (1969), and see in particular fn. 5, which distinguishes the facts in *Rich's*.

Carpet workroom employees as a 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., Inc.*, 86 NLRB 914, 916–917 (1949); see also *W & J Sloane, Inc.*, 173 NLRB 1387,

1389 (1969). But see *John Wanamaker, Philadelphia, Inc.*, 195 NLRB 452, 453 (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. See also *Sears, Roebuck & Co*., 194 NLRB 321, 322 (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, 1144–1145 (1966); *Allied Super Markets, Inc.*, 167 NLRB 361, 362 (1967); *Great Atlantic & Pacific Tea Co*., 162 NLRB 1182, 1200 (1967); *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); *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 who 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, 1127–1129 (1994), the Board affirmed a regional director's finding that a unit of nontipped kitchen employees, separate from other food and beverage employees, was appropriate. Compare *Casino Aztar*, 349 NLRB 603 (2007).

Service department employees in 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); *Montgomery Ward & Co*., 150 NLRB 598 (1965).

15-250 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). For cases in which "before the microphone/camera" units were found appropriate, see *Hampton Roads Broadcasting Corp.*, 100 NLRB 238, 239 (1951); *Pulitzer Publishing Co.*, 203 NLRB 639, 641 (1973); *Perry Broadcasting, Inc.*, 300 NLRB 1140, 1141–1142 (1999).

Notwithstanding the general appropriateness of separate on-air and off-air units, the Board has in certain cases found that, due to shared interests with other employees, the distinction had broken down and a separate on-air unit was not appropriate. *KJAZ Broadcasting Co.*, 272 NLRB 196, 197 (1984); see also *WTMJ-AM-FM-TV*, 205 NLRB 36 (1973).

Similarly, 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, 1225 (1982), in which a unit of camera employees was not appropriate because of the working conditions they shared with other employees.

Where no labor organization seeks to represent the performing and nonperforming employees separately, a single unit of the program department employees is appropriate. Id. See also *El Mundo, Inc*., 127 NLRB 538, 539 (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); see also *KFDA-TV Channel 10*, 308 NLRB 667 (1992) (reporters included in production unit).

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, 1112 (1976).

In a case involving an employer with both radio and television operations, the Board found a petitioned-for unit of news editors, production assistants, and copyroom employees limited to the radio new operation appropriate given various distinctions between the radio and television newsroom operations.. *Post-Newsweek Stations*, 203 NLRB 522, 524 (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).

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, e.g., *WTTV*, 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*., 168 NLRB 976, 976–977 (1968). 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, 100 (1949); *Indiana Broadcasting Corp*., 121 NLRB 111, 112 (1958).

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, 397–398 (1973).

15-260 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 section 1-307; Rules sec. 103.1; 35 Fed. Reg. 18370.

In *Cornell University*, 183 NLRB at 336, the Board, mindful of entering into "a hitherto uncharted area," drew on established unit determination principles (in that case, those for determining the propriety of a multilocation unit), stating they were "reliable guides to organization in the educational context as they have been in the industrial."

15-261 Faculty, Graduate Students, & Professional Employees

420-9660

440-1760-4300

460-5033

In *C. W. Post Center*, 189 NLRB 904, 905–906 & fn. 7 (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 University*, 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 engaged directly or indirectly in student instruction (including full-time and adjunct faculty, librarians, a research associate, and guidance counselors) was found appropriate, with certain specific inclusions and exclusions. Id. at 905–908.; see also *Long Island University*, 189 NLRB 909 (1971).

But in *Syracuse University*, 204 NLRB 641, 643 (1973) (citing *Adelphi University*, 195 NLRB 639 (1972), the Board commented that "the industrial model cannot be imposed blindly on the academic." In this context, the Board recognized that faculty are employees, but that unlike employees in the industrial setting, certain faculty members may have special interests or allegiances, such as to a particular discipline, and the Board held that it "must be especially watchful in guarding the rights of minor groups whose intellectual pursuits and interests differ in kind from the bulk of the faculty." Id. the Board accordingly directed an election among all full-time faculty members, but ensured that law faculty would have a separate voice in the process (for a further discussion of this type of election, see section 21-400). See also *Fordham University*, 193 NLRB 134, 140 (1971) (stating that separate units of all professional employees, including faculty, and law school faculty are appropriate); *Catholic University of America*, 201 NLRB 929, 930 (1973) (separate unit of law school faculty appropriate); *Trustees of Boston University v. NLRB*, 575 F.2d 301, 308 (1st Cir. 1978) (sustaining Board ruling excluding law school, school of medicine, and school of graduate dentistry faculty from overall faculty unit) *University of Vermont*, 223 NLRB 423, 425 (1976) (excluding medical school faculty from overall unit).

In a similar vein, the Board has held that the differences between full-time and part-time faculty members are so substantial in most colleges and universities that its normal treatment of part-time employees does not apply; accordingly, it has excluded part-time faculty members who were not employed in "tenure track" positions from an overall faculty unit. *New York University*, 205 NLRB 4, 6 (1973); see also *Bradford College*, 261 NLRB 565, 567 (1974).

Graduate and undergraduate faculty may be included in the same unit, however, provided they share a sufficient community of interest. *Nova Southeastern University*, 325 NLRB 728 (1998). Similarly, terminal contract faculty members who are not being rehired after the expiration of their current contracts are properly included in an overall faculty bargaining. *Goucher College*, 364 NLRB No. 71, slip op. at 2 (2016).

As indicated above, librarians found to be professional employees may be included in a unit of faculty members. *Florida Southern College*, 196 NLRB 888, 889 (1972); *C. W. Post Center*, 189 NLRB 904, 906 (1971); *Long Island University (Brooklyn Center)*, 189 NLRB 909 (1971). A separate unit of library employees may be appropriate, too, provided that they are an identifiable group with a separate community of interest. *Claremont University Center*, 198 NLRB 811, 813 (1972).

Members of a religious order have been excluded from a faculty unit where the order operates the university, *Seton Hill College*, 201 NLRB 1026 (1973), but have been included if the university is operated by another order. *Niagara University*, 227 NLRB 313 (1977). See also section 1-403 for a discussion of Board jurisdiction over religious schools.

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. Following *Yeshiva*, the Board has frequently been called on to determine managerial status as part of unit determination in higher education cases. For more on the standard for determining managerial status, see section 19-200. 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); *University of New Haven*, 267 NLRB 939 (1983); and *Elmira College*, 309 NLRB 842 (1992).

The Board has found employee rather than managerial status in other cases. See, e.g., *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 14–25 (2014); *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); *Lewis University*, 265 NLRB 1239 (1983).

The propriety of units of graduate students presents an area in which the Board's approach has varied over time. In *Adelphi University*, 195 NLRB 639 (1972), the Board excluded graduate students from a unit of faculty members. Shortly thereafter, in *Leland Stanford Junior University*, 214 NLRB 621, 623 (1974), the Board held that research assistants were "primarily students" and thus not statutory employees. See also *College of Pharmaceutical Sciences*, 197 NLRB 959, 960 (1972). In *New York University*, 332 NLRB 1205, 1206 (2000), the Board changed course and held that graduate assistants were statutory employees, finding that they fell within the meaning of "employee" as defined in Section 2(3) and by the common law. *New York University* was overruled in *Brown University*, 342 NLRB 483 (2004), which was itself overruled in *Columbia University*, 364 NLRB No. 90 (2016). In *Columbia University*, the Board—in addition to holding that certain graduate assistants are statutory employees—held that the petitioned-for unit of all student employees who provide instructional services, including graduate and undergraduate teaching assistants, all graduate research assistants, and all departmental research assistants, was appropriate. See also section 20-400 for more on the eligibility of student workers.

Even under *Brown University*, the Board held that research project assistants employed by a private corporation are employees within the meaning of the Act. See *Research Foundation-SUNY*, 350 NLRB 197 (2007); *Research Foundation of the City University of New York*, 350 NLRB 201 (2007).

15-262 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, 305 (1988); *Cornell University* 183 NLRB 329, 336 (1970).

In *Yale University*, 184 NLRB 860, 862 (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 *Cornell University*, the Board concluded that these employees did not share a sufficiently special community of interest which would justify creating a separate unit for them, insofar as 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 Department was thoroughly integrated into the EPH Department into the Yale School of Medicine and the University. Compare *Harvard College*, 269 NLRB 821 (1984), in which the Board found insufficient basis for a separate unit of clerical and technical employees from the university's medical area.

Food service employees have been found appropriate in a separate unit. In *Cornell University*, 202 NLRB 290, 294 (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 (citing *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, 2 (1971).

Service employees were found appropriate in a separate unit. *Duke University*, 194 NLRB 236, 238 (1972). So too was a campuswide unit of maintenance employees. *Duke University*, 200 NLRB 81 (1972). And a service and maintenance unit was found appropriate as it was "analogous to the usual production and maintenance unit in the industrial sphere," although the Board excluded office clericals (consistent with the industrial production and maintenance units) and also excluded technical employees based on their separate and distinct community of interest. *Georgetown University*, 200 NLRB 215, 216 (1972). Note that in each of these cases, the Board excluded any employees working more than 50 percent of their time within the employer's hospital operations, given that the Board had no jurisdiction over private hospitals at that time, but this practice was rendered moot following passage of the 1974 health care amendments extending Board jurisdiction over health care institutions. *Duke University*, 306 NLRB 555, 557 fn. 10 (1992). For another example of an appropriate service and maintenance unit, see *Leland Stanford Junior University*, 194 NLRB 1210, 1212–1213 (1972), which also rejected petitions for subsets of maintenance employees.

In *Georgetown University*, 200 NLRB 215, 217 (1972), the Board excluded "library assistants" from a service and maintenance unit on the ground they were clerical employees, but included "library aides" and messenger clerks, stating they were essentially "blue collar" workers.

In *California Institute of Technology*, 192 NLRB 582 (1971), 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. Id. at 584–585. Compare *Leland Stanford Junior University*, 194 NLRB 1210, 1212 (1972) (finding petitioned-for unit limited to physical plant department was not appropriate).

A unit of firemen at the university was also found to be an appropriate unit in *Leland Stanford Junior University*, 194 NLRB 1210, 1214 (1972).

Applying the *Cornell* guidelines, a unit of bookstore employees was found inappropriate. *George Washington University*, 191 NLRB 151, 152 (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 *Tulane University*, 195 NLRB 329, 330 (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.

15-270 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, 1632–1633 (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. *A. Harris & Co* does not apply to nonretail warehouses, *Esco Corp*., 298 NLRB 837, 840–841 (1990), nor does it apply in combination retail and wholesale

operations. *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999).

Under *A. Harris & Co.*, 116 NLRB 1628, 1632 (1957), 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. See also *J. W. Robinson Co*., 153 NLRB 989, 992 (1965). The absence of a bargaining history on a broader basis, see *Wigwam Stores*, 166 NLRB 1034 (1967), and the fact that no union seeks a broader unit, see *Sears, Roebuck & Co*., 152 NLRB 45, 48 (1965), are also relevant considerations.

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); see also *Sears, Roebuck & Co.*, 151 NLRB 1356, 1358–1359 (1965) (warehouse unit appropriate based on functional difference and autonomy, including geographic and supervisory separateness); *Loveman, Joseph & Loeb Div.*, 152 NLRB 719, 721–722 (1965) (same); *John's Bargain Stores Corp*., 160 NLRB 1519, 1521–1522 (1966) (separate community of interest met *A. Harris* standard and limited bargaining history did not offset appropriateness of warehouse unit).

The Board has subsequently stated that the *A. Harris & Co.* factors must be satisfied for a separate warehouse unit to be found appropriate. *Levitz Furniture Co.*, 192 NLRB 61, 62 (1971). Thus, 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. *Wickes Furniture*, 201 NLRB 610 (1973); see also *Sears, Roebuck & Co*., 180 NLRB 862, 863 (1965); *Wickes Furniture*, 201 NLRB 615 (1973); *Charrette Drafting Supplies*, 275 NLRB 1294, 1295–1296 (1985).

For a period of time, the Board construed the geographically separate requirement broadly. See *Wickes Furniture*, 255 NLRB 545, 547–548 (1981). However, in *Roberds, Inc*., 272 NLRB 1318, 1318–1319 (1984), the Board announced that it would henceforth apply a narrow construction to the requirement.

A retail warehouse unit should comprise employees performing "typically" warehouse functions. *A. Harris & Co*., 116 NLRB 1628, 1633 (1957). 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*., 153 NLRB 341, 344 (1965).

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, 343 (1965); *Sears, Roebuck & Co*., 151 NLRB 1356, 1358 (1965).

A. Harris & Co. and its progeny deal with warehouse units in the retail store industry. For warehouse units in other industries, the Board considers "all relevant factors" in determining whether a separate unit would be appropriate. *Esco Corp*., 298 NLRB 837, 841 (1990); see also *Vitro Corp*., 309 NLRB 390 (1992).

Thus, by way of illustration, warehouse unit was found appropriate (for an employer engaged in providing health and other insurance) where 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. *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).

By contrast, in *Scholastic Magazines, Inc.*, 192 NLRB 461, 462 (1971), a case in which the employer was a paperback bookseller, the Board rejected a unit limited to the warehouse and maintenance departments due to the fact that the warehouse employees—like other excluded employees—were engaged in a single highly integrated process of filling customer orders and no substantial distinctions could be drawn between the warehouse and maintenance departments and the processing departments. See also *Frisch's Restaurants, Inc.*, 182 NLRB 544 (1970) (warehouse unit inappropriate where functions had been integrated with functions performed by other employees in production areas); *Riker Laboratories*, 156 NLRB 1099, 1101 (1966) (same). Cf. *Garrett Supply Co*., 165 NLRB 561 (1967).

15-280 Research and Development Industry

440-1760-1040-7300

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, 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." See CHM sec. 11091.3 for a description of the procedures for such an election.

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.

This chapter begins with a discussion of craft and departmental severance, particularly in the context of Section 9(b)(2), before turning to a consideration of 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).

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.

At one time, the Board would grant severance only where the employees sought constituted a true craft or traditional departmental group and the union which sought to represent them was their "traditional" representative, with only certain exceptions. See *American Potash & Chemical Corp.*, 107 NLRB 1418, 1422 (1954).

In *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), the Board changed course, characterizing the prior policy as "rigid and inflexible," id. at 398, and articulating the need to balance the interest of the employer and the total employee complement in maintaining industrial stability 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. Id. at 392. The Board accordingly announced that it was broadening its judgmental scope "to permit evaluation of all considerations relevant to an informed decision in this area." Id. at 397.

Mallinckrodt spelled out a number of factors to be considered in deciding craft issues. See also *Kaiser Foundation Hospitals*, 312 NLRB 933, 935–936 (1993) (discussing the factors in the context of a health care institution); *Battelle Memorial Institute*, 363 NLRB No. 119, slip op. at 2 (2016) (stating there was no compelling reason to revisit *Mallinckrodt*).

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, or of employees constituting a functionally distinct department employed in trades or occupations for which a tradition of separate representation exists? See *Mallinckrodt Chemical Works*, 162 NLRB 387, 397 (1966); *Firestone Tire & Rubber Co.*, 223 NLRB 904, 905 (1976). 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. *Mallinckrodt*, 162 NLRB at 397 fn. 14; see also *Burns & Roe Services*, 313 NLRB 1307, 1308 (1994), and *Schaus Roofing*, 323 NLRB 781 (1997), for the definition of a craft unit. Craft units include apprentices and helpers. *American Potash & Chemical Corp.*, 107 NLRB 1418, 1423 (1954); *Fletcher Jones Chevrolet*, 300 NLRB 875, 876 (1990).

For an example of a case in which this inquiry was not met, see *Metropolitan Opera Assn*., 327 NLRB 740 (1999), finding that a group of choristers was not a distinct and homogenous group.

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. *Mallinckrodt Chemical Works*, 162 NLRB 387, 397 (1966). Inquiry is also made into the history and pattern of collective bargaining in the industry involved. Id. at 397; *Firestone Tire & Rubber Co*., 223 NLRB 904, 906–907 (1976); see also *Kaiser Foundation Hospitals*, 312 NLRB 933, 935 (1993); *Metropolitan Opera Assn.*, 327 NLRB 740, 741 (1999); *Battelle Memorial Institute*, 363 NLRB No. 119 (2016).

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. *Mallinckrodt Chemical Works*, 162 NLRB 387, 397 (1966); see also *Beaunit Corp*., 224 NLRB 1502, 1504–1505 (1976).

16-114 Degree of Integration of the Employer's Production Processes

440-1760-9133-8300

What is the degree of integration of the employer's production processes, 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? *Mallinckrodt Chemical Works*, 162 NLRB 387, 397 (1966). 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 de Nemours & Co*., 162 NLRB 413, 419 (1966); see also *Burns & Roe*, 313 NLRB 1307, 1309 (1994).

16-115 Qualifications of the Union Seeking Severance

440-1760-9133-1200

What are the qualifications of the union seeking to "carve out" a separate unit in the face of a broader bargaining history? This inquiry, in turn, depends on its experience in representing employees such as those involved in the severance proceeding. *Mallinckrodt Chemical Works*, 162 NLRB 387, 397 (1966). 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. Id. at 397 fn. 15; see *Beaunit Corp*., 224 NLRB 1502, 1505 (1976); *Kaiser Foundation Hospitals*, 312 NLRB 933, 936 (1993).

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, 235 (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, 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. *Mallinckrodt Chemical Works*, 162 NLRB 387, 398 (1966). "In severance cases such as this we do not apply automatic rules but rather evaluate all relevant considerations." *Kimberly-Clark Corp*., 197 NLRB 1173, 1174 (1972). Cf. *Allied Chemical Corp.*, 165 NLRB 235, 236 (1967) (rejecting contention that pre-*Mallinckrodt* directing severance election was binding precedent given that policy had changed and *all* relevant factors must now be considered).

16-120 Application of Severance Principles

440-8325-7591

440-8325-7596

440-8325-7562

As indicated in the foregoing sections, severance determinations are fact-specific. The following is a sampling of cases applying severance principles.

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, 409–410 (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, 651 (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, 921 (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, 733 (1967).

Craft status, the petitioner's qualifications as representative, coordination in the production process, bargaining history, and industry and area bargaining 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, 17 (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, 1041 (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, 445 (1969); see also *Beaunit Corp*., 224 NLRB 1502 (1976) (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, 261 (1968).

In *Firestone Tire & Rubber Co*., 223 NLRB 904, 905–907 (1976), 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.

By contrast, severance was granted 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. *Buddy L. Corp*., 167 NLRB 808, 809–810 (1967). In so finding, 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, 721 (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, 468 (1970). Compare *Union Carbide Corp*., 205 NLRB 794, 797–799 (1973).

In *La-Z-Boy Chair Co*., 235 NLRB 77, 78 fn. 5 (1978), the Board declined to grant severance, and in doing so distinguished *Buddy L. Corp*., 167 NLRB 808 (1967), and *Eaton Yale & Towne, Inc*., 191 NLRB 217 (1971), 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, 1028 (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, 882 (1970); see also *Downingtown Paper Co*., 192 NLRB 310, 312 (1971). Compare *Olinkraft, Inc*., 179 NLRB 414 (1969), and *Dura-Containers, Inc*., 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, 413–414 (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.*, 197 NLRB 1173 (1972) (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 & Rubber Co*., 165 NLRB 188 (1967) (electricians); *Aerojet-General Corp*., 163 NLRB 890 (1967) (tool-and-die makers); *North American Aviation*, 162 NLRB 1267 (1967) (welders); *Burns & Roe Services*, 313 NLRB 1307 (1994) (electricians).

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); *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, 465 (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.

Thus far, this chapter has been concerned with application of Board law to petitions seeking severance from more comprehensive units. This section turns to the initial establishment of craft or departmental groups.

An obvious distinction exists between the two situations, and precedent clearly highlights the difference 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, e.g., *E. I. du Pont de Nemours & Co*., 162 NLRB 413, 418–419 (1966); see also *Mirage Casino-Hotel*, 338 NLRB 529, 532–534 (2002); *E. I. duPont (Florence Plant)*, 192 NLRB 1019 (1971).

In *Burns & Roe Services*, 313 NLRB 1307, 1308 (1994), 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 petitioned-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, 1019–1021 (1994), the Board summarized the cases involving initial establishment of maintenance units. See also *Macy's West*, *Inc*., 327 NLRB 1222, 1223 (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 892 (2001); *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." Id. at 296. 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, 325 (1972). Compare *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, 640 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, 1063–1064 (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*, 323 NLRB 739 (1997), enf. denied 144 F.3d 877 (D.C. Cir. 1998). 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, Inc.*, 164 NLRB 290, 292 (1967); see also *Monsanto Co.*, 172 NLRB 1461 (1968); *Proctor & Gamble Paper Products Co*., 251 NLRB 492, 494 (1980).

By contrast, 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 because 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, 48 (1968) (note that in this case the Board used the *Mallinckrodt* tests in its determinations, but advised that they 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 supervision among the maintenance employees. See also *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); *Fletcher Jones Chevrolet*, 300 NLRB 875 (1990). See also *Phoenician*, 308 NLRB 826, 828 (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, 532–534 (2002), the Board directed an election in a unit of carpenters and upholsterers at a gaming hotel/casino, noting that the carpenters performed craft work, were—with the upholsterers—separately supervised, had limited interchange with other engineering department employees, and area practice was to include the upholsterers with the carpenters.

In *Turner Industries Group, LLC*, 349 NLRB 428, 431–432 (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.

16-300 Skilled Maintenance-Health Care

470-5800

Skilled maintenance units are one of the appropriate units under the Health Care Rule. See section 15-160; *Jewish Hospital of St. Louis*, 305 NLRB 955 (1991).

In *University of Pittsburgh Medical Center*, 313 NLRB 1341, 1342 (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, 653 (1993), the Board dealt with a number of

classifications that are included in a skilled maintenance unit including biomedical technicians. See also *San Juan Regional 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 Memorial Hospital*, 309 NLRB 393, 396 (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.

The Board has also found appropriate a skilled maintenance unit at a nursing home. *Hebrew Home & Hospital*, 311 NLRB 1400 (1993) (note that this case involved an application of *Park Manor Care Center*, 305 NLRB 872 (1991), which has subsequently been overruled—see sec. 15-163).

In *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), the Board denied craft severance of a skilled maintenance unit by applying *Mallinckrodt* principles. See section 15–160.

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.

This chapter considers 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, e.g., *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303 (1977); *Davis Grain Corp.*, 203 NLRB 319, 320–321 (1973); *Jack Frost, Inc.*, 201 NLRB 659, 660 (1973); *CPA Trucking Agency*, 185 NLRB 452 (1970); *D'Arrigo Bros. Co. of California*, 171 NLRB 22 (1968); *Samuel B. Gass*, 154 NLRB 728, 731–733 (1965); *Bodine Produce Co.*, 147 NLRB 832 (1964); *Imperial Garden Growers*, 91 NLRB 1034, 1036–1038 (1950).

Thus, in *Jack Frost, Inc.*, 201 NLRB 659, 660 (1973), 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*, 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, Inc. v. NLRB*, 429 U.S. 298, 302 (1977). See also *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (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 972 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.*, 147 NLRB 832 (1964). 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 sec. 780; *Jack Frost, Inc.*, 201 NLRB 659, 660 (1973); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303 fn. 13 (1977).

Thus, 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*, 185 NLRB 452, 453 (1970); see also *Draper Valley Farms, Inc.*, 307 NLRB 1440 (1992) (finding chicken catchers working on farms of independent growers are engaged in activity incidental to separate nonfarming business activity); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (upholding as reasonable Board's conclusion "live-haul crews" are employees under the Act as their work was tied to employer's processing operations, rather than incidental to farming operations). Compare *Pictsweet Mushroom Farm*, 329 NLRB 852 (1999) (finding mushroom slicers were agricultural employees as slicing was only small part of employer's operation, raw state of mushrooms was unchanged by slicing, slicing operation was not "factory-like," and slicing was common among mushroom growers in general); *Drummond Coal Co.*, 249 NLRB 1017 (1980) (employees engaged in revegetation of mined land as part of reclamation project are agricultural laborers)..

Another criterion is whether the employer confines the operation in question to its own produce.

Thus, 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, Inc.*, 190 NLRB 299, 300 (1971); see also *CPA Trucking Agency*, 185 NLRB 452, 453 (1970); *D'Arrigo Bros. Co. of California*, 171 NLRB 22, 23 (1968). The Board has declined to set a standard based on the percentage coming from outside sources, but instead 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, 908 (1990); see also *Campbells Fresh, Inc.*, 298 NLRB 432 (1990); *Cal-Maine Farms*, 307 NLRB 450 (1992); *AgriGeneral L.P.*, 325 NLRB 972 (1998).

A different test applies when considering whether workers who perform both 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).

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); *John Bagwell Farms & Hatchery, Inc.*, 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." *Local Union No. 300, Amalgamated Meat Cutters & Butcher Workmen of North America v. McCulloch*, 428 F.2d 396, 399 (5th Cir. 1970).

The annual rider to the Board's appropriation has, since 1954, also added "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" in the definition of agricultural laborers. Thus, where employees were found by the Board to have engaged solely in such functions and more than 95 percent of the water stored or supplied by their employer was used for farming purposes, the Board found that jurisdiction was precluded because these employees were agricultural employees. *Minidoka Irrigation District*, 175 NLRB 880 (1969); see also *Truckee-Carson Irrigation District*, 164 NLRB 1176 (1967); *Sutter Mutual Water Co.*, 160 NLRB 1139 (1966).

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, Inc.*, 831 F.2d 999, 1005 (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.

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 common law agency principles. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). Under agency principles, each case is determined on its own facts. *Frito-Lay, Inc. v. NLRB*, 385 F.2d 180, 188 (7th Cir. 1967). As stated in *NLRB v. United Insurance Co.*, 390 U.S. at 258, "there is no shorthand formula or magic phrase that can be applied" to determine whether an individual is an employee or an independent contractor; rather, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." See also *Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 192 (6th Cir. 1972); *Gary Enterprises*, 300 NLRB 1111, 1112 (1990); *Portage Transfer Co.*, 204 NLRB 787, 788 (1973); *Associated General Contractors*, 201 NLRB 311, 314 (1973).

Following subsequent Supreme Court precedent, the Board applies the multifactor analysis of the Restatement (Second) of Agency, Section 220, in determining whether an individual is an employee or an independent contractor under common law agency principles. *Roadway Package System, Inc.*, 326 NLRB 842, 849 (1998) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). These factors are:

(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.

The party asserting independent contractor status bear the burden of establishing that status. *Community Bus Lines*, 341 NLRB 474 (2004).

Although recognizing that the common-law agency test "ultimately assesses the amount or degree of control exercised by an employing entity over an individual," the Board has rejected the notion that the "right to control" the manner and means of the work performed is the predominant factor in its independent-contractor analysis. *Roadway Package System, Inc.*, 326 NLRB at 850. Rather, all factors must be assessed and weighed, with no one factor being dispositive. Id.

Given that no one factor is dispositive, the fact that the written agreement defines the relationship as one of "independent contractor" does not control. *National Freight, Inc.*, 153 NLRB 1536, 1358–1359 (1965); *Big East Conference*, 282 NLRB 335, 345 (1986)). Nor does the fact 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).

With respect to the "extent of control" factor, Board does not consider requirements imposed by the government to constitute employer control; it is considered government control, and accordingly does not dictate any result. *Air Transit*, 271 NLRB 1108, 1110 (1984); *Elite Limousine Plus*, 324 NLRB 992, 1002 (1997).

In *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 1, 15 (2014), the Board stated that in addition to the Restatement factors, the Board also "asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." The Board explained that one aspect of this additional factor is whether the putative independent contractors have "significant entrepreneurial opportunity for gain or loss." Id., slip op. at 12. The Board observed that the D.C. Circuit had described "entrepreneurial opportunity" as an "important animating principle" in recent cases (see *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009)); interpreting the court's treatment of this consideration as "the overriding consideration in all but the clearest cases," the Board rejected this approach. Id., slip op. at 8–9. In addition to clarifying that this consideration is but one part of the "rendering services as part of an independent business" factor, the Board clarified that "entrepreneurial opportunity" requires an actual, not merely theoretical, opportunity for gain or loss. Id., slip op. at 10. The Board also overruled several cases to the extent they suggested the Board "cannot consider evidence that a putative employer has imposed constraints on an individual's ability to render services as part of an independent business." Id., slip op. at 16-17 (overruling *Arizona Republic*, 349 NLRB 1040 (2007), and *St. Joseph News-Press*, 345 NLRB 474 (2005)). The D.C. Circuit denied enforcement of the Board's decision in *FedEx Home Delivery*, but in doing so applied the "rule of the circuit" doctrine; the court offered little analysis of the Board's treatment of this factor, aside from stating it was not entitled to deference. 849 F.3d 1123 (D.C. Cir. 2017).

For subsequent cases applying *FedEx Home Delivery*, see *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015) (finding employer established crew leaders were independent contractors); *Sisters'*

Camelot, 363 NLRB No. 13 (2015) (finding employer had not shown canvassers were independent contractors).

Given that independent contractor cases are fact-driven and rely on the balancing of the multiple factors discussed above, any attempt to provide a general discussion or summary of such cases would be fruitless. Instead, the following sections provide illustrations of cases in which the Board has considered independent contractor arguments in particular industries. In this regard, the issue has arisen with particular frequency in the trucking (17-410), newspaper (17-420), and taxi (17-430) industries. A fourth section (17-440) briefly touches on the myriad other industries in which the issue has appeared.

17-410 Trucking Industry

177-2484-5067

The trucking industry has generated a large number of cases presenting the independent contractor issue. Once again, these determinations are heavily fact-based, so little purpose is served by summarizing the facts of particular cases. Instead, this section lists various cases in which the Board has found independent contractor status and then other cases in which the Board has found employee status. 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, Inc.*, 261 NLRB 183 (1983).
– *Diamond L Transportation*, 310 NLRB 630 (1993).
– *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).
– *Argix Direct, Inc.*, 343 NLRB 1017 (2004).

Cases Finding Employee Status

– *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000).
– *Slay Transportation Co.*, 331 NLRB 1292 (2000).
– *C. C. Eastern, Inc.*, 309 NLRB 1070 (1992).
– *R. W. Bozel Transfer*, 304 NLRB 200 (1991).
– *Roadway Package System*, 288 NLRB 196 (1988).
– *North American Van Lines*, 288 NLRB 38 (1988).
– *Redieh Interstate, Inc.*, 255 NLRB 1073 (1980).
– *Standard Oil Co.*, 230 NLRB 967 (1977).
– *Okeh Caterers*, 179 NLRB 535, 537 (1969).
– *Roadway Package System*, 326 NLRB 842 (1998).
– *Igramo Enterprise*, 351 NLRB 1337 (2007).
– *FedEx Home Delivery*, 361 NLRB No. 55 (2014).

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, 220 (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); see also *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, Inc.*, 160 NLRB 1515 (1966) (district dealers); *Citizen News Co.*, 97 NLRB 428 (1951) (carrier boys); *News Syndicate Co.*, 164 NLRB 422 (1967) (franchise 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, 452 (1970), enfd. 444 F.2d 430 (2d Cir. 1971), cert. denied 404 U.S. 990 (1971) (distributors); *News-Journal Co.*, 185 NLRB 158 (1970), enfd. 447 F.2d 65 (3d Cir. 1971), cert. denied 404 U.S. 1016 (1972) (newspaper deliverers); *Long Beach Press-Telegram*, 305 NLRB 412 (1991) (area managers and district advisers).

In *San Antonio Light Division*, 174 NLRB 934 (1969), distributors were found to be supervisors rather than either employees or independent contractors. In *News-Journal Co.*, 185 NLRB 158, 159 fn. 2 (1970), 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. By contrast, in *Denver Post, Inc.*, 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.

The Board found independent contractor status for newspaper carriers in both *St. Joseph News-Press*, 345 NLRB 474 (2005), and *Arizona Republic Co.*, 349 NLRB 1040 (2007). In doing so, the Board noted that such findings were consistent with newspaper carrier cases decided before *Roadway Package System, Inc.*, 326 NLRB 842 (1998). As indicated above, however, both cases were subsequently overruled in *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 16–17 (2014), at least in certain respects (see section 17-400).

17-430 Taxi Industry

177-2482-5067-6000

Cabdrivers' status presents a frequent occasion for litigation of the independent contractor issue.

Although the usual common law test applies, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fare collected," and "the company's lack of control over the manner and means by which the drivers conducted business after leaving the [employer's] garage." *AAA Cab Services*, 341 NLRB 462, 465 (2004) (citing *Elite Limousine Plus*, 324 NLRB 992, 1001 (1997); see also *City Cab of Orlando*, 285 NLRB 1191, 1193 (1987); *Air Transit*, 271 NLRB 1108, 1110–1111 (1984)). The Board has also indicated that if a driver pays a fixed rental fee and retains all fares without accounting for them, a strong inference exists that the company does not control the

manner and means of performance. *Metro Cab Co.*, 341 NLRB 722, 724 (2004).

For two cases applying these principles and reaching different conclusions, compare *AAA Cab Services*, 341 NLRB 462 (2004) (finding independent contractor status), with *Metro Cab Co.*, 341 NLRB 722 (2004) (finding employee status). See also *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300 (2004) (in course of finding most drivers were independent contractors, recounting history of conversion of these drivers from employees to independent contractors).

In *Yellow Taxi of Minneapolis*, 262 NLRB 702 (1982), the Board reconsidered an earlier decision that drivers were employees, but reached the same result notwithstanding adverse court decisions in similar cases. The D.C. Circuit reversed. See *Suburban Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983). For a subsequent decision distinguishing *Suburban Yellow Taxi* and other adverse court decisions, see *Yellow Cab of Quincy*, 312 NLRB 142, 144 (1993). For a court case affirming a Board finding of employee status for taxi drivers, see *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (2008), enfg. 341 NLRB 722 (2004).

For other taxi and related cases, see *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000) (finding taxi drivers to be employees); *Elite Limousine Plus*, 324 NLRB 992 (1997) (finding limousine drivers are employees); *Southern Cab Corp.*, 159 NLRB 248, 250 fn. 4 (1966) (noting the fact that drivers are free to solicit own passengers in addition to complying with employer's dispatch orders is not determinative, nor is the fact employer gives drivers written driving instructions); *Diamond Cab*, 164 NLRB 859 (1967) (finding employee status).

17-440 Other Industries

177-2484-5033-0167

177-2484-5067

Independent contractor issues have arisen in any number of industries. This section does not attempt to provide an exhaustive catalogue of industries in which the Board has dealt with the issue, but instead is designed to give the reader a sampling of cases in this area.

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).

In a case involving a franchisee, the Board found that the franchisee was an independent contractor under the circumstances, and in doing so 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, 1333 (1968) (citing *Clark Oil & Refining Corp.*, 129 NLRB 750 (1960)).

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, 531 (1961); see also *Young & Rubicam International, Inc.*, 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.

Although freelance writers, artists, and designers were employees exhibited a number of factors that favored independent contractor status, the Board found that they were employees based on the supervision the employer exercised over their scripts, the fact that they performed functions that were an essential part of the employer's normal operations, and did not operate as independent entrepreneurs. *BKN, Inc.*, 333 NLRB 143, 144–145 (2001). Compare *DIC Animation City*, 295 NLRB 989 (1989) (finding freelance animation writers were independent contractors).

In *Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016), the Board found that symphony orchestra musicians were employees because, among other things, the orchestra, not the musicians, controlled the manner and means by which performances are accomplished and the musicians did not have any entrepreneurial risk of loss.

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 Cooperative Creamery Assn.*, 119 NLRB 817 (1957).

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).

In *Lakes Pilots Assn.*, 320 NLRB 168, 173–174 (1995), the Board found that pilots in training—applicant maritime pilots—were employees, noting that the employer retained the right to control the manner in which these pilots performed their services.

In *Cardinal McCloskey Services*, 298 NLRB 434 (1992), the Board found day care providers to be independent contractors. Compare *People Care, Inc.*, 311 NLRB 1075 (1993) (finding home health care workers to be employees).

In *AmeriHealth Inc.*, 329 NLRB 870 (1999), the Board found physicians are independent contractors, rather than employees of a health maintenance organization.

In *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305 (11th Cir. 2016), the court reversed the Board's finding that stagehands were employees, not independent contractors.

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 follows:

> 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.

With respect to the 12 listed indicia, Section 2(11) is to be interpreted in the disjunctive and "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, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); see also *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574 (1994); *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 335 U.S. 908 (1948); *Harborside Healthcare, Inc.*, 330 NLRB 1334

(2000); *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994); *Queen Mary*, 317 NLRB 1303 (1995).

The burden of establishing supervisory status rests on the party asserting that status, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001), and the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the rights protected under the Act. See *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Hydro Conduit Corp.*, 254 NLR 433, 437 (1981).

It is axiomatic, of course, that the existence of the power determines whether an individual is an employee or a supervisor. See, e.g., *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 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. Other factors may be considered as well, depending on the circumstances of each case. As discussed in more detail below, depending on the alleged supervisory functions at issue, additional principles may apply. Combined with the fact that supervisory issues are among the most common in representation cases, and that the factual situations in which the Board addresses supervisory issues are more often than not complex, there is no easy way to summarize this vast and complicated body of law.

The following discussion nevertheless endeavors to sketch out the relevant principles in supervisory determinations. The next several sections address a series of general supervisory concepts that arise in determining whether supervisory authority has been established: independent judgment (17-511), "in the interest of the employer" (17-512), effective recommendation (7-513), limited/sporadic/part-time exercise of supervisory functions (17-514), substituting for a supervisor (17-515), promotions to supervisory positions (7-516), ostensible or apparent authority (17-517), and supervision of nonunit employees (7-518). The chapter then discusses cases dealing with, and principles applicable to, the 12 enumerated primary functions (17-520). The chapter closes with a consideration of secondary indicia (17-530), as well as supervisory issues in educational (17-540) and health care (17-550) institutions.

17-510 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 been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001); *U.S. Gypsum Co.*, 93 NLRB 91, 92 fn. 8 (1951); *Wasatch Oil Refining Co.*, 76 NLRB 417, 423 fn. 17 (1948).

The language of Section 2(11) sets forth three requirements that must be met to establish supervisory status: (1) the putative supervisor must possess at least one of the 12 enumerated supervisory functions, (2) the putative supervisor must exercise independent (as opposed to routine or clerical) judgment in exercising that authority, and (3) that authority must be held "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001).

Each of these requirements is discussed at length below, but before turning to these (and several other) general principles, at the outset it should be reiterated that the party asserting supervisory status bears the burden of establishing that status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Benchmark Mechanical Contractors*, 327 NLRB 829 (1999); *Alois Box Co.*, 326 NLRB 1177

(1998); *Youville Health Care Center*, 326 NLRB 495, 496 (1998). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). Conclusory statements without supporting evidence do not establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Supervisory status is not established where the record evidence is "in conflict or otherwise inconclusive." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The burden does not shift, *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003), and the burden remains on the party asserting supervisory status even where the parties had previously stipulated that the individual was a supervisor but one party now argues the individual is not a supervisor. *Benjamin H. Realty Corp.*, 361 NLRB No. 103, slip op. at 2 (2014).

The party asserting supervisory status must prove it by a preponderance of the evidence, and this requires detailed, specific evidence. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016); *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015).

It is an individual's duties—not job title—that determines status. *Dole Fresh Vegetables*, 339 NLRB 785 (2003). As a result, supervisory issues can arise with respect to all types of classifications in all types of industries. That said, supervisory issues have arisen with respect to certain types of classifications in certain industries with some regularity. Although not an exhaustive list, the Board has often considered the putative supervisory status of the following types of positions (in both representation and unfair labor practice cases):

– *Nurses*, including registered nurses (*Barstow Community Hospital*, 356 NLRB 88 (2010) (burden not met); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997) (burden not met)), charge nurses (*Pine Brook Care Center*, 322 NLRB 740 (1996) (burden not met)), and licensed practical nurses (*Beverly Health & Rehabilitation Services*, 335 NLRB 635, 635 fn. 3 (2001) (burden not met); *Heartland of Beckley*, 328 NLRB 1056 (1999) (burden met)). See section 17-550 for a related discussion.

– *Boat captains*, *pilots* and/or *mates*. For cases involving captains, see, e.g., *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015) (burden not met); *Cook Inlet Tug & Barge*, 362 NLRB No. 111 (2015) (burden not met); *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) (burden met); *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), enf. denied 106 F.3d 484 (2d. Cir. 1997) (burden not met); *McAllister Bros.*, 278 NLRB 601 (1986) (burden not met). For cases involving pilots and/or mates, see *Brusco Tug & Barge, Inc.*, 359 NLRB 486 (2012) (recess Board decision), incorporated by reference at 362 NLRB No. 28 (2015) (burden not met); *American River Transportation Co.*, 347 NLRB 925 (2006) (burden met); *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543 (2006) (burden met); *Ingram Barge Co.*, 336 NLRB 1259 (2001) (burden met); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001) (burden met); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995) (burden not met); *Masters, Mates & Pilots Local 28*, 136 NLRB 1175 (1962), enfd. 321 F.2d 376 (D.C. Cir. 1963) (burden met); *Bernhardt Bros. Tugboat Service*, 142 NLRB 851 (1963), enfd. 328 F.2d 757 (7th Cir. 1964) (burden met).

– Broadcast *producers*, *directors*, and/or *editors*. See, e.g., *KGTV*, 329 NLRB 454 (1999) (burden not met); *KGW-TV*, 329 NLRB 378 (1999) (burden not met); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986), enfg. 274 NLRB 1014 (1985) (burden not met); *WDTN-TV*, 267 NLRB 326 (1983) (burden met); *Meredith Corp. v. NLRB*, 679 F.2d 1332 (10th Cir. 1982), enfg. 243 NLRB 323 (1979) (burden not met); *Taft Broadcasting*, 226 NLRB 540 (1976) (burden met); *Post-Newsweek Station-WPLG-TV*, 217 NLRB 14 (1975) (burden not met); *Golden West Broadcaster-KTLA*, 215 NLRB 760 (1974) (burden not met); *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123 (1974) (burden not met); *Post-Newsweek Stations*, 203 NLRB 522 (1973) (burden not met); *Westinghouse*

Broadcasting Co., 195 NLRB 339 (1972) (burden met); *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971) (burden met).

– Trucking and other types of vehicle *dispatchers*. *Acme Bus Corp.*, 320 NLRB 458 (1995) (burden met); *Express Messenger Systems*, 301 NLRB 651 (1991) (burden not met); *B.P. Oil, Inc.*, 256 NLRB 1107 (1981) (burden not met); *Connecticut Distributors*, 255 NLRB 1255 (1981) (burden met); *Central Cartage, Inc.*, 236 NLRB 1232 (1978) (burden not met); *Interstate Motor Freight System*, 227 NLRB 1167 (1977) (burden not met); *St. Petersburg Limousine Service*, 223 NLRB 209 (1976) (burden not met); *Pilot Freight Carriers, Inc.*, 221 NLRB 1026 (1975) (burden not met), enf. denied 558 F.2d 205 (4th Cir. 1977); *Orleans Transportation Service*, 217 NLRB 483 (1975) (burden not met); *Spector Freight System, Inc.*, 216 NLRB 551 (1975) (burden not met); *Quality Transport Inc.*, 211 NLRB 198 (1974) (burden met); *Pennsylvania Truck Lines, Inc.*, 199 NLRB 641 (1972) (burden met); *Consolidated Freightways Corp. of Delaware*, 196 NLRB 807 (1972) (burden met); *Greyhound Airport Services*, 189 NLRB 291 (1971) (burden not met); *Spector Freight System, Inc.*, 141 NLRB 1110 (1963) (burden met); *Yellow Cab, Inc.*, 131 NLRB 239 (1961) (burden not met); *Dixie Ohio Express, Inc.*, 123 NLRB 1936 (1959) (burden met); *Carey Transportation, Inc.*, 119 NLRB 332 (1957) (burden not met).

– *Electric utility dispatchers*. *Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011) (burden not met); *Mississippi Power & Light Co.*, 328 NLRB 965 (1999) (burden not met), revg. *Big Rivers Electric Corp.*, 266 NLRB 380 (1983).

– *Leadmen, foremen*, and similarly-titled positions. *Brown & Root, Inc.*, 314 NLRB 19, (1994) (burden not met for "leadmen"); *Upshur-Rural Electric*, 254 NLRB 709 (1981) (burden not met for "foremen"); *Western Saw Mfrs.*, 155 NLRB 1323 (1965) (burden met for "working foreman"); *Little Rock Hardboard Co.*, 140 NLRB 264 (1962) (burden met for "shift leaders"); *Lee-Rowan Mfg. Co.*, 129 NLRB 980 (1960) (burden met for "line leaders").

– Various types of *newspaper* personnel, including press supervisors or operators (*North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995) (burden not met); *McClatchy Newspapers*, 307 NLRB 773 (1992) (burden met)); district managers (*Suburban Newspaper Group*, 195 NLRB 438 (1972) (burden not met)); and pressroom assistant foremen (*Newark Newspaper Pressmen's Union*, 194 NLRB 566 (1971) (burden met)).

In addition, the mere issuance of a directive to alleged supervisors setting forth alleged supervisory authority, including their purported ability to make effective recommendations, is not determinative of their supervisory status. *Connecticut Light & Power Co.*, 121 NLRB 768, 770–771 (1958). 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.

17-511 Independent Judgment

177-8520

177-8560

As Section 2(11) plainly states, the exercise of independent judgment is a requirement for any finding of supervisory status. Board determinations of supervisory status commonly turn on the present or absence of independent judgment. Thus, the fact that an individual is "in charge" during a period of time will not establish supervisory authority in the absence of evidence that the putative supervisor's actions involve independent judgment. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

Section 2(11) distinguishes between "independent" judgment and that which is "merely routine or clerical nature." The question, accordingly, is whether a putative supervisor exercises a sufficient degree of discretion to constitute "independent judgment." *NLRB v. Kentucky River*

Community Care, Inc., 532 U.S. 706, 714 (2001). It falls within the Board's discretion "to determine, within reason, what scope of discretion qualifies." Id. at 713. The kind or nature of the judgment, however, does not determine whether it is "independent" under Section 2(11). Id. at 714. See section 17-522 for a discussion of such a "categorical exemption," once employed by the Board with respect to responsible direction, which the Supreme Court rejected in *Kentucky River*.

The definitive statement of the Board's current interpretation of "independent judgment" is set forth in *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006). In that case, the Board 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." Id. at 693. The Board reiterated that independent judgment "contrasts with actions that are of a merely routine or clerical nature," and noted that an individual's authority may meet the "dictionary definitions" of "independent judgment" yet "still not rise above the merely routine or clerical." Id. Rather, the asserted supervisory authority "must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id.

Consistent with prior precedent, *Oakwood Healthcare* states that a judgment is not independent if it is dictated or controlled by detailed instructions, such as company policies or rules, verbal instructions of a higher authority, or provisions of a collective bargaining agreement. 348 NLRB at 693; see also *Dynamic Science Inc.*, 334 NLRB 391, 391 (2001); *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). The mere existence of company policies does not eliminate independent judgment, however, if policies allow for discretionary choices. *Oakwood Healthcare*, 348 NLRB at 693. By the same token, the fact that detailed instructions "do not dictate or control specific action" does not necessarily mean that independent judgment exists. Id. at 693 fn. 42.

Similarly, a judgment does not rise above the clerical or routine when "there is only one obvious and self-evident choice," or, in the case of assignment, if an assignment is made "solely on the basis of equalizing workloads." *Oakwood Healthcare*, 348 NLRB at 693.

In *Oakwood Healthcare* itself, the Board found that independent judgment was established where certain charge nurses made assignments tailored to patient conditions and needs and particular nurses' skills, among other factors. 348 NLRB at 697. By contrast, the Board found that certain other charge nurses had no "discretion to choose between meaningful choices" and thus did not exercise independent judgment. Id. at 698.

Cases applying *Oakwood Healthcare* have reiterated that, in terms of meeting the evidentiary burden to establish supervisory authority, purely conclusory evidence and testimony that lacks specificity (particularly with respect to the factors weighed or balanced in exercising putative supervisory authority) will not be sufficient to establish independent judgment. See, e.g., *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (lead persons); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (charge nurses); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (staff nurses); *Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007) (team leader); *Lynwood Manor*, 350 NLRB 489, 490 (2007) (RNs and LPNs); *Network Dynamics Cabling*, 351 NLRB 1423, 1425 (2007) (crew chief); *Pacific Coast M.S. Industries*, 355 NLRB 1422 (2010) (team leaders).

By way of more specific illustration, in *Brusco Tug & Barge Co.*, 359 NLRB 486, 492 (2013) (recess Board decision), incorporated by reference at 362 NLRB No. 28 (2015), the Board found that independent judgment had not been established due in part to the lack of detailed specific evidence of a mate or pilot selecting one deckhand over another to perform a particular task. Similarly, in *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111 (2015), the Board found that vague and hypothetical testimony that captains played to deckhand strengths in making assignments did not show that judgment was more than routine. See also *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. at 2 (2016) (finding independent judgment had not been established with respect to lieutenants' authority to direct because, inter alia, testimony

concerning what variables lieutenants might consider in directing subordinates was vague and lacked even general examples of the choices lieutenants might make in doing so).

For examples of post-*Oakwood Healthcare* cases in which the Board found independent judgment, see *Metropolitan Transportation Services*, 351 NLRB 657, 660 (2007), in which the maintenance manager at issue exercised disciplinary authority free from the control of others. See also *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015), in which the Board found that tugboat captains' direction of deckhands involved independent judgment because captains directed crew by deciding specific tasks to be undertaken in connection with navigation and setting up tows, but went on to find that such direction was not "responsible" within the meaning of section 2(11).

Following *Oakwood Healthcare*, the Board has reiterated various principles concerning the degree of judgment required to be "independent" within the meaning of the Act.

Thus, the Board has declined to find independent judgment in assigning when assignments are made only to equalize workload. See *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 6 (2006) (charge nurses); *Shaw, Inc.*, 350 NLRB 354 (2007) (foremen); *Lynwood Manor*, 350 NLRB 489 (2007) (RNs and LPNs). For a pre-*Oakwood Healthcare* case articulating this principle, see *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997).

Similarly, the Board has not found independent judgment when the putative supervisors follow established patterns or rotational systems in assigning or directing subordinates. See *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (lead persons followed preestablished delivery schedule and generally employed standard pattern in directing employees); *Shaw, Inc.*, 350 NLRB 354 (2007) (foremen made assignments by rotating unskilled and routine duties among available crew); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 22 (2014) (TVS managers followed established pattern in making assignments); *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 2 (2014) (certain team leaders made assignments using rotational system).

As emphasized in *Oakwood Healthcare*, the existence of detailed instructions or policies may result in a finding that independent judgment has not been established. See *Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007) (team leader assignment and direction controlled by higher instructions); *Pacific Coast M.S. Industries*, 355 NLRB 1422 (2010) (team leader assignments controlled by detailed instructions); *Brusco Tug & Barge Co.*, 359 NLRB 486, 491 (2013) (recess Board decision), incorporated by reference at 362 NLRB No. 28 (2015) (mates' direction followed bill specifying duties, and testimony mates could vary bill lacked specificity); *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015), incorporating by reference 358 NLRB 1701 (2012) (recess Board decision) (discipline issued by lieutenants was routine and significantly limited by instructions and progressive discipline policies); see also *Community Education Centers, Inc.*, 360 NLRB No. 17 (2014) (finding independent judgment in direction not shown where it was not established that actions taken by putative supervisors were not controlled by employer's policies and procedures or rose beyond the routine). Cf. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006) (independent judgment not found where higher official authorized putative supervisory charge nurses to "mandate" employees to come to work). For pre-*Oakwood Healthcare* cases making the same point, see *Dynamic Science Inc.*, 334 NLRB 391 (2001); *Arizona Public Service Co.*, 310 NLRB 477 (1993); *Northwest Steel, Inc.*, 200 NLRB 108 (1972).

Similarly, the assignment of recurrent and predictable tasks, and a limited role in the direction of routine tasks, does not establish independent judgment. *Shaw, Inc.*, 350 NLRB 354 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 fn. 14 (2006) (citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986); *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002)). For other pre-*Oakwood Healthcare* decisions articulating this principle, see *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Cf. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997) (no supervisory status where putative supervisor is a "lead person, an experienced employee who directs the work of other employees engaged in routine work").

Basing assignments on whether an individual is capable of performing the job does not involve independent judgment. *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111 (2015).

And independent judgment will not be found where there is only one obvious and self-evident choice. *Brusco Tug & Barge Co.*, 359 NLRB 486, 491 (2013) (recess Board decision), incorporated by reference at 362 NLRB No. 28 (2015) (assignment of overtime to sole engineer); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 2 fn. 8 (2015) (assignment of tasks to sole deckhand); *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 3 (2016) (assignment of duties to sole associate producer).

Post-*Oakwood Healthcare* cases have rearticulated other principles as well. For instance, no independent judgment is required where assignments are based on well-known employee skills. *CNN America, Inc.*, 361 NLRB No. 47 (2014) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999); *Shaw, Inc.*, 350 NLRB 354, 356 fn. 9 (2007) (citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996)).

Testimony that decisions are collaborative also is insufficient to show independent judgment free from the control of others. *CNN America, Inc.*, 361 NLRB No. 47 (2014) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999); *Veolia Transportation Services*, 363 NLRB No. 188, slip op. at 7–8 (2016).

Assignments based on the expressed preferences of employees involved, or on their availability, are routine and do not require independent judgment. *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010) (citing *Children's Farm Home*, 324 NLRB 61, 64 (1997).

Taking action in response to a flagrant violation of common working conditions, such as being drunk or impaired, does not by itself involve the exercise of independent judgment. *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 10 (2016) (quoting *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989)); *Veolia Transportation Services*, 363 NLRB No. 188, slip op. at 8 (2016) (same); see also *Chevron Shipping*, 317 NLRB 379, 381 (1995).

The authority to initial timecards is considered routine and clerical and thus does not establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 9 (2006) (citing *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232 (2003)).

Courts have deferred to the *Oakwood Healthcare* standard as reasonable. See, e.g., *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015); *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287 (5th Cir. 2015); *Palmetto Prince George Operating, LLC v. NLRB* , 841 F.3d 211 (2016). Courts have also indicated that decisions—Board and court—predating *Oakwood Healthcare* may be of limited use depending on if they accord with the *Oakwood Healthcare* standard. See *NLRB v. NSTAR Elec.*, 783 F.3d at 10–11 (approving Board's reliance on *Oakwood Healthcare* instead of earlier standard with respect to transmission dispatchers); *Palmetto Prince George*, 841 F.3d at 216–217 (stating court's pre-*Oakwood Healthcare* cases may be instructive if they accord with *Oakwood Healthcare*, but that the Board's current standards supersede prior cases to the extent the two conflict). In *Entergy Mississippi*, 810 F.3d at 297, however—in which the Board had found that transmission dispatchers did not use independent judgment in assigning field employees to trouble spots, see 357 NLRB 2150 (2011)—the court remanded, finding that the Board had ignored significant portions of the record that arguably showed the dispatchers exercised independent judgment.

As the foregoing should make clear, cases predating *Oakwood Healthcare* are not necessarily irrelevant in assessing whether purported supervisory authority involves the exercise of independent judgment. With the exception of a certain line of cases involving direction (discussed in section 17-522), neither *Kentucky River Care Center* nor *Oakwood Healthcare* purported to overrule prior areas of Board law, and as thoroughly illustrated above, the Board continues to draw on many pre-*Oakwood Healthcare* cases. That said, it should be noted that many older Board decisions involving findings that independent judgment exists may or may not contain sufficient facts or analysis to determine whether independent judgment would have been found

under the *Oakwood Healthcare* standard. See, e.g., *Custom Bronze & Aluminum Corp.*, 197 NLRB 397, 398 (1972) (finding authority to assign and direct using independent judgment). Indeed, in some instances pre-*Oakwood Healthcare* Board decisions that find supervisory status contain no explicit finding of independent judgment at all. See, e.g., *Wolverine World Wide, Inc.*, 196 NLRB 410 (1972).

Further, in at least certain areas, the Board has drawn a clear distinction between pre- and post-*Oakwood Healthcare* cases and declined to rely on the former. See *Brusco Tug & Barge, Inc.*, 359 NLRB 486, 493-495 (2012) (recess Board), incorporated by reference at 362 NLRB No. 28 (2015) (finding pre-*Oakwood Healthcare* cases dealing with supervisory status of mates "to be of limited precedential value"); *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015) (pre-*Oakwood Healthcare* cases involving tugboat captains are also of limited precedential value); *Entergy Mississippi*, 357 NLRB 2150, (2011) (rejecting reliance on earlier cases regarding electricity dispatchers decided "under a different standard for determining supervisory status than the one set forth in *Oakwood Healthcare*").

Even so, certain pre-*Oakwood Healthcare* pronouncements regarding independent judgment, not necessarily rearticulated in post-*Oakwood Healthcare* cases, presumably remain valid. Thus, 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); *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988).

Nor is an individual a supervisor if the control exercised is merely that which is derived from job experience. See, e.g., *Sanborn Telephone Co.*, 140 NLRB 512, 515 (1963); *Upshur-Rural Electric*, 254 NLRB 709, 710 (1981); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996) (direction and guidance based on experience and skill "involve[s] no real managerial discretion that would require the exercise of independent judgment").

For various other pre-*Oakwood Healthcare* cases in which the Board found independent judgment was established, see *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003) (assign); *Wal-Mart Stores*, 335 NLRB 1310 (2001) (effective recommendation of reward); *DST Industries*, 310 NLRB 957 (1993) (assign and direct); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994) (assign and hire); *Virginia Mfg. Co.*, 311 NLRB 992, 993 (1993) (evaluate and discipline); *Superior Baker*, 294 NLRB 256, 262 (1989) (direct and discipline); *Rose Metal Products*, 289 NLRB 1153 (1988) (assign); and *Consolidated Freightways Corp. of Delaware*, 196 NLRB 807 (1972) (direct).

For pre-*Oakwood Healthcare* cases in which the Board found independent judgment had not been established, see *Mid-State Fruit, Inc.*, 186 NLRB 51, 52 (1970) (direct, assign, and discharge); *Wal-Mart Stores*, 340 NLRB 220, 224 (2003) (direct, reward, discipline); *KGW-TV*, 329 NLRB 378 (1999) (assign and direct); *KGTV*, 329 NLRB 454 (1999) (assign); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003) (discharge); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (assign and direct); *Armstrong Machine Co.*, 343 NLRB 1149, 1150 (2004) (assignment). *Dynamic Science, Inc.*, 334 NLRB 391 (direction); *Health Resources of Lakeview*, 332 NLRB 878 (2000) (assign, hire, discipline); *Arlington Electric*, 332 NLRB 845 (2000) (assign and direct); *Carlisle Engineered Products*, 330 NLRB 1359 (2000) (assign, direct, discipline); *Freeman Decorating Co.*, 330 NLRB 1143 (2000) (assign and discipline); *Fleming Cos.*, 330 NLRB 277, 277 fn. 1 (1999) (assign and direct); *Crittenton Hospital*, 328 NLRB 879 (1999) (assign, direct, discipline, evaluate); *Tree-Free Fiber Co.*, 328 NLRB 389 (1999) (assign, hire, discipline); *Millord Refrigerated Services*, 326 NLRB 1437 (1998) (assign and direct); *Ryder Truck Rental*, 326 NLRB 1386 (1998) (assign, direct, discipline); *Alois Box Co.*, 326 NLRB 1177 (1998) (direct); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 517 (1998) (assign, direct, discipline, grievances); *Youville Health Care Center*, 326 NLRB 495 (1998) (assign and direct); *General Security Services Corp.*, 326 NLRB 312 (1998) (assign, direct, discipline); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998) (assign, direct, discipline, evaluate); *Hydro Conduit Corp.*, 254 NLRB 433 (1981) (assign, direct, hire, many others); *Suburban*

Newspaper Group, 195 NLRB 438 (1972) (hire, reward, direct); *Willis Shaw Frozen Food Express*, 173 NLRB 487 (1968) (hire, transfer, evaluate, discharge, direct); *Bakersfield Californian*, 316 NLRB 1211 (1995) (assign, evaluate, discipline, direct, hire, fire, suspend); *J. C. Brock Corp.*, 314 NLRB 157, 158–159 (1994) (direct); *Clark Machine Corp.*, 308 NLRB 555 (1992) (direct); *McCollough Environmental Services*, 306 NLRB 565 (1992) (assign, direct, evaluate, discipline); *Quadrex Environmental Co.*, 308 NLRB 101 (1992) (assign, evaluate, suspend, adjust grievances); *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991) (assign).

17-512 In the Interest of the Employer

177-8501

Section 2(11) requires that the alleged supervisor exercise authority "in the interest of the employer." Compared to "independent judgment," this statutory requirement has been the subject of far less discussion in Board decisions. Nevertheless, from time to time the Board and the courts elaborated on the meaning of this phrase.

The Supreme Court has held that acts within the scope of employment or on the authorized business of the employer are in the interest of the employer. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 578 (1994) (citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488–489 (1947). By way of example, the Court stated that the phrase "ensures . . . that union stewards who adjust grievances are not considered supervisory employees." Id. at 579. By contrast, the court rejected the Board's prior interpretation of the phrase, under which nurses exercising professional judgment incidental to the treatment patients in directing less-skilled employees were held not to be acting "in the interest of the employer." In doing so, the Court noted that "[t]he welfare of the patient, after all, is no less the object and concern of the employer than it is of the nurses." Id. at 580. See section 17-550 for more on this case.

The Board has found that authority is not exercised "in the interest of the employer" when it is principally exercised in the putative supervisor's own interest. Thus, in *Allstate Insurance Co.*, 332 NLRB 759, 760–761 (2000), the Board found that the individual in question had complete discretion whether to work alone or to hire assistants, and that the essential components of the employer's business would not be affected by such a decision. The Board also noted that any authority the individual might exercise over assistants she might hire would be exercised primarily in her own interest, given that the decision to add assistance would be informed by whether she thought adding them would enhance her office's profitability and, thus, her sales commissions. See also *Lipsey, Inc.*, 172 NLRB 1535, 1535 fn. 2 (1968) (authority not exercised in interest of employer where it was "basically a limited and personal authority exercised . . . in their own interest to suit their own particular needs and desires"); *Distillery Workers v. NLRB*, 298 F.2d 297, 304 (D.C. Cir. 1961), cert. denied 369 U.S. 843 (1962), enfg. 127 NLRB 850 (1960). Compare *Deaton Truck Lines, Inc. v. NLRB*, 337 F.2d 697, 699 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965), affg. 143 NLRB 1372, 1378 (1963).

Similarly, in *Tiberti Fence Co.*, 326 NLRB 1043 (1998), the Board concluded that foremen were not supervisors by virtue of their recommendation that their helpers be given wage increases, because the helpers' wages were subtracted from the foremen's pay, and thus the wage recommendations were not rooted in the interest of the employer, but instead in the foremen's own interest to ensure "a harmonious relationship" with the helpers. See also *Bricklayers Local 6 (Key Waterproofing)*, 268 NLRB 879, 883 (1984); *Willis Shaw Frozen Food Express*, 173 NLRB 487, 488 (1968). Compare *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999).

In *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 3 (2015), the Board considered whether tugboat captains possessed the authority to responsibly direct. In holding that the evidence did not establish that the captains were held accountable under that standard (see section 17-522), the Board noted that even if the Coast Guard held captains accountable under the Coast Guard's regulations, it did not follow that the *employer* held the captains accountable, and

noted that supervisory authority must be exercised in the interest of the employer. See also *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 2 (2015).

17-513 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, 319–320 (1989); *Westwood Health Care Center*, 330 NLRB 935, 938–939 (2000).

The evidence must, of course, show that the recommendation is undertaken with independent judgment. See, e.g., *Tree-Free Fiber Co.*, 328 NLRB 389, 391–392 (1999) (effective recommendation of discipline not shown where decisions were reached by "consensus"); *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997) (alleged disciplinary forms contained no space for recommendations).

The authority to effectively recommend generally means that "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997); see also *Veolia Transportation Services, Inc.*, 363 NLRB No. 188, slip op. at 5 (2016); *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748–1749 (2011); *Ryder Truck Rental*, 326 NLRB 1386 (1998); *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enf. denied on other grounds 712 F.2d 40 (2d Cir. 1991).

A supervisory finding was made, based in part, on the power effectively to recommend hiring and firing where, when an employee was discharged and asked a company official for a second chance, the official stated he must abide by the decision of the individual found to be a supervisor. *Elliott-Williams Co.*, 143 NLRB 811, 816 fn. 11 (1963).

By contrast, 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.*, 186 NLRB 1, 2 (1970). Likewise, relaying to a manager reports of inefficiency or faults will not establish supervisory status if they are independently investigated. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493–494 (1965); see also *Ken-Crest Services*, 335 NLRB 777, 778 fn. 12 (2001) (supervisory authority not established where recommendations of discipline were not adopted or ignored).

There must actually be a recommendation for supervisory authority to be established by this method. See, e.g., *Mower Lumber Co.*, 276 NLRB 766, 772 (1985) (no supervisory authority where management sought advice as to talents and potential of prospective employees, but putative supervisors did not make any recommendations for hire); *Hogan Mfg.*, 305 NLRB 806, 807 (1991) (no supervisory authority where individual did not recommend applicant be hired or rejected, but only reported results of test of applicant's technical skills to superior); *Aardvark Post*, 331 NLRB 320, 321 (2000) (same); *Pacific Coast M.S. Industries Co.*, 355 NLRB 1422, 1425–1426 (2010) (evidence did not establish individual made hiring recommendation).

On this count, mere suggestions are insufficient to establish effective recommendations. *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

The fact that a putative supervisor has signed a disciplinary form does not, by itself, establish the authority to effectively recommend discipline. See *Necedah Screw Machine Products*, 323 NLRB 574, 577 (1997) (putative supervisors signed forms as witnesses, not disciplinarians); *Pacific Coast M.S. Industries Co.*, 355 NLRB 1422, 1424–1425 (2010) (signatures were only in conjunction with additional signatures).

Similarly, initialing timecards does not constitute supervisory authority. *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1234 (2003).

As with all supervisory cases, the party asserting supervisory status bears the burden of

establishing that any recommendations are effective. For example, the Board rejected an argument that a putative supervisory effectively recommended wage increases where, despite testimony that her recommendations were followed on two occasions, there was no indication of the circumstances under which these recommendations were made, the actual role they played in the ultimate decision to grant an increase, and there was no indication whether she made recommendations as part of her regular duties or just volunteered an opinion from time to time. *Custom Mattress Mfg.*, 327 NLRB 111 (1998); see also *Pacific Coast M.S. Industries Co.*, 355 NLRB 1422, 1425–1426 (2010) (effective recommendation not established where testimony did no address weight given to putative supervisor's recommendations); *Williamette Industries,* 336 NLRB 743, 744 (2001) (no evidence of weight given recommendation contained in evaluation or that it had any effect on employee status or tenure); *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999) (no explanation of specific purpose of putative supervisors' role in hiring process); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998) (testimony superior considered evaluations filled out by putative supervisor did not show evaluation actually affected decision to grant raises or promotions in direct or systematic way).

The fact that a majority of recommendations are "ultimately followed" does not show that the recommended action is taken without independent investigation. *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1749 (2011). Similarly, where a recommendation is subject to multiple levels of review, and there is no evidence regarding the extent or components of the review process, it has not been shown that the recommendation is effective. Id.

With respect to discipline, in several cases the Board has found that an individual who decides whether to initiate an employer's disciplinary process by taking issues to a higher authority who imposes discipline without independently investigating the issues effectively recommend discipline. *Progressive Transportation Services*, 340 NLRB 1044, 1045–1047 (2003); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474–1476 (2004). In *Progressive Transportation*, the individual at issue did not include a recommendation for the specific level of discipline in her write-ups; the individuals at issue in *Mountaineer Park* did recommend the level of discipline. See also *Sheraton Universal Hotel*, 350 NLRB 1114, 1115–1118 (2007); *Oak Park Nursing Care Center*, 351 NLRB 27, 29–30 (2007). Subsequent Board decisions have indicated that the result in these cases was tied to the fact the employer followed a progressive disciplinary policy. See *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 9 fn. 34 (2016); see also *Jochims v. NLRB*, 480 F.3d 1161, 1169–1170 (D.C. Cir. 2007), revg. *Wilshire at Lakewood*, 345 NLRB 1050 (2005). For more discussion of these cases, see section 17-523.

17-514 Limited, Occasional, or Sporadic Exercise of Supervisory Power; Part-Time Supervisors

177-8560-5000

Employees who spend a "regular and substantial" part of each workday or workweek in supervisory positions are customarily excluded as such from the bargaining unit. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *OHD Service Corp.*, 313 NLRB 901 (1994); *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992); *Canonie Transportation Co.*, 289 NLRB 299, 300 (1988); *U.S. Radium Corp.*, 122 NLRB 468, 472–473 (1958). As explained in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006), "regular" means according to a pattern or schedule, rather than sporadic; as for substantiality, the Board has not adopted a strict numerical definition but has found supervisory status where the individuals have spent 10–15 percent of their total work time serving in a supervisory role. See also *Swift & Co*, 129 NLRB 1391 (1961) (15 percent sufficient); *Archer Mills, Inc.*, 115 NLRB 674, 676 (1956) (10 percent sufficient). Cf. *Benchmark Mechanical Contractors*, 327 NLRB 829, 829–830 (1999) (evidence did not show that, even if individual had not quit on day of election, he would have spent a regular and substantial portion of his time as supervisor).

By contrast, 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, 553 (1962). But if the time spent in the supervisory capacity is in excess of 50 percent, they will not be included. *Shattuck School*, 189 NLRB 886, 887 fn. 3 (1971).

The foregoing cases deal with whether individuals who perform supervisory functions some of the time should nevertheless be included in a bargaining unit. The situation is different when a party asserts supervisory status based on duties that are only exercised on a sporadic basis. In such circumstances, the Board has held that "[t]he exercise of some purportedly 'supervisory authority in a sporadic manner does not confer true supervisory status." *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997) (citing *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993)).

Thus, the evidence must establish that the authority is more than isolated, infrequent, or sporadic. See, e.g., *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 3–4 (2016); *Veolia Transportation*, 363 NLRB No. 188, slip op. at 9 (2016); *The Republican Co.*, 361 NLRB No. 15, slip op. at 8 (2014); *Shaw, Inc.*, 350 NLRB 354, 357 & fn. 1 (2007); *Franklin Home Health*, 337 NLRB 826, 829 (2002); *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001); *Billows Electric Supply*, 311 NLRB 878, 879 (1993); *Chevron U.S.A.*, 309 NLRB 59, 61 (1992); *Bowne of Houston*, 280 NLRB 1222, 1223 (1986); *Commercial Fleet Wash, Inc.*, 190 NLRB 326 (1971); *Indiana Refrigerator Lines, Inc.*, 157 NLRB 539, 550 (1966); *Meijer Supermarkets, Inc.*, 142 NLRB 513, 517 fn. 8 (1963); see also *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971) (disciplinary authority not established where individuals only occasionally reprimand others).

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 *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994) (one isolated incident insufficient to establish supervisory authority). Compare *Union Square Theatre Management, Inc.*, 326 NLRB 70, 72 (1998) (rejecting argument that individuals only exercised hiring authority sporadically where such authority was "part and parcel" of their duties as shown by fact they were hired with specific understanding that they would be responsible for recruiting and hiring casual employees as needed); *Biewer Wisconsin Sawmill*, 312 NLRB 506, 507 (1993) (with respect to disciplinary incident, "[t]here was nothing routine, perfunctory, or clerical about it," and despite being sole instance of exercise of authority, "we do not view it as sporadic").

The Board has stated that, in the particular circumstance where an employee has not been specifically notified of purported supervisory authority, irregular and sporadic exercise of that authority will not establish supervisory status. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76 (1995), enfd. 101 F.3d 107 (1996); *Tree-Free Fiber Co.*, 328 NLRB 389, 392–393 (1999).

17-515 Substituting for a Supervisor

177-8520-8500

177-8560-1800

Where an employee completely takes over the supervisory duties of another in the other's absence, he or she is regarded as a supervisor under the Act. *Birmingham Fabricating Co.*, 140 NLRB 640 (1963); *Illinois Power Co.*, 155 NLRB 1097, 1099 (1965). However, isolated supervisory substitution does not warrant a supervisory finding. *Latas de Aluminio Reynolds*, 276 NLRB 1313, 1313 fn. 3 (1985). The Board has stated that in such circumstances, 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, 1361 (2000); *Aladdin Hotel*, 270 NLRB 838, 840 (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, 300 (1988); see also *Hexcomb Corp.*, 313 NLRB 983 (1994); *Billows Electric Supply*, 311 NLRB 878 (1993); *Brown & Root, Inc.*, 314 NLRB 19, 20–21 (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.

17-516 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, 215 (1959). See also *International General Electric, S. A., Inc.*, 117 NLRB 1571, 1581 (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). Similarly, "employees being groomed for supervisory positions are not supervisors since future assignments are at best speculative." *Ramona's Mexican Food Products, Inc.*, 217 NLRB 867, 868 (1975); see *Du-Tri Displays, Inc.*, 231 NLRB 1261, 1270 (1977).

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. *Big "N," Department Store No 307*, 200 NLRB 935, 936 (1972); see also *Gibson Discount Center*, 191 NLRB 622, 624–625 (1971) (management trainee found not to be supervisor and included in unit in absence of specific exclusion). Compare *M. O'Neil Co.*, 175 NLRB 514, 517 (1969), in which "management trainees"—who were given broad experience in the employer's operation with the hope that they would eventually qualify for supervisory or management positions as supervisors, and, those who did not left the company—were excluded from a petitioned-for unit on community of interest grounds.

A person in supervisory training who exercises some supervisory authority is excluded from the unit. *Augusta Chemical Co.*, 124 NLRB 1021, 1023 (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).

See also section 20-620 (Trainees).

17-517 Ostensible or Apparent Authority

177-8520-7000

Although not specifically a method of finding supervisory status, ostensible or apparent authority is a related concept that bears brief mention here. Generally speaking, supervisors are agents of an employer when acting within their authority and thus, for instance, their actions or statements may be attributable to the employer. See, e.g., *Ace Heating & Air Conditioning Co.*, 364 NLRB No. 22, slip op. at 2 (2016).

Ostensible or apparent authority can be a basis for making an agency finding. Particularly in unfair labor practice cases, such a finding may result in a determination of unlawful conduct, even where supervisory status is not established. See, e.g., *Poly-America, Inc.*, 328 NLRB 667 (1999) (reversing supervisory finding but concluding apparent authority rendered individuals

agents of employer); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998) (same).

A finding of agency based on apparent authority may also result in a finding of objectionable conduct. See, e.g., *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1818 & fn. 12 (2011).

For more on the test for apparent authority, see section 24-220.

17-518 Supervision of Nonunit Employees

177-8501-7000

The Board has long held that sporadic exercise of supervisory authority over nonunit personnel should not be a basis for "isolat[ing]" an individual with such authority from bargaining unit employees who otherwise share the same principal duties as in the individual in question. *Detroit College of Business*, 296 NLRB 318, 320 (1989). No danger of conflict of interest within the unit is present in such a situation, nor does infrequent exercise of such authority "so ally such an employee with management as to create a more generalized conflict of interest." Id.

This principle was articulated in *Adelphi University*, 195 NLRB 639 (1972). Over time, *Adelphi University* was cited as setting forth a rule that an individual who supervises nonunit employees less than 50 percent of his or her time is not a supervisor, whatever the nature of the supervisory duties or other factors indicating alliance with management. See, e.g., *Florida Memorial College*, 263 NLRB 1248, 1253 (1982); *New York University*, 221 NLRB 1148, 1155–1156 (1975).

In *Detroit College of Business*, 296 NLRB 318, 321 (1989), the Board rejected "any such shorthand approach" and instead stated that it would "make a complete examination of all the factors present to determine the nature of the individuals alliance with management." These factors as include (1) the business of the employer, (2) duties of individuals exercising supervisory authority and those of unit employees, (3) particular supervisory functions exercised, (4) degree of control exercised over nonunit emloyees, and (5) the relative amount of interest the individuals in question have in furthering employer policies as opposed to those of the unit in which they would be included.

See also *Pepsi-Cola Co.*, 327 NLRB 1062, 1063–1064 (1999); *Union Square Theatre Management, Inc.*, 326 NLRB 70, 72 (1998); *Rite Aid Corp.*, 325 NLRB 717 (1998); *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).

In addition, Section 2(11) refers to supervisory authority over "other employees." Thus, authority exercised over a stipulated supervisor does not constitute section 2(11) authority. See *Brusco Tug & Barge Co.*, 359 NLRB 486, 491 (2012), incorporated by reference at 362 NLRB No. 28 (2015) (citing *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 and fn. 1 (9th Cir. 1981), cert. denied 455 U.S. 1017 (1982); *Mourning v. NLRB*, 559 F.2d 768, 770 fn. 3 (D.C. Cir. 1977)).

17-520 Application of Primary Indicia

177-8520

Having considered principles generally applicable to cases involving supervisory status determination, this section compiles principles and cases dealing with the 12 enumerated indicia of supervisory status. Again, it bears mentioning that supervisory cases are very fact-intensive and determinations accordingly often turn on the particular facts of a given case.

As the subsequent sections indicate, the authority to assign, direct, and discipline are perhaps the most common functions advanced by a party asserting supervisory status. As discipline, suspension, and discharge are closely related, all three are treated together in one section. The authority to hire, adjust grievances, and reward (particularly in the form of evaluations) are also not infrequently asserted. The remaining primary indicia are less frequently encountered in

published Board decisions and accordingly are treated together in one section.

17-521 Assign

177-8520-0800

As with "independent judgment," *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), sets forth the Board's definition of "assign." The Board defines "assign" as referring "to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee."

Elaborating on this definition, the Board stated that "assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night), or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' . . . However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of" assignment authority. *Oakwood Healthcare*, 348 NLRB at 689. Similarly, a charge nurse designating an LPN to regularly administer medication to a patient or group of patients would be assignment of an overall duty, but ordering an LPN to immediately give a sedative to a particular patient would not constitute an assignment. See id.

Significant overall duties are contrasted against "ad hoc instruction that the employee perform a discrete task." *Oakwood Healthcare*, 348 NLRB at 689; see *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016).

As with all 2(11) indicia, it must also be shown that any assignment is undertaken using independent judgment, as opposed to judgment that is clerical or routine. No independent judgment is involved when "there is only one obvious and self-evident choice," and with specific reference to assignment authority, there is no independent judgment if an assignment is made "solely on the basis of equalizing workloads." *Oakwood Healthcare*, 348 NLRB at 693; see also *Lynwood Manor*, 350 NLRB 489, 490 (2007) (equalizing workloads does not involve independent judgment); *Peacock Productions of NBC Universal Media*, 364 NLRB No. 104, slip op. at 3 (2016) (no independent judgment where there is only one obvious and self-evident choice); *Brusco Tug & Barge Co.*, 359 NLRB 486, 491 (2012), incorporated by reference at 362 NLRB No. 28 (2015) (same).

The Board has emphasized the lack of evidence as to what factors a putative supervisor considers in finding that independent judgment has not been established with respect to assignments. See, e.g., *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016). In a similar vein, the Board has held that evidence limited to vague or hypothetical testimony that putative supervisors play to employees' strengths does not establish independent judgment. *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111 (2015). Cf. *Brusco Tug & Barge Co.*, 359 NLRB 486, 492 (2012), incorporated by reference at 362 NLRB No. 28 (2015) (independent judgment not shown in absence of detailed specific evidence on putative supervisor selecting one employee over another to perform a particular task).

Assignments based on employee availability do not involve independent judgment. *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010). Nor do assignments based on the expressed preferences of the employees. *Children's Farm Home*, 324 NLRB 61, 64 (1997).

Similarly, assignments that are based on well-known employee skills also do not involve independent judgment. *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 22 (2014) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999)); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). Similarly, basing an assignment on whether the employee is capable of performing the job doesn't involve independent judgment. See *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016) (citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004))); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 2 (2015) (citing *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006)).

Assignments that are made on a rotational basis or are otherwise controlled by detailed

instructions also do not involve independent judgment. *Shaw, Inc.*, 350 NLRB 354, 355–356 (2007) (no independent judgment were assigned tasks were recurrent and predictable and involved rotating unskilled and routine duties among available crew to vary work and equalize burdens); *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1424 (2010) (no independent judgment where assignments were controlled by detailed instructions and putative supervisors did not take into account the relative skills of team members when making assignments); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 22 (2014) (no independent judgment where assignments followed an established pattern); *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 2 (2014) (no independent judgment where assignments were made using rotational system); *Brusco Tug & Barge Co.*, 359 NLRB 486, 491 (2012), incorporated by reference at 362 NLRB No. 28 (2015) (assignments specified by station bill, and testimony putative supervisors could deviate from bill "fail[ed] to explain with the requisite specificity" the purported exercise of independent judgment).

The authority to assign overtime or to have off-duty employees come in to work may establish assignment authority within the meaning of Section 2(11), but only if the evidence shows that the putative supervisor can require employees to work overtime or come in when off-duty. *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156–2157 (2011); *Golden Crest Healthcare*, 348 NLRB 727, 729 (2006); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001).

A vast number of cases that predate *Oakwood Healthcare* also deal with the authority to assign. They do not, however, employ the definition of "assignment" (or, for that matter, "independent judgment") set forth in *Oakwood Healthcare*. Although such cases may remain instructive, the Board has also rejected reliance on earlier cases considered under a standard other than *Oakwood Healthcare*. See, e.g., *Brusco Tug & Barge Co.*, 359 NLRB 486, 494 (2012), incorporated by reference at 362 NLRB No. 28 (2015); *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154 (2011). Cf. *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 293–294, 297–298 (2015) (court agreed with Board's application of *Oakwood Healthcare* definition of "assignment," but remanded finding Board had disregarded evidence that might establish authority to assign under that definition).

For examples of pre-*Oakwood Healthcare* cases finding the authority to assign had been established, see *Custom Bronze & Aluminum Corp.*, 197 NLRB 397, 398 (1972); *Illini Steel Fabricators, Inc.*, 197 NLRB 303 (1972); *Wolverine World Wide, Inc.*, 196 NLRB 410 (1972); *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972); *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971). For pre-*Oakwood* supervisory findings based in part on the specific authority to grant time off, see *Western Saw Mfrs.*, 155 NLRB 1323, 1329 fn. 11 (1965); *Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963).

For examples of pre-*Oakwood Healthcare* cases finding the assignment authority had *not* been established, see *Tree-Free Fiber Co.*, 328 NLRB 389, 391–392 (1999); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998); *Chrome Deposit Corp.*, 323 NLRB 961 (1997); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997); *PECO Energy Co.*, 322 NLRB 1074 (1997); *New Jersey Newspapers*, 322 NLRB 394 (1996); *Azusa Ranch Market*, 321 NLRB 811 (1996); *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995); *Arizona Public Service Co.*, 310 NLRB 477 (1993); *Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989).

17-522 Responsibly Direct

177-8520-2400

As with "independent judgment" and the authority to assign, *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), sets for the Board's definition of "responsibly to direct." In doing so, the Board emphasized that there is a distinction between "assign" and "responsibly to direct" (a distinction which, it should be noted, is not always clearly drawn in cases predating *Oakwood Healthcare*). As indicated in section 17-521, assignment does not encompass "ad hoc instructions to perform discrete tasks," but such instructions may constitute direction. Id. at 689–690. That said, as the legislative history of the Act demonstrates, "responsibly to direct"

does not include "minor supervisory functions performed by lead employees, straw bosses, and setup men." Id. at 690. But if a putative supervisor "has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." Id. at 691.

With respect to whether direction is "responsible," *Oakwood Healthcare* (noting that the Board had previously "rarely" sought to define the phrase) adopted a definition previously articulated by several circuit courts. Under this definition, "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 performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691–692. Put differently, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 692. See also *Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009) (rejecting argument *Oakwood Healthcare* was wrongly decided because the Board inappropriately read the "corrective action" requirement into the statute).

Thus, under *Oakwood Healthcare*, the putative supervisor must direct other employees, but this direction must be "responsible," meaning the putative supervisor must be "accountable" within the meaning of *Oakwood Healthcare*. The Board in *Oakwood Healthcare* further noted that the "de minimis principle obviously applies" and that if, for example, "a charge nurse gives a single ad hoc instruction to an employee to perform a discrete task, that would not, without more, establish supervisory status." Id. at 691 fn. 28.

Accountability may be shown by either negative or positive consequences to the putative supervisor's terms and conditions of employment as a result of the putative supervisor's performance in the direction of others. See, e.g., *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 4 (2016).

The Board will not find accountability where the evidence shows that the putative supervisors "are accountable for their *own* performance or lack thereof, not the performance of *others*." *Oakwood Healthcare*, 348 NLRB 686, 695 (2006); see also *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2155–2156 (2011); *Community Education Centers*, 360 NLRB 85 (2014); *Cook Inlet Tug & Barge Co.*, 362 NLRB No. 111, slip op. at 2–3 (2015).

The evidence must show actual accountability; this does not mean "that there must be evidence that an asserted supervisor's terms and conditions of employment have been actually affected by her performance in directing subordinates . . . . But there must be a more-than-merely-paper showing that such a prospect exists." *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

In *Oakwood Healthcare* itself, the Board found that accountability had not been shown because there was no evidence that the asserted supervisors had to take corrective action if their subordinates failed to properly perform their tasks, nor was there any indication the asserted supervisors were subject to discipline (or lower evaluations) if their subordinates failed to adequately perform the tasks in which they were directed. 348 NLRB at 694–695.

For post-*Oakwood Healthcare* cases finding that "accountability" had not been demonstrated, see *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (no evidence of material consequence, or that putative supervisors were informed such consequences might result, from subordinates' performance, and although putative supervisors were evaluated based on direction evidence did not show what action might be taken as a result of this rating); *Lynwood Manor*, 350 NLRB 489, 490–491 (2007) (no specific evidence introduced or proffered to show adverse consequences due to failures in subordinates' performance); *Entergy Mississippi, Inc.*, 357 NLRB

2150, 2155–2156 (2011) (no evidence of consequences or that putative supervisors were held accountable for performance of others rather than own performance); *Brusco Tug & Barge Co.*, 359 NLRB 486 (2013), incorporated by reference at 362 NLRB No. 28 (2015) (evidence limited to conclusory assertions without delineation of for what or how putative supervisors were held accountable); *Community Education Centers*, 360 NLRB 85 (2014) (insufficient evidence of prospect of adverse consequences, and documentary evidence indicated prospect of such consequences based on putative supervisor's own performance); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 2–3 (2015) (testimony lacked specific examples or evidence illustrating accountability, and even hypothetical testimony indicated captains were held accountable for own performance); *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015) (simply stating putative supervisor is held accountable for errors of subordinates does not establish accountability in absence of evidence showing how or for what they are held accountable); *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016) (one disciplinary example unclear as to whether it was for performance of subordinate or putative supervisor's own performance); and *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 4 (2016) (accountability not shown absent examples of adverse consequences or commendations and testimony was that if subordinate made mistake, superior would hold the subordinate, rather than putative supervisor, responsible for it).

In *Brusco Tug & Barge Co.*, 359 NLRB 486 (2013), incorporated by reference at 362 NLRB No. 28 (2015), the Board held that the inquiry into accountability cannot be answered by mere assertion the alleged supervisors (mates) are "accountable" under maritime law. See also *Cook Inlet Tug & Barge Co.*, 362 NLRB No. 111, slip op. at 3 (2015) (recourse to Coast Guard regulations not sufficient to show accountability); *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 2 (2015) (same).

In *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006), the Board found that accountability was established because the putative supervisors had been disciplined through written warnings based on the failure of their subordinates to meet production goals or other shortcomings. The Board went on to find, however, that independent judgment was not shown because the direction was routine and there was no evidence concerning the factors weighed in directing employees. Id.

The Board has noted that *Oakwood*'s "accountability" requirement only applies to responsible direction, not to other 2(11) functions. See *Hobson Bearing International, Inc.*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017).

For cases in which the Board found that direction was not undertaken using independent judgment, see *Shaw, Inc.*, 350 NLRB 354, 356 (2007) (direction based on prior instructions, work performed was routine and repetitive, and direction was subject to close scrutiny by higher management); *Network Dynamics Cabling*, 351 NLRB 1423, 1425 (2007) (no evidence putative supervisor considered relative skills in directing others); *Community Education Centers*, 360 NLRB 85 (2014) (actions taken controlled by employer policies and procedures); and *WSI Savannah River Site*, 363 NLB No. 113, slip op. at 2 (2016) (direction controlled by detailed instructions and testimony about variables considered lacked even general examples of choices putative supervisors might make).

As indicated in section 17-511, the Board at one time held that with respect to responsible direction, individuals did not use "independent judgment" when they exercised "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001). The Supreme Court rejected this interpretation, stating that there was no justification for limiting this interpretation only 1 of the 12 supervisory functions listed in Section 2(11), nor was there any justification for such "categorical exclusion" of a particular kind of judgment. Id. at 715–721. Board decisions dealing with responsible direction that predate *Kentucky River* must accordingly be approached with caution.

Similarly, as with assignment (see section 17-521), Board decisions assessing responsible

direction that predate *Oakwood Healthcare* must also be viewed with caution, as they do not apply the "accountability" standard, and frequently do not contain sufficient facts to judge whether accountability even might have been established. The Board has, in several post-*Oakwood Healthcare* cases, observed that earlier holdings may no longer be applicable due to the doctrinal developments encapsulated in *Oakwood Healthcare*. See, e.g., *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154 (2011) (declining to apply pre-*Oakwood Healthcare* cases involving utility dispatchers); *Brusco Tug & Barge Co.*, 359 NLRB 486 (2013), incorporated by reference at 362 NLRB No. 28 (2015) (same for mates); *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015) (same for captains); see also *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015) (enforcing Board decision finding responsible direction not established under *Oakwood Healthcare* and rejecting employer argument premised on pre-*Oakwood Healthcare* cases involving utility dispatchers).

As noted above, pre-*Oakwood Healthcare* cases involving the asserted authority to assign and to responsibly direct often are not rigorous in distinguishing between the two functions. For examples of pre-*Oakwood Healthcare* cases (finding no supervisory authority) that do not discuss "accountability," or that do not necessarily systematically distinguish the authority to assign from the authority to direct, see, e.g., *Chrome Deposit Corp*., 323 NLRB 961, 963–964 (1997); *PECO Energy Co*., 322 NLRB 1074, 1083 (1997); *New Jersey Newspapers*, 322 NLRB 394, 395 (1996); *Azusa Ranch Market*, 321 NLRB 811, 812–813 (1996); *Northwest Florida Legal Services*, 320 NLRB 92, 93–94 (1995); *Spentonbush/Red Star Cos*., 319 NLRB 988 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997); *Arizona Public Service Co.*, 310 NLRB 477, 480 (1993); *Greyhound Airport Services*, 189 NLRB 291, 293–294 (1971).

For pre-*Oakwood Healthcare* cases finding the authority to responsibly direct had been established, see, e.g., *Illini Steel Fabricators, Inc.*, 197 NLRB 303 (1972); *Wolverine World Wide, Inc.*, 196 NLRB 410 (1972); *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972); *Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962).

Although not necessarily specifically articulated in terms of responsible direction, several principles set forth in pre-*Oakwood Healthcare* cases have a bearing on what may or may not constitute "direction." Thus, quality control work—inspecting and reporting the work of others—is not supervisory. *Brown & Root, Inc.*, 314 NLRB 19, 21 fn. 6 (1994). Similarly, the authority to issue instructions and minor orders based on greater job skills or experience does not amount to supervisory authority. *WETM-TV*, 363 NLRB No. 32, slip op. at 10 (2015); *Byers Engineering Corp*., 324 NLRB 740, 741 (1997); *Providence Hospital*, 320 NLRB 717, 729 (1996); *Upshur-Rural Electric*, 254 NLRB 709, 710 (1981); *Sanborn Telephone Co.*, 140 NLRB 512, 515 (1963).

17-523 Discipline, Discharge, and Suspension

177-8520-0800

To establish the supervisory authority to discipline, asserted disciplinary authority "must lead to personnel action without independent investigation by upper management." *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7 (2016) (citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007), and *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003)); see *Lucky Cab Co*., 360 NLRB 271 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)); *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493–494 (1965).

Where the evidence is in conflict as to whether a particular type of corrective action constitutes discipline, the Board will find that the party asserting supervisory status has not met its burden. See, e.g., *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7–8 (2016) (conflicting testimony on whether mere issuance of "observation notice," as well as coaching and counseling, constituted discipline).

The authority to issue verbal reprimands, without more, does not establish the authority to discipline. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Washington Nursing Home*,

321 NLRB 366, 371 (1996); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987); *Beverly Manor Convalescent Centers*, 275 NLRB 943, 945 (1985).

"[T]he mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority." *Passavant Health Center*, 284 NLRB 887, 889 (1987) (citing *Heritage Manor Center*, 269 NLRB 408, 413 (1984); see also *Republican Co.*, 361 NLRB No. 15, slip op. at 6–8 (2014) (verbal warning did not establish supervisory status where there was no evidence it had effect on warned employee's job status or tenure); *Hausner Hard-Chrome of KY., Inc.*, 326 NLRB 426, 427 (1998) (reprimand not disciplinary without evidence "job affecting discipline" resulted); *Azusa Ranch Market*, 321 NLRB 811, 812–813 (1996) (written warnings not shown to have any effect on employee's employment status); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings do not establish supervisory status where merely reportorial and not clearly linked to disciplinary action affecting job status).

Warnings or counseling forms that bring substandard employee performance to the employer's attention absent a recommendation for future discipline are merely reportorial and thus are not evidence of supervisory authority. *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7 (2016); *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Thus, a warning that simply described an incident without recommending any disposition was held merely reportorial where higher management determined what discipline, if any, was warranted based on the incident. *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000); see also *Shaw, Inc.*, 350 NLRB 354, 356–357 (2007) (record did not establish writeup forms played significant role in disciplinary process).

A warning may, however, qualify as disciplinary if it "automatically" or "routinely" leads to job-affecting discipline by operation of a defined progressive disciplinary system. *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 8 (2016); *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007); *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989); *Concourse Village, Inc.*, 276 NLRB 12, 13 (1985). The party asserting supervisory status bears the burden of proving such a progressive system exists, as well as the role that warnings play in the system. *Republican Co.*, 361 NLRB No. 15, slip op. at 7 (2014); see also *Jochims v. NLRB*, 480 F.3d 1161, 1169–1170 (D.C. Cir. 2007), revg. *Wilshire at Lakewood*, 345 NLRB 1050 (2005)). Thus, testimony that an employer maintains a progressive policy is insufficient where documentary evidence fails to substantiate it. *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 8–9 (2016). Cf. *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1749 fn. 13 (2011) (progressive system not established where, among other things, there were no instances of higher levels of discipline referring to prior infractions). See also *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 18 (2016) (observing that when Board has found supervisory authority based on operation of progressive policy, record typically contains evidence of subsequent discipline expressly referencing prior discipline (citing *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007); *Progressive Transportation Services*, 340 NLRB 1044, 1046 (2003))).

The evidence also must show that an allegedly progressive disciplinary system is consistently applied. Accordingly, if the evidence shows that steps may be skipped or repeated, or that there is no fixed relationship between warnings and the level of discipline imposed, it has not been established that a progressive system is in use. Id.; see *Veolia Transportation*, 363 NLRB No. 188, slip op. at 8–9 (2016); *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3–4 (2016); *Republican Co.*, 361 NLRB No. 15, slip op. at 7 fn. 8 (2014); *Ken-Crest Services*, 335 NLRB 777, 777–778 (2001); *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). Cf. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 6–7 (2016) (finding progressive policy not established where collective-bargaining agreement showed employer reserved right to repeat and skip steps); *Lucky Cab Co.*, 360 NLRB 271 (2014) (progressive policy not established where handbook provided that employer reserved right to skip steps or deviate from progressive discipline).

Where a progressive disciplinary policy is in use, however, warnings that constitute an "integral" first disciplinary step establish the authority to discipline. See *Oak Park Nursing Care Center*, 351 NLRB 27, 27 (2007); *Sheraton Universal Hotel*, 350 NLRB 1114, 1117 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 549 U.S. 1338 (2007); *Progressive Transportation Services*, 340 NLRB 1044, 1044 (2003); see also *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004) (relying on *Progressive Transportation* to find that disputed individuals effectively recommended discipline).

Supervisory cases involving discipline often include assertions that the putative supervisors effectively recommend discipline. As discussed above in section 17-513, to be effective, it must be established that recommendations are not be independently investigated. See, e.g., *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 9 (2016) (despite claims superiors always followed putative supervisors' disciplinary recommendations, other testimony indicated they were independently investigated).

Even in the absence of an independent investigation, warnings that are merely reportorial do not constitute effective recommendations of discipline. See, e.g., *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997) (putative supervisors used forms to document incidents, but form did not prompt recommendation, there was no evidence putative supervisors otherwise recommended whether discipline should ensue, and employer did not follow progressive disciplinary system and there was no evidence a particular offense would lead to a particular form of discipline); see also *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 9–10 (2016).

For other cases involving assertions that putative supervisors effectively recommended discipline, see *Veolia Transportation Services*, 363 NLRB No. 188, slip op. at 8–9 (2016) (reports issued by putative supervisors contained no recommendation of any kind and there was no showing they were not independently investigated); *Republican Co.*, 361 NLRB No. 15, slip op. at 7 (2014) (note referring to possibility of future discipline made no recommendation based on incident at hand and no evidence placed in employee's personnel file); *DirecTV U.S. DirecTV Holdings, LLC*, 357 NLRB 1747, 1749 (2011) (record did not establish what weight was given to recommendations, that they were not independently investigated, and there was no indication regarding impact on subordinates' job status or tenure); *Green Acres Country Care Center*, 327 NLRB 257, 257–258 (1998) (recommended warnings had no tangible effect on job status); see also *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (collecting cases holding "[r]eporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations").

Taking action in response to flagrant violations of common working conditions, such as being drunk, does not by itself establish disciplinary authority. *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); see also *Veolia Transportation*, 363 NLRB No. 188, slip op. at 8 (2016); *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 10 (2016); *Chevron Shipping*, 317 NLRB 379, 381 (1995).

As always, independent judgment must be shown to establish disciplinary authority. See, e.g., *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015) (disciplinary notices in evidence showed putative supervisory authority was "both routine and significantly limited by detailed instructions"); *Green Acres Country Care Center*, 327 NLRB 257 (1998) (no independent judgment where putative supervisor sent employee home pursuant to management instruction). Testimony that discipline may be a collaborative effort, without specificity as to what collaboration entails or how often it occurs, may suggest that putative supervisors do not exercise independent judgment. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7–8 (2016); *Shaw, Inc.*, 350 NLRB 354, 356–357 (2007); *Tree-Free Fiber Co.*, 328 NLRB 389, 391–392 (1999).

For examples of other cases in which disciplinary authority was found, see *Heartland of Beckley*, 328 NLRB 1056 (1999) (disciplinary authority established where putative supervisors regularly issued warnings and had discretion to determine when and why to issue warnings under progressive policy); *Venture Industries*, 327 NLRB 918 (1999) (disciplinary authority

established where putative supervisors issue oral or written reprimands which are placed in personnel file); *Biewer Wisconsin Sawmill, Inc.*, 312 NLRB 506, 507 (1993) (disciplinary authority established where putative supervisor, in front of senior manager at plant, authoritatively placed an employee one step away from termination); *Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963) (one putative supervisor possessed the authority to effectively recommend discipline and another possessed the authority to discipline employees).

For other cases finding disciplinary authority was not established, see, e.g., *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1386–1387 (1998); *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997); *MJ Metal Products*, 325 NLRB 240 (1997); *Chrome Deposit Corp*., 323 NLRB 961, 963 (1997); *PECO Energy Co.*, 322 NLRB 1074, 1083 (1997); *Pine Brook Care Center*, 322 NLRB 740 (1996); *New Jersey Newspapers*, 322 NLRB 394, 395 (1996); *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997); *Brown & Root, Inc.*, 314 NLRB 19, 19–23 (1994); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970).

* * *

The supervisory functions of suspension and discharge are closely related to the authority to discipline, as suspension and discharge can be construed as particular, heightened forms of discipline. The Board has passed on these functions less frequently than the authority to discipline, but the same types of principles and considerations apply to these functions.

Thus, the Board has held that the authority to suspend was not established where there was always an independent investigation of situations in which the putative supervisor took employees off the clock and sent them to the operations manager's office, and there were no examples of the putative supervisor sending employees home on his own initiative. *Greyhound Airport Services*, 189 NLRB 291, 293–294 (1971); see also *DirecTV U.S. DirecTV Holdings, LLC*, 357 NLRB 1747, 1750 (2011) (no evidence any recommended suspension was imposed without independent investigation). Similarly, suspending employees for flagrant violations, such as drunkenness or (in the case of nurses) abuse of patients, does not involve independent judgment. *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993). And supervisory status was established where putative supervisors had the authority to recommend suspension under a system of progressive discipline (and the recommendations were followed some 75 percent of the time). *Venture Industries*, 327 NLRB 918, 919 (1999).

Likewise, the authority to discharge has not been established where such a recommendation is independently investigated, or where facts are merely reported to a higher authority without a recommendation. See *DirecTV U.S. DirecTV Holdings, LLC*, 357 NLRB 1747, 1750 (2011) (absence of independent investigation not established); *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997) (one incident in evidence was independently investigated, second did not involve a recommendation to discharge). Discharging an employee for a flagrant violation (such as being drunk) is not supervisory because it does not involve independent judgment. See id.; *Loffland Bros. Co.*, 243 NLRB 74, 75 fn. 4 (1979); *Great Lakes Towing Co.*, 168 NLRB 695, 700 (1967). But see *Pennsylvania Truck Lines, Inc.*, 199 NLRB 641, 642 (1972) (supervisory authority found where, inter alia, putative supervisors had discharged employees for "serious misconduct" such as drunkenness or refusal to perform assigned work).

"Bare testimony to the effect" that a putative supervisor has the authority to discharge does not establish independent judgment, because such testimony does not show whether such action was undertaken at the direction of management. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047–1048 (2003); see also *New Jersey Newspapers*, 322 NLRB 394 (1996) (authority to discharge not shown where superior specifically authorized it in advance); *Wilson Tree Co.*, 312 NLRB 883, 885 (1993) (supervisory status not shown where, in discharging employee, putative supervisor told employee "I was told to let you go"). Cf. *Northwest Steel, Inc.*, 200 NLRB 108 (1972) (authority to discharge not shown where putative supervisor stated he had authority to

discharge, but then expressed doubt he had such authority and testified he had not and would not exercise it).

For two other cases in which the authority to discharge was established, see *Armstrong Machine Co.*, 343 NLRB 1149, 1159–1160 (2004) (putative supervisor discharged employee while highest-ranking person on premises, and when superiors returned neither reinstated the discharged employee); and *Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (authority to effectively recommend discharge established where employee's discharge was delayed because putative supervisor persuaded superior to give employee another chance).

17-524 Hire

177-8520-0800

The Board has found the authority to hire established where putative supervisors hired individuals and crews on a temporary basis, that such hires were a significant part of the putative supervisors' function, that the putative supervisors set the pay and duration of employment for such temporary hires, and the putative supervisors had complete discretion to decide whom to hire (based on their assessment of what skills were needed and whether candidates had the appropriate skills or qualifications). *Union Square Theatre Management, Inc.*, 326 NLRB 70, 71 (1998); see also *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001) (supervisory status established where some putative supervisors interviewed and hired employee, and hiring decisions required independent judgment); *Detroit College of Business*, 296 NLRB 318, 319 (1989) (putative supervisors "actually perform the hiring function, in that they interview and determine which applicants to hire to fill" certain vacancies).

The fact that not all of the putative supervisors have actually exercised their hiring authority does not defeat a supervisory finding, see *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001), but the Board has found that a putative supervisor who substituted for a superior (for about 2 weeks annually) and in this capacity hired an employee on only one or two occasions over a six-year period was not a supervisor within the meaning of Section 2(11). *New Jersey Newspapers Co.*, 322 NLRB 394, 395 (1996).

The Board more commonly entertains arguments that putative supervisors effectively recommend hire. Without additional evidence, a putative supervisor does not effectively recommend hiring where acknowledged supervisors also interview candidates. *Peacock Productions of NBC Universal Media*, 364 NLRB No. 104, slip op. at 4–5 (2016); *Republican Co.*, 361 NLRB No. 15, slip op. at 5–6 (2014); *J. C. Penney Corp.*, 347 NLRB 127, 129 (2006); *Boston Medical Center Corp.*, 330 NLRB 152, 201 (1999); *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 fn. 9 (1998); see also *North General Hospital*, 314 NLRB 14, 16 (1994) ("[m]ere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish Section 2(11) supervisory authority"). This is so even if there is testimony that the putative supervisors' recommendations are given "significant" weight. *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1388 (1998). Compare *NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920, 926–928 (8th Cir. 2017), enfg. 363 NLRB No. 102 (2017) (supervisory status shown where recommendations involved independent judgment and were not independently investigated).

As with all supervisory functions, a hiring recommendation is not effective in the absence of a contention or finding that such recommendation is relied on without further inquiries. *Adco Electric*, 307 NLRB 1113, 1124 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989). Likewise, a hiring recommendation has not been shown to be effective where the influence of the recommendation on the ultimate decision is not known. *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1425–1426 (2010); *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, 759 (2000); *F.A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997).

An individual who administers a test for technical competence and merely reports the result of that test does not effective recommend hiring. *Hogan Mfg.*, 305 NLRB 806, 807 (1991); see also

Aardvark Post, 331 NLRB 320, 320–321 (2000); *The Door*, 297 NLRB 601 (1990); *Plumbers Local 195 (Jefferson Chemical Co.)*, 237 NLRB 1099, 1102 (1978).

Compatibility recommendations are insufficient to support a finding of hiring authority. *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999); *Anamag*, 284 NLRB 621, 623 (1987); *Marymount College*, 280 NLRB 486, 489 (1986); *U.S. Pollution Control*, 278 NLRB 274 (1986); *Kenosha News Publishing Corp.*, 264 NLRB 270, 271 (1982); *Willis Shaw Frozen Food Express*, 173 NLRB 487, 488 (1968).

Merely narrowing the applicant pool by screening applicants and recommending several to the ultimate decisionmaker does not constitute and effective hiring recommendation. *Wake Electric Membership Corp.*, 338 NLRB 298, 298–299 (2002); *Ohio State Legal Services Assn.*, 239 NLRB 594, 596 (1978); *The Door*, 297 NLRB 601, 602 (1990).

A hiring recommendation must be undertaken using independent judgment, and it must also be made in the interest of the employer, not to suit the recommender's own interests. *Bricklayers Local 6 (Key Waterproofing)*, 268 NLRB 879, 883 (1984) (recommending family members did not show independent judgment and was exercised in putative supervisor's own interest); see also *Allstate Insurance Co.*, 332 NLRB 759, 761 (2000) (decision to hire assistant was not in interest of the employer); *Suburban Newspaper Group*, 195 NLRB 438 (1972) (no showing hiring function required independent judgment).

Effectively recommending against hiring a candidate can establish supervisory authority. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (superior unequivocally testified he would not hire an applicant if alleged supervisor recommended against it); see also *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), enfd. 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986) (although putative supervisor's recommendation to hire was followed by further interviews, recommendation against hiring was normally final); *HS Lordship*, 274 NLRB 1167, 1173 (1985) (bar manager's recommendations against hiring were followed).

For cases finding that the authority to effectively recommend hire was established, see *USF Reddaway, Inc.*, 349 NLRB 329, 333–334, 340 (1997) (superior postponed hiring decision where two alleged supervisors could not agree on recommendation, and superior ultimately based hiring decision on majority vote of alleged supervisors); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 962–963 (2004) (alleged supervisor alone interviewed applicants, recommended them for hire, recommendations were followed based only on review of applications of recommended candidates); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001) (putative supervisors interviewed applicants on their own and made recommendations that were followed); *RB Associates*, 324 NLRB 874, 879 (1997) (individual reviewed applications, selected three candidates based on his assessment of their qualifications, all three were hired, and nobody else conducted any sort of assessment of applicant qualifications); *Queen Mary*, 317 NLRB 1303 (1995) (unrebutted testimony showed putative supervisor's hiring recommendations were effective, and he had in fact recommended the hire of every employee currently working at the plant); *North General Hospital*, 314 NLRB 14, 16 (1994) (alleged supervisor alerted superior he had decided to hire another, and based on that decision the other was hired); *Detroit College of Business*, 296 NLRB 318, 319 (1989) (putative supervisors participated in interviewing instructors, made hiring recommendation afterwards, no instructor was hired without the consent of a putative supervisor, and all recommendations were followed with only two exceptions); *Lawson Milk Co.*, 143 NLRB 916, 919–920 (1963) (putative supervisor was always one of the persons who interviewed applicants, and the rule was that mutual agreement between himself and other interviewers was needed before an applicant was hired); *Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (laid off employees were not rehired due to unfavorable reports by putative supervisors).

The fact that a hiring recommendation is not followed due to staffing level decisions (i.e., an individual is not hired not because a superior disagrees with the recommendation, but because the superior does not want to hire any more employees) is not inconsistent with a finding that an

individual makes effective hiring recommendations. *Queen Mary*, 317 NLRB 1303, 1303 fn. 5 (1995).

17-525 Adjust Grievances

177-8520-3900

To establish the statutory authority to adjust grievances, a party must show disputed individuals have authority to actually adjust grievances, not merely minor disputes (such as complaints regarding workload or lunch and break schedule conflicts). *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Illinois Veterans Home at Anna, L.P.*, 323 NLRB 890, 891 (1997) (noting absence of evidence putative supervisors performed any role in formal grievance procedure); *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *Hudson Waterways Corp.*, 193 NLRB 378, 380 (1971). Similarly, the authority to resolve personality conflicts or "squabbles" between employees does not warrant an inference that establishes supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997); *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *Beverly Manor Convalescent Center*, 275 NLRB 943, 946 (1985); see also *Regal Health and Rehab Center, Inc.*, 354 NLRB 466, 473 (2009), incorporated by reference at 355 NLRB 352 (2010) (noting putative supervisors functioned "more as mediators . . . than authoritative decisionmakers").

The Third Circuit has taken a different approach, holding that the authority to resolve minor grievances does establish supervisory status. See *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243, 248 (3d Cir. 1998); *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154, 166 (3d Cir. 2003). The Board has not adopted this approach, but subsequent Board cases have also distinguished them. See, e.g., *Ken-Crest Services*, 335 NLRB 777, 779 (2001) (finding employer had failed to show putative supervisors actually "resolve" minor grievances); *Leisure Chateau Care Center*, 330 NLRB 846 (2000) (stating assertions that LPNs adjusted grievances were unsupported by specific examples); *Troy Hills Nursing Home*, 326 NLRB 1465 (1998) (no evidence LPNs adjusted grievances).

Relaying (or offering assistance in relaying) grievances to upper management, or simply offering advice or suggestions, does not constitute the authority to adjust grievances. See *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006); *Ken-Crest Services*, 335 NLRB 777, 778 (2001); *California Beverage Co.*, 283 NLRB 328, 330 (1987).

Being informed of a dispute between subordinates does not, by itself, show that the putative supervisors adjusts or handles the problems at issue (nor does it establish independent judgment). *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006).

Even if asserted supervisors have some involvement in a grievance resolution procedure, the evidence must specify with clarity what role they play and, of course, the evidence must show independent judgment is exercised. *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 2 (2000).

In *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1076–1077 (1985), the authority to adjust grievances was not established where, in response to several complaints that certain activities violated the union's contract, the putative supervisor did not "do anything more than merely attempt to pacify" the complaining individuals.

17-526 Reward/Evaluate

177-8520-0800

As discussed below, the authority to reward commonly arises in the context of putative supervisors' authority to evaluate other employees. In several cases, however, the Board has found supervisory status based on the authority to reward. See, e.g., *Taylor-O-Brien Corp.*, 112 NLRB 1, 12–13 (1955) (finding supervisory status based, among other things, on the authority to reward employees with time off); *Newspaper Guild, Local 47 (Pulitzer Publishing)*, 272 NLRB 1195, 1200

(1984) (supervisory status found where, inter alia, individual sent employees home early with pay as a reward for good performance); see also *Lee-Rowan Mfg. Co.*, 129 NLRB 980, 984–985 (1960) (basing supervisory status finding on several considerations, including authority to recommend merit increases).

The Board has declined to find supervisory authority based on the authority to reward in several other cases. See *Veolia Transportation*, 363 NLRB No. 188, slip op. at 9–10 (2016) (no indication recording favorable observation resulted in positive consequence for employee, and even assuming distribution of $25 gift cards could constitute reward, evidence did not establish this was more than sporadic or involved independent judgment); *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 11 (2016) (assuming one-time $100 award is sufficient to establish authority to reward, supervisory status not shown due to lack of evidence as to how frequently purported recommendation resulted in aware, or as to who determined award or how determination was made); *Shaw, Inc.*, 350 NLRB 354, 357 (2007) (no independent judgment where putative supervisor passed along every employee request for a raise regardless of whether he thought raise was warranted); *Custom Mattress Mfg.*, 327 NLRB 111 (1998) (lack of evidence showing what weight, if any, recommendations for raise increases were given); *Brown & Sharpe Mfg. Co.*, 87 NLRB 1031, 1046–1048 (1949) (time-study employees gathered information later used to determine incentive rates, but in doing so time-study employees were not concerned with amount of compensation received by other employees). Cf. *L. Suzio Concrete Co.*, 325 NLRB 392, 397–398 (1998) (limited discretion in allowing absences does not establish supervisor status); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996) (allowing employees to leave early on request does not establish supervisory status).

The authority to evaluate is not a supervisory indicium under Section 2(11). *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 2 (2014); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Even so, the Board analyzes the authority to evaluate to determine whether it is an "effective recommendation" of promotion, reward, or discipline. See *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); see also *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 723 (7th Cir. 2000). The Board will find supervisory status if the evaluation leads directly to personnel actions, but will not find supervisory status if the evaluation does not, by itself, directly affect other employees' job status. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139–1140 (1999); see also *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997) (evaluations must, by themselves, affect job status); *Passavant Health Center*, 284 NLRB 887, 891 (1987) (authority simply to evaluate without more is insufficient to find supervisory status).

For cases finding such a direct effect, see *Wal-Mart Stores*, 335 NLRB 1310 (2001) ("direct link" between appraisal rating and rate of pay increase); *Trevilla of Golden Valley*, 330 NLRB 1377 (2000) ("direct linkage" of evaluations to merit increases); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997) (numerical ratings directly determined amount of wage increase); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995) (ratings automatically determined percentage increase in pay); *Bayou Manor Health Center*, 311 NLRB 955 (1993) ("direct correlation" found where putative supervisors' scores on evaluations directly determined amount of merit increase).

For cases finding such a direct effect was not established, see *Williamette Industries*, 336 NLRB 743 (2001) (no "direct effect"); *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999) (no "direct correlation"); *Crittenton Hospital*, 328 NLRB 879 (1999) ("crucial link" not present); *MJ Metal Products*, 325 NLRB 240 (1997) (no evidence showed what effect evaluations had on wage rates); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996) (no "direct correlation"); *Manor West, Inc.*, 311 NLRB 655, 663 (1993) (no persuasive evidence evaluations "contributed in any sense to personnel decisions or actions").

Evidence that evaluations "play a role" and are "one of the criteria considered" in determining wage increases does not establish the requisite "direct correlation." *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 2–3 (2014); see also *Harborside*

Healthcare, Inc., 330 NLRB 1334 (2000) (direct link not shown where evaluation is taken "into consideration"); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998) (fact superior "considers" evaluations in determining whether to give raises or promotions does not show evaluations affect such decisions "in any direct or systematic way"). But see *General Telephone Co. of Michigan*, 112 NLRB 46 (1955) (supervisory status established where evaluations were given "substantial weight" in determining whether changes in job status should be made); *Albany Medical Center*, 273 NLRB 485, 486 (1984) (evaluations given "substantial weight" in determining merit wage increases and promotions).

The mere fact that evaluations may represent a collaborative effort does not necessarily defeat a finding of supervisory status. *Trevilla of Golden Valley*, 330 NLRB 1377 (2000); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995).

As the foregoing cases indicate, evaluations most frequently bear on the authority to recommend wage increases which presumable implicates the statutory authority to reward. As previously noted, however, evaluations may also be linked to the authority to promote, see *Washington Nursing Home*, 321 NLRB 366, 371 (1996), and to the extent an evaluation could negative affect an employee's terms and conditions of employment, the authority to evaluate could be linked to the statutory authority to discipline or discharge.

17-527 Transfer, Lay Off, Recall, Promote

177-852-0800

The remaining statutory indicia—transfer, lay off, recall, and promote—are discussed in Board decisions less frequently than the foregoing forms of supervisory authority.

a. Transfer

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690 (2006), the Board majority did not affirmatively define "transfer," but it signaled that "transfer" is not "merely a subset of 'assign,'" and rejected the suggestion that it means "to reassign . . . to a different [job] classification."

For cases finding supervisory status based on the authority to transfer, see *Detroit College of Business*, 296 NLRB 318, 319–320 (1989) (based on evaluations, putative supervisors effectively recommended transfer); *Wolverine World Wide, Inc.*, 196 NLRB 410, 410 & fn. 4 (1972) (putative supervisors transferred employees "from one job to another, from machine to machine based on production needs and their knowledge of the employees' capabilities to perform the work"). Note that both of these cases predate the Board's definition of "independent judgment" in *Oakwood Healthcare*.

For cases finding that the authority to transfer had not been established, see *Community Education Centers*, 360 NLRB 85, 88 (2014) (purely conclusionary evidence insufficient to show recommendation of transfers); *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997) (putative supervisor only concurred in superior's recommendation to transfer, and single instance was de minimis); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996) (transfers not based solely on LPN recommendations, but instead determined by superior based on her assessment of situation); *Greenspan D.D.S., P.C.*, 318 NLRB 70 (1995) (transfer recommendations merely "a means of ensuring compatibility among employees who work closely together" and exercised too infrequently); *J.C. Brock Corp.*, 314 NLRB 157, 158–159 (1994) (transfers were merely putative supervisor following superior's instructions)

b. Promote

The Board has found the authority to promote where the putative supervisors could recommend promotion, each one had the authority to block a promotion (because promotion required the consensus of all the putative supervisors), and where consensus had been reached to recommend promotion the recommendation had never been overridden. *Entergy Systems & Service*, 328 NLRB 902, 902–903 & fn. 3 (1999). Compare *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994) (evidence did

not show recommendations were effective where putative supervisor made informal promotion suggestions and on one occasion an employee received a raise after such a suggestion); *U.S. Gypsum Co.*, 116 NLRB 1140, 1141–1143 (1956) (authority to effective recommend promotions not shown where recommendations were not always accepted, and evidence did not show how often recommendation were made or whether they were effective).

As noted in section 17-525, the authority to promote may be established through putative supervisors' role in completing evaluations. See *Albany Medical Center*, 273 NLRB 485, 486 (1984) (supervisory status found where individuals regularly prepared written evaluations of nurses which were given "substantial weight" in determining promotions, and superiors testified she would not promote an employee unless a putative supervisor had recommended it). Compare *Washington Nursing Home*, 321 NLRB 366, 379–380 (1996) (supervisory status not shown where putative supervisors had no greater role in evaluation process than any other employee); *Arizona Public Service Co.*, 310 NLRB 477 (1993) (no evidence verbal input for evaluations constituted effective recommendation for promotion).

An individual who administers a test for technical competence and merely reports the result of that test does not effectively recommend hiring or promotion. *Hogan Mfg.*, 305 NLRB 806, 807 (1991).

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690 fn. 25 (2006), the majority seemingly rejected the dissent's characterization of "promote" as "a permanent elevation in rank."

c. Layoff and Recall

Relatively few Board decisions discuss the authority to lay off or the authority to recall in any detail. For cases that have assessed such arguments, see *Community Education Centers, Inc.*, 360 NLRB 85, 88 (2014) (record clearly indicated putative supervisors did not participate in decisions regarding layoffs); *Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963) (finding supervisory status where, inter alia, putative supervisor had authority to furlough employees during slack periods); see also *Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (indicating putative supervisors effectively recommended recall). Cf. *F.A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997) (no authority to lay off or recall employees; also noted putative supervisors could recommend rehiring, but there was no evidence the employer gave any weight to such recommendations).

17-530 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 at Vineland*, 332 NLRB 1412, 1412 fn. 3 (2000); *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Cf. *K.G. Knitting Mills*, 320 NLRB 374 (1995) (reversing, where no primary indicia were present, finding of supervisory status based solely on fact individual had key to factory, opened facility in the morning, "watche[d] everything" before the manager arrived, and dealt with trucks arriving at plant). Four such secondary indicia commonly mentioned are the ratio of alleged supervisors to employees, differences in terms and conditions of employment, attending management meetings, and how the individual in question is held out to (or perceived by) other employees.

a. Ratio of supervisors to nonsupervisors

177-8520-7800

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, 779 (2001). Where the ratio is unrealistic, a practical evaluation of employees' functions in this context is normally made.

For example, in *Pennsylvania Truck Lines, Inc.*, 199 NLRB 641, 643 (1972), the Board pointed out—after finding the evidence established strip supervisors' authority to assign, direct, and discharge—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, 1336 (2000); *Naples Community Hospital*, 318 NLRB 272 (1995); *Essbar Equipment Co.*, 315 NLRB 461, 466 (1994); *Sears, Roebuck & Co.*, 292 NLRB 753 (1989); *Washington Beef Producers, Inc.*, 264 NLRB 1163, 1174 (1982); *Ridgely Mfg. Co.*, 198 NLRB 860 (1972); *Maryland Cup Corp.*, 182 NLRB 686, 688 (1970); *U.S. Gypsum Co.*, 178 NLRB 85, 86 (1969); *Welsh Farms Ice Cream, Inc.*, 161 NLRB 748, 751 (1966); *West Virginia Pulp & Paper Co.*, 122 NLRB 738, 752 fn. 19, 755 fn. 22 (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 indicium, may be considered as a background factor or secondary criterion militating in favor of finding supervisory status. *American Commercial Barge Line Co.*, 337 NLRB 1070, 1072 (2002); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *Essbar Equipment Co.*, 315 NLRB 461, 466 (1994); *Illini Steel Fabricators, Inc.*, 197 NLRB 303 (1972); *Grand Rx Drug Stores*, 193 NLRB 525 (1971); *Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962). It is, however, a secondary indicium and is not dispositive. *General Security Services Corp.*, 326 NLRB 312 (1998); *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111, 112 fn. 2 (1996); *Auto West Toyota*, 284 NLRB 659, 662 (1987); see also *Waterbed World*, 286 NLRB 425, 426 (1987); *Brown & Root, Inc.*, 314 NLRB 19, 22 (1994); *Custom Mattress Mfg.*, 327 NLRB 111, 112 fn. 2 (1998); *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Central Plumbing Specialties*, 337 NLRB 973, 975–976 (2002).

For example, in *Illini Steel Fabricators, Inc.*, 197 NLRB 303 (1972), the Board considered as one of the elements the higher rate of pay received by the individual found to be a supervisor. Similarly, in *Grand Rx Drug Stores*, 193 NLRB 525, 526 (1971), the Board noted 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, 265 (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

177-8520-9300

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, 1048 (2003).

d. Holding out

The fact that an individual is held out as a supervisor is not necessarily dispositive of supervisory status. *Williamette Industries*, 336 NLRB 743, 744 (2001); *Pan-Oston Co.*, 336 NLRB 305 (2001); *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429, 430 (1991). Indeed, "[i]t is well established that rank and file employees cannot be transformed into supervisors merely being invested with that title." *Carlisle Engineered Products*, 330 NLRB 1359, 1360 (2000).

That said, in addition to other considerations, the Board attached some significance to the fact

that disputed individuals were held out as supervisors to employees by department foremen and that the employees were instructed to do as they were told by the putative supervisors. *Wolverine World Wide, Inc.*, 196 NLRB 410 (1972).

Similarly, in a case where the employees looked on the individual in question as a supervisor and there was "valid basis for such judgment on their part," the Board gave some weight to this circumstances in resolving the supervisory question. *Bama Co.*, 145 NLRB 1141, 1143 (1964).

17-540 Supervisory Issues Affecting Educational Institutions

177-8540-8200

177-8540-8200

The Board often resolves 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, 946 (1978); *University of Vermont*, 223 NLRB 423, 425–426 (1976); *Adelphi University*, 195 NLRB 639, 641–642 (1972); see also *C. W. Post Center*, 189 NLRB 904, 906 (1971). It should be noted, however, that in *Fordham University*, 193 NLRB 134, 137–139 & fn. 19 (1971), the "department chairmen" were found to be nonsupervisory and included in the unit. And in *University of Detroit*, 193 NLRB 566, 568 (1971), the university was said to regard the "department chairmen" as faculty members, not administrators. In addition to lacking any of the primary supervisory indicia, 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.

In *Adelphi University*, 195 NLRB 639, 648 (1972), 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. Id. See *NLRB v. Yeshiva University*, 444 U.S. 672, 680, 689 (1980), however, on the concept of collegiality as a factor to be considered in determining managerial status. See also section 19-200.

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*, 189 NLRB 904, 905 (1971), 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." Id. at 66; see also *Fordham University*, 193 NLRB 134, 135 (1971).

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*, 193 NLRB 134, 136 (1971). See *Detroit College of Business*, 296 NLRB 318 (1989), for analysis of the effect of supervisory authority over nonunit clerical employees. See also section 17-518.

17-550 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.

In *Northcrest Nursing Home*, 313 NLRB 491 (1993), the Board discussed at length the issue of whether LPN charge nurses responsibly direct nurse's 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." Id. at 493–497.

Shortly thereafter, however, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), the Supreme 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." Id. 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. Id. at 579.

For other key cases involving supervisory status in healthcare institutions, see *NLRB v. Kentucky River Community Care*, 532 U.S.706 (2001), and *Oakwood Healthcare*, 348 NLRB 686 (2006), which are of particular importance for their discussion of independent judgment (see section17-511).

For "effective recommendation" cases in a health care setting, see *Oak Park Nursing Care Center*, 351 NLRB 27, 29 (2007) (filling out counseling forms is effective recommendation); *Coventry Health Center*, 332 NLRB 52, 53–54 (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); *Michigan Masonic Home*, 332 NLRB 1409, 1409–1410 (2000) (recommendations for discipline not effective); and *Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764 (1995) (evaluation authority established supervisor status).

17-600 Individuals Employed by Employers Subject to the Railway Labor Act

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. Section 2(3).

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. See section 1-402 for a fuller discussion of the interplay between the Act and the Railway Labor 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." *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1521 fn. 1 (1964).

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 (note, however, that residents and interns are, under current precedent, employees within the meaning of the Act—see section 20-400).

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. As craft units were treated in chapter 16, only the first and third limitations are discussed here.

18-100 Professional Employees

177-9300

355-2260

470-1700

18-110 The Statutory Mandate

355-2260

401-2570-1450

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).

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. In *Leedom v. Kyne*, 249 F.2d 490, 492 (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 affirmed this ruling at 358 U.S. 184 (1958).

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).

The procedural method for determining whether professional employees wish to be included in a unit with nonprofessional employees is a *Sonotone* self-determination election, discussed in more detail in chapter 21. See *Sonotone Corp.*, 90 NLRB 1236, 1241–1242 (1950); *Barnes-Hind Pharmaceuticals, Inc.*, 183 NLRB 301, 303 (1970); *Firestone Tire & Rubber Co.*, 181 NLRB 830, 833 (1970); *New England Telephone & Telegraph Co.*, 179 NLRB 527, 529–530 (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, Inc.*, 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. *Western Electric Co*., 126 NLRB 1346, 1348 (1960). 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 & Potomac Telephone Co*., 192 NLRB 483, 484 (1971); *Loral Electronics Systems*, 200 NLRB 1019, 1021 (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). In addition, Section 2(12)(b)'s alternate definition of professional employee ("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)") makes personal qualifications a determinative factor. Further, 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). An employer's requirement that all employees in a unit have advanced degrees in such a field is persuasive evidence for professional status, but it is not conclusive. *Express-News Corp.*, 223 NLRB 627, 631 (1976).

Thus, the requirement that professionals possess "knowledge of an advanced type" does not mean that such knowledge be acquired through academic training alone. *Express News Corp*., 223 NLRB 627, 629 (1976) (journalists held not professional). Again, it is not the individual's qualifications, but the nature of the work performed. *A. A. Mathews Associates*, 200 NLRB 250, 251 (1972) (engineer-inspectors not professional); *Chrysler Corp*., 154 NLRB 352, 354 (1965) (manufacturing engineers are professional); *Ryan Aeronautical Co*., 132 NLRB 1160, 1164 (1961) (engineers are professional); see also *Syosset General Hospital*, 190 NLRB 304 (1971) (pharmacists are professional, technicians are not). Formal education is not a prerequisite for finding professional status where individuals perform work normally attributable to professionals. *Robbins & Myers, Inc.*, 144 NLRB 295, 300 (1963); see also *Avco Corp*., 313 NLRB 1357, 1357–1358 (1994) (although educational background does not control, if few in group possess the appropriate degree, "it logically follows that the work does not requires the use of advanced knowledge").

Salary cannot be used as a test of professional status. *E. W. Scripps Co*., 94 NLRB 227, 240 (1951).

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, 1527 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).

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 supported this inclusion. Id. at 726 fn. 19. 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." Id. at 726 fn. 18.

Programmers 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, Inc.*, 174 NLRB 1274, 1276 (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, Inc.*, 217 NLRB 765, 768 (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 listing of cases from the 1970s and early 1980s dealing with professionals in health care settings, see General Counsel Memorandum 91-4, "Health Care Unit Placement Issues" (June 5, 1991), available on the Agency website.

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, 1215–1217 (1999); *General Electric Co*., 120 NLRB 199, 203 (1958). In *Permanente Medical* Group, 187 NLRB 1033, 1035 (1971), the Board called for a self-determination election for professionals "on a basis coextensive with the existing bargaining unit."

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, e.g., *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. *A. O. Smith Corp*., 166 NLRB 845, 847 (1967). 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 (a mixed professional-nonprofessional unit). Section 9(b)(1) did not, in the Board's view, bar granting the relief sought in the form of unit clarification. Id. at 847-848. Compare *Lockheed Aircraft Corp*., 155 NLRB 702, 713 (1965); *Lockheed Aircraft Corp*., 202 NLRB 1140 (1973); and *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, with *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 was once held to preclude the Board from ordering bargaining in a mixed unit as a remedy for an unfair labor practice. See *Temple Security, Inc*., 328 NLRB 663 (1999), enf. denied 230 F.3d 909 (7th Cir. 2000) (dismissing complaint involving withdrawal of voluntary recognition of mixed guard-nonguard unit); *Wells Fargo Corp*., 270 NLRB 787 (1984) (same). In *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016), the Board overruled *Wells Fargo* and held that it is an unfair labor practice for an employer who has voluntary recognized a mixed unit to subsequently withdraw recognition without demonstrating the union has lost majority support. 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 property of the employer or to protect the safety of persons on the employer's premises." Section 9(b)(3); see also *Petroleum Chemicals, Inc.*, 121 NLRB 630 (1958).

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 or her own employer, the court construed the language of that section as follows: "[T]he 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 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, 89 (3d Cir. 1953). The Board reaffirmed its adoption of this approach in *American District Telegraph Co*., 160 NLRB 1130, 1136–1137 (1966).

Watchmen whose primary duty is to check for fire hazards are not "guards" within the meaning of the Act. *Woodman Co.*, 119 NLRB 1784, 1789 (1958). For a discussion of prior Board precedent in the area of firefighters-as-guards, see *Burns Security Services*, 300 NLRB 298, 299–300 (1990), enf. denied 942 F.2d 519 (8th Cir. 1991), As noted in that case, the Eighth Circuit has taken a different view, criticizing the Board's restriction of section 9(b)(3) to the enforcement of security rules only. *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 329 (8th Cir. 1987). 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.

Custodians who make plant rounds, punch clocks, enforce company rules, and prevent unauthorized individuals from entering plant property are "guards" within that definition. *Jakel Motors*, 288 NLRB 730, 742–743 (1988); *West Virginia Pulp & Paper Co*., 140 NLRB 1160 (1963); see also *Allen Services Co*., 314 NLRB 1060, 1062 (1994).

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, Inc.*, 128 NLRB 903 (1960); see also *A. W. Schlesinger Geriatric Center*, 267 NLRB 1363, 1364 (1983) (maintenance employees also employed for security purposes). Cf. *Madison Square Garden*, 333 NLRB 643 (2001) (relying in part on *A.W. Schlesinger* to conclude 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.

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 employer's customers are not guards. *American District Telegraph Co.*, 160 NLRB 1130, 1138 (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, 814 (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.

In *Hoffman Security*, 302 NLRB 922 (1991), the Board found that receptionists were not guards in the circumstances of that case. See also *55 Liberty Owners Corp*., 318 NLRB 308 (1995) (doorpersons and elevator operators likened to receptionists); *Wolverine Dispatch, Inc*., 321 NLRB 796 (1996) (receptionists).

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, and they reported any infractions to individuals who actually enforced the rules. *Lion Country Safari*, 225 NLRB 969 (1976). In so finding, the Board observed that there was no risk of conflicting loyalties, which is what Congress sought to avoid by enacting Section 9(b)(3). Id. at 670.

In *J. C. Penney Co*., 312 NLRB 32 (1993), the Board affirmed that chargeback clerks (persons primarily responsible for receiving, packing, and shipping merchandise) are not guards, and that they were distinguishable from coinroom employees found to be guards in *Brink's Inc*., 272 NLRB 868 (1984). See also *Arcus Data Security Systems*, 324 NLRB 496 (1997) (inside and outside customer service representatives were not guards and were distinguishable from the coinroom employees in *Brink's Inc.*); *Tac/Temps*, 314 NLRB 1142 (1994) (checkers held not to be guards); *Madison Square Garden*, 325 NLRB 971 (1998) (event staff employees not guards).

In *Crossroads Community Correctional Center*, 308 NLRB 558 (1992), the Board found that correctional residence counselors who are responsible for preparing inmates for life outside prison were guards in the circumstances there.

Security toll operators were held to be guards within the meaning of the Act because they were 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 was 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 still deemed guards and thus eligible to vote in a guard unit election. *U. S. Steel Corp*., 188 NLRB 309 (1971).

In several of the foregoing cases, the Board—in finding that certain employees are not guards—has commented that any property protection function is incidental to the employees' primary function. See, e.g., *Tac/Temps*, 314 NLRB 1142, 1143–1144 (1994); *J.C. Penney Co.*, 312 NLRB 32, 33 (1993); *Lion Country Safari*, 246 NLRB 156 (1979); *Pepsi-Cola Bottling Co. of Cincinnati*, 189 NLRB 105, 105 fn. 1 (1971).

18-230 Guards Unions

339-7575-7500

401-2575-2800

As Section 9(b)(3) prohibits the Board from certifying a labor organization as the representative of a unit of guards if that organization admits to membership employees other than guards, 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) (overruling prior precedent allowing such a union to appear on the ballot for "arithmetical" purposes). However, the Board has expressed its reluctance to apply Section 9(b)(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, 568 (1986); *Rapid Armored Corp*., 323 NLRB 709, 710–711 (1997); *Children's Hospital of Michigan*, 317 NLRB 580, 581 (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); *Children's Hospital of Michigan*, 299 NLRB 430 (1990).

Section 9(b)(3) also provides that a labor organization shall not be certified as the representative of a unit of guards if it is affiliated "directly or indirectly with an organization which admits to membership employees other than guards." The Board has addressed assertions of indirect affiliation in the following situations.

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); *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, Inc.*, 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. It was accordingly found to be indirectly affiliated with the nonguard union. *International Harvester Co.*, 145 NLRB 1747, 1749–1750 (1964).

Where indirect affiliation is found and the unit involved is currently certified, the Board will revoke the certification, even if the nonguard union does not represent employees in the same plant in which the guards involved were employed. *International Harvester Co.*, 145 NLRB 1747, 1750–1751 (1964).

See also sections 6-200 and 6-310.

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.

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 (1) share a confidential relationship with managers who "formulate, determine, and effectuate management policies in the field of labor relations," and (2) assist and act in a confidential capacity to such persons. *Waste Management de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003); *Intermountain Electric Assn.*, 277 NLRB 1, 3–4 (1985); *Hampton Roads Maritime Assn.*, 178 NLRB 263, 264 (1969); *Ladish Co.*, 178 NLRB 90 (1969); *Eastern Camera & Photo Corp.*, 140 NLRB 569, 574–575 (1963). An employee who regularly substitutes for someone has these duties also meets the definition. *Prince Gardner*, 231 NLRB 96, 97 (1977). "Formulate, determine, and effectuate" are assessed in the conjunctive. *Weyerhaeuser Corp.*, 173 NLRB 1170, 1172 (1968). This test is known as the "labor nexus" test and was endorsed by the Supreme Court in *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). Under this test, it is insufficient that an employee has occasional access to labor-related or personnel information. *Intermountain Electric Assn.*, 277 NLRB 1, 4 (1985); *Chrysler Corp.*, 173 NLRB 1046, 1048 (1969). The Board adheres "strictly" to this definition. *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956) (citing *Ford Motor Co.*, 66 NLRB 1317 (1946)). Under Board policy, employees who meet this test are excluded from the bargaining unit.

As an alternative test, employees who have "regular" access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations are deemed confidential employees. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987); *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762–763 (1974). Compare *American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1720–1721 (1958) (employee had no way of knowing from statistical data he prepared what labor policy proposals might result). The Supreme Court has also approved of this alternative test. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 188–189 (1981).

The party asserting confidential status has the burden of providing evidence to support its assertion. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987).

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 & Standard Sanitary Corp.*, 119 NLRB 1715, 1719 (1958). This is also true of employees who spend only a small proportion of their time substituting for those who act in a confidential capacity. *Meramec Mining Co.*, 134 NLRB 1675, 1678 (1962); *Swift & Co.*, 129 NLRB 1391, 1393 (1961).

The parties' agreement in the past to exclude clerks as confidential is not necessarily binding in a subsequent representation proceeding. *Chrysler Corp.*, 173 NLRB 1046, 1048 (1969).

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. *Ladish Co.*, 178 NLRB 90 (1969); see *RCA Communications, Inc.*, 154 NLRB 34, 37 (1965); *Hampton Roads Maritime Assn*., 178 NLRB 263, 264 (1969); see also *S. S. Joachim & Anne Residence*, 314 NLRB 1191, 1196 (1994); *Lincoln Park Nursing Home*, 318 NLRB 1160, 1169 (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 & Standard Sanitary 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, Inc.*, 124 NLRB 1302, 1304 (1959); *Brodart, Inc*., 257 NLRB 380, 384 fn. 10 (1981). Similarly, 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*., 119 NLRB 1556, 1565 (1958).

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*., 283 NLRB 999, 1000 (1987); *International Rural 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, e.g., *Swift & Co*., 119 NLRB 1556, 1564, 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, Inc.*, 195 NLRB 306, 307 (1972).

With respect to secretaries to the employer's negotiating team and to management officials responsible for formulating the employer's contract proposals, the Board found they were confidential employees because they 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. The Board also found that two other employees who substituted for the regular secretaries were confidential employees. *Firestone Synthetic Latex Co*., 201 NLRB 347 (1973); see also *National Cash Register Co*., 168 NLRB 910, 912–913 (1968); *Bakersfield Californian*, 316 NLRB 1211, 1213 (1995).

Similarly, the Board found confidential status established where secretaries to vice presidents and the secretary to the secretary treasurer 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, Inc*., 118 NLRB 595 (1957); *Santa Fe Trail Transportation Co*., 119 NLRB 1302, 1303–1304 (1958); *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, 1025 (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. Id. at 1025–1026 (citing *B. F. Goodrich Co*., 115 NLRB 722. 724 (1956); *Weyerhaeuser Co.*, 173 NLRB 1170, 1172–1173 (1968)). 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. Id. at 1026. See also *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981); *PTI Communications*, 308 NLRB 918 (1992); *Inland Steel Co.*, 308 NLRB 868 (1992); *Waste Management de Puerto Rico*, 339 NLRB 262, 282–283 (2003).

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*., 173 NLRB 263 (1969).

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, 457 (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, 163 (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, 853 fn. 3 (1980). But see *NLRB v. Hendricks County Rural Membership Electric Corp*., 454 U.S. 170, 185 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, 682 (1980); *Ladies' Garment Workers Union v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *Ford Motor Co*., 66 NLRB 1317, 1322 (1946); *Palace Laundry Dry Cleaning Corp*, 75 NLRB 320, 323 fn. 4 (1948).

"Managerial employees" are defined as employees who formulate and effectuate high-level employer policies or "who have discretion in the performance of their jobs independent of their employer's established policy." *Republican Co.*, 361 NLRB No. 15, slip op. at 3 (2014) (quoting *General Dynamics Corp.*, 213 NLRB 851, 857 (1974)); see also *Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 3 (2016); *Tops Club, Inc*., 238 NLRB 928, 928 fn. 2 (1978) (quoting *Bell Aerospace*, 219 NLRB 384, 385 (1975), on remand from the Supreme Court's decision 416 U.S. 267 (1974)). The decisions must be made on behalf of the employer. *Allstate Insurance Co*., 332 NLRB 759, 762 (2000); see also section 17-512.

The party asserting managerial status bears the burden of proof. *Republican Co.*, 361 NLRB No.

15, slip op. at 4 (2014); *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

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).

In *NLRB v. Yeshiva University*, 444 U.S. 672, 682–683 (1980), Supreme Court described managerial employees as follows:

> 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.

At one time, the Board's practice was to exclude managerial employees from a petitioned-for unit, see, e.g., *Swift & Co.*, 115 NLRB 752, 753 (1956), but the Board directed elections in units of managerial employees in *North Arkansas Electric Cooperative*, 185 NLRB 550 (1970), and *Bell Aerospace Co.*, 196 NLRB 827 (1972), determining that such individual were nevertheless "employees" within the meaning of the Act. But in *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974), the Supreme Court struck down this practice, finding that Congress intended to exclude from the protections of the act all managerial employees.

Managerial cases inquire into the degree of discretion and authority exercised by the disputed employees. Thus, 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." *Holly Sugar Corp*., 193 NLRB 1024, 1026 (1971). Similarly, in *Case Corp.*, 304 NLRB 939 (1991), the Board held that industrial engineers are not managerial because although they participated in grievance handling and bargaining, the record did not show they had discretion to deviate from established policies or the authority to make any final binding disposition of grievances. See also *George L. Mee Memorial Hospital*, 348 NLRB 327, 333 (2006); *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994); *Sampson Steel & Supply, Inc.*, 289 NLRB 481, 482 (1988); *Central Maine Power Co*., 151 NLRB 42, 45 (1965); *American Radiator & Standard Sanitary Corp*., 119 NLRB 1715, 1717 (1958).

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, Inc.*, 195 NLRB 306, 307 fn. 5 (1972) (citing *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971) (credit reporters); *Banco Credito y Ahorro Ponceno*, 160 NLRB 1504 (1966) (bank collectors, loan officers, loan adjusters)).

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, 206 (1978); see also *Republican Co.*, 361 NLRB No. 15, slip op. at 4 (2014) (managerial status found based on individuals' role in formulating, determining, and effectuating newspaper editorial policies). But see *Washington Post Co*., 254 NLRB 168, 183 (1981); *Long Beach Press-Telegram*, 305 NLRB 412 (1991); *Reading Eagle Co*., 306 NLRB 871 (1992); *Bakersfield Californian*, 316 NLRB 1211 (1995).

The fact that employees train or instruct other employees does not, by itself, establish managerial

status, and such employees will not be found to be managerial if they do not exercise sufficient independent discretion or judgment in carrying out these duties. *Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 3 (2016). Compare *Roofing, Metal & Heating Associates*, 304 NLRB 155, 161 (1991); *A. Barton Hepburn Hospital*, 238 NLRB 95, 96 (1978); and *Fairfax Family Fund, Inc.*, 195 NLRB 306, 308 (1972), with *Miller Electric Co.*, 301 NLRB 294, 298–299 (1991).

In *NLRB v. Yeshiva University*, 444 U.S. 672, 682–691 (1980), the Supreme Court concluded that university professors who can take or recommend discretionary actions that effectively control or implement employer policy were managerial employees. Following this decision, the Board issued many decisions addressing managerial status of faculty and colleges and universities. See *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 15 fn. 30 (2014) (collecting cases); *University of Great Falls*, 325 NLRB 83 (1997); *Lewis & Clark College*, 300 NLRB 155 (1990). Compare *Carroll College, Inc.*, 350 NLRB No. 30 (2007) (not reported in Board volumes) (finding managerial status not established based on authority to determine admission of applicants falling below traditional academic standards), with *LeMoyne-Owen College*, 345 NLRB 1123 (2005) (finding managerial status established based on, among other things, faculty control of curriculum decision, degrees and degree requirements, tenure standards and selections, and faculty evaluation procedures).

In *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 16 (2014), the Board undertook "to develop a more workable, more predictable analytical framework" for managerial determinations involving college and university faculty. The Board stated that it would consider both the breadth and depth of the faculty's authority. With respect to breadth, the Board "will give more weight to those areas of policy making that affect the university as a whole, such as the product produced, the terms on which it is offered, and the customers served." Ibid. With respect the depth, the Board will "seek to determine whether the faculty actually exercise control or make effective recommendations over those areas of policy," and noted this inquiry "will necessarily be informed by the administrative structure of the particular university, as well as the nature of the faculty's employment with that university." Id., slip op. at 16–17. Applying this framework, the Board found that the faculty at issue were not managerial. Id., slip op. at 24–25; see also *University of Southern California*, 365 NLRB No. 11, slip op. at 1 fn. 1 (2016) (denying review of regional director's finding that employer had not shown petitioned-for faculty possess managerial authority under *Pacific Lutheran*).

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, 973–974 (1958); *Textile Workers Union of America*, 138 NLRB 269, 269 fn. 2 (1962). Compare *Retail Clerks Local 428*, 163 NLRB 431, 438 (1967); *Retail Clerks Local 880*, 153 NLRB 255, 258 (1965).

19-210 Stock Ownership

177-2401-7500

460-5033-2550-1770

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, 195 (1971); *Florence Volunteer Fire Department, Inc.*, 265 NLRB 955 (1982) (firefighter members of nonprofit fire company); see also *Science Applications Corp*., 309 NLRB 373, 375–376 (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"); *Centurion Auto Transport*, 329

NLRB 394, 397–399 (1999); see also *Citywide Corporate Transportation, Inc.*, 338 NLRB 444, 449–450 (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 enough on its face, but it has been elaborated on in several ways requiring further explication.

In *Scandia*, 167 NLRB 623, 624 (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 and excluded an individual whose parent owned half of the stock of the corporate employer. See *Campbell-Harris Electric, Inc.*, 263 NLRB 1143 (1983) (Board will exclude child of shareholder having 50-percent or more ownership in closely held corporation); *Ideal Elevator Corp.*, 295 NLRB 347, 347 fn. 2 (1989) (excluding son of sole owner). Clearly, an employee of a corporation wholly owned by his or her parent(s) is excluded. *Bridgeton Transit*, 123 NLRB 1196, 1197 (1959) (excluding individuals whose parents owned 399 of 400 shares). So also are children of majority shareholders. *Cerni Motor Sales*, 201 NLRB 918 (1973) (stating Board would adhere to rule that where an individual owns 50 percent or more of a closely held corporation, that person is the actual employer and his or her offspring will be excluded).

When the ownership is less than 50 percent, the Board applies a different test for determining eligibility. The Board hesitates to include relatives of management in bargaining units as their interests are distinguishable from those of other employees, *R & D Trucking*, 327 NLRB 531, 533 (1999), but the Board will not exclude an employee simply because he or she is related to a member of management. *International Metal Products Co.*, 107 NLRB 65, 66–67 (1953). Instead, the Board considers various factors to decide whether an employee's family ties sufficiently align his or her interests with management to warrant exclusion from the bargaining unit; the great the family involvement in ownership and management of the company, the more likely the employee will be excluded. *R & D Trucking*, 327 NLRB 531, 533 (1999). In other words, the Board uses an expanded community of interest test to determine whether relatives of owner-managers should be excluded from the unit. Id. In such cases, there is no requirement that the employee-relatives enjoy special job-related benefits in order to be excluded. See *NLRB v. Action Automotive*, 469 U.S. 490 (1985), in which the Supreme court affirmed Board practice in this area.

Under this expanded community of interest test, the Board may, in addition to the usual factors, consider 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 he or she receives special job-related benefits such as high wages or favorable working conditions, but as noted above these are not a prerequisite for exclusion. See, e.g., *NLRB v. Action Automotive*, 469 U.S. 490, 495 (1985) (excluding wife of corporate president and one-third owner and mother of three brothers who owned the corporation); *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429, 431–432 (1991) (declining to exclude individual who was nephew of one owner and grandson of another); *Luce & Son, Inc.*, 313 NLRB 1355 (1994) (excluding individual who owned a relatively small number of shares and was sister of the principal owner); *M. C. Decorating*, 306 NLRB 816, 817 (1992) (excluding brother-in-law of part-owner and president).

In cases where ownership is not an issue, the question is whether the relative enjoys a special status on the job because of his or her relationship to the nonowner manager. *R & D Trucking*, 327 NLRB 531, 533 (1999); *Cumberland Farms*, 272 NLRB 336, 336 fn. 2 (1984);

Allen Services Co., 314 NLRB 1060, 1062–1063 (1994). Compare *Peirce-Phelps, Inc*., 341 NLRB 585, 586 (2004) (finding no special status), with *Novi American Inc.–Atlanta*, 234 NLRB 421, 422 (1978) (finding special status).

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); *Fisher Controls Co*., 192 NLRB 514, 515 (1971); *Weyerhaeuser Co*., 173 NLRB 1170, 1171 (1968); *Rudolph Wurlitzer Co*., 117 NLRB 6, 7 (1957); *Republic Steel Corp*., 131 NLRB 864 (1961); *Vulcanized Rubber & Plastics Co*., 129 NLRB 1256, 1257 (1961); see also *Carling Brewing Co.*, 126 NLRB 347, 349 fn. 6 (1960) (rejecting employer contentions in support of unit consisting of both office and plant clerical employees). As noted, an exception is made where there is an agreement of the parties. See *Eljer Co*., 108 NLRB 1417, 1423–1424 (1954); *Otis Hospital, Inc.*, 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).

The reasoning behind this policy is that, under normal circumstances, a distinct difference exists between office employees and plant clerical employees. See, e.g., *Rudolph Wurlitzer Co.*, 117 NLRB 6, 7 (1957); *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 drawn between office clericals and plant clericals is not always clear." *Hamilton Halter Co*., 270 NLRB 331, 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. *Kroger Co.*, 342 NLRB 202 (2004); *Cook Composites & Polymers Co*., 313 NLRB 1105, 1108 (1994). Normally, plant clericals spend most of their working time in the plant production area. *Caesars Tahoe*, 337 NLRB 1096, 1098 (2002).

Typical plant clerical duties are timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. *Hamilton Halter*, 270 NLRB 331 (1984); see also *Caesars Tahoe*, 337 NLRB 1096, 1098–1099 (2002) (dispatching, payroll, and note-taking found to be akin to plant clerical duties). In contrast, typical office clerical duties are billing, payroll activities in the office area, phone, and mail. *Dunham's Athleisure Corp*., 311 NLRB 175, 176 (1993); see also *Mitchellace, Inc*., 314 NLRB 536 (1994) (data entry and printing shipping labels); *Virginia Mfg. Co*., 311 NLRB 992 (1993) (compiling production information and tracking inventory reports); *PECO Energy Co*., 322 NLRB 1074, 1084–1085 (1997) (generating reports, tracking data, typing, filing, data entry).

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.*, 342 NLRB 202 (2004); *Caesars Tahoe*, 337 NLRB 1096, 1100 (2002); *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994); *Raytee Co*., 228 NLRB 646 (1977); *Armour & Co*., 119 NLRB 623, 625 (1958). For this reason, in *Fisher Controls Co*., 192 NLRB 514, 515 (1971),

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, 1037–1038 (1989) (overruling challenges to voters found to be plant clericals). Compare *Avecor, Inc*., 309 NLRB 73 (1992) (excluding employees found to be office clericals).

Office clerical employees, by contrast, 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. *Westinghouse Electric Corp.*, 118 NLRB 1043, 1047 (1957); *Lilliston Implement Co*., 121 NLRB 868, 870 (1958); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971); *PECO Energy Co.*, 322 NLRB 1074, 1084–1085 (1997).

This policy of excluding office clericals holds true even when a prior bargaining history on an overall basis exists. *Westinghouse Electric Corp*., 118 NLRB 1043, 1047 (1957). 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).

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. *Weyerhaeuser Co*., 173 NLRB 1170, 1171–1172 (1968); see also *Robbins & Myers, Inc*., 144 NLRB 295, 299 (1963); *Armstrong Rubber Co*., 144 NLRB 1115, 1119 (1963); *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." *Weyerhaeuser Co.*, 173 NLRB 1170, 1171 (1968).

The Board also excludes office clerical employees from a residual unit of production and maintenance employees (*California Cornice 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 *(Brown Instruments Division*, 115 NLRB 344, 348 (1956)). Thus, in *Swift & Co*., 166 NLRB 589, 590 (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, 281 fn. 4 (1981), in which the Board noted that, although the unit included office clericals in a unit of warehouse clericals, no review of this action was requested. In *United Parcel Service*, 258 NLRB 223 (1981), the Board designated separate units of office clericals and operating clericals.

As with production and maintenance units, the Board stressed lack of community of interest as the basis for excluding 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*., 198 NLRB 217, 219 (1972); see also *Fireman's Fund Insurance Co*., 173 NLRB 982, 984 (1969).

19-420 Clerical Units Generally

440-1760-1901

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, 21 (1997); *Olin Mathieson Chemical Corp*., 117 NLRB 665, 667 (1957); *Beech Aircraft*

Corp., 170 NLRB 1595 (1968); *California Blue Shield*, 178 NLRB 716, 718 (1969).

19-430 Clericals—Warehouse Units

440-1780-6001

One difficult area concerns the placement of clericals in warehouse-type integrated operations. See, e.g., *Esco Corp*., 298 NLRB 837, 840–841 (1990); *Scholastic Magazines, Inc.*, 192 NLRB 461, 462 (1971); *Jacob Ash Co*., 224 NLRB 74 (1976); *Gustave Fischer, Inc*., 256 NLRB 1069, 1072–1073 (1981). Order takers and others involved in the ordering process have proved particularly troublesome. *ABS Corp*., 299 NLRB 516, 518–519 (1990); *Hamilton Halter Co*., 270 NLRB 331 (1984); *Cincinnati Bronze*, 286 NLRB 39, 44 (1987); *John N. Hansen Co*., 293 NLRB 63, 65 (1989).

For petitioned-for units of warehouse employees, the Board has stated that warehouse clericals should be included in the unit of warehouse employees when the duties of such clericals are integral to the functioning of the warehouse operations. *Fleming Foods*, 313 NLRB 948, 949 (1994); *John N. Hansen Co.*, 293 NLRB 63, 64–65 (1989); *S & S Parts Distributors Warehouse*, 277 NLRB 1293 (1985).

As set forth in section 19-400, generally separate units of office clerical employees alone and plant clerical employees alone are appropriate. But see *Montgomery Ward & Co*., 259 NLRB 280, 281 at fn. 4 (1981), where the Board noted that the regional director had included office clericals in a unit of warehouse clericals, Board review of this action had not been requested, and the unit presented was thus in effect "a residual warehouse unit in which it would be improper to exclude any segment or classification"). See also *Fleming Foods*, 313 NLRB 948 (1994) (concluding that a petitioned-for unit of warehouse clericals was not an appropriate unit separate from other warehouse employees, but directing election in residual unit consistent of warehouse clericals and maintenance employees); *Kalustyans*, 332 NLRB 843 (2000) (concluding challenged individuals performed duties similar to shipping clerks parties stipulated were included in warehouse unit, as opposed to duties of excluded office clericals).

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).

In *Swift & Co.*, 166 NLRB 589, 590 (1967), the Board commented that, just as it customarily excludes office clericals from a production and maintenance unit (citing *Westinghouse Electric Corp.*, 118 NLRB 1043 (1957)), it also usually excludes them from a residual unit of production and maintenance employees (citing *California Cornice Steel & Supply Corp.*, 104 NLRB 787, 789 (1953)), as well as from a previously unrepresented fringe group of production and maintenance employees when a labor organization seeks to add that fringe group to an existing production and maintenance unit (citing *Brown Instruments Division*, 115 NLRB 344, 348 (1956)). Applying these principles, the Board refused to include office clericals in a voting group the petitioner sought to add to an existing unit of production employees, and instead directed a separate election to determine if the office clericals wished to be represented in a separate unit.

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. Rules Sec. 103.30(a)(6); see also 284 NLRB 1515, 1562 (1987).

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 15-160.

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. *Avco Lycoming Div.*, 173 NLRB 1199, 1200 (1969); *Audiovox Communications Corp.*, 323 NLRB 647 (1999); see *Folger Coffee Co*., 250 NLRB 1 (1980); *Barnert Memorial Hospital Center*, 217 NLRB 775, 777 (1975); *Fisher Controls Co*., 192 NLRB 514 (1971); *Design Service Co*., 148 NLRB 1050 (1964); *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).

Initially, the policy had been automatic exclusion of technical employees from a production and maintenance unit if either party objected to their inclusion. See, e.g., *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." 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. Id; see also *Virginia Mfg. Co*., 311 NLRB 992, 993 (1993).

Under this revised policy, the Board declined to combine certain technical employees (planners and estimators) in a voting group of plant clerical employees as there was no evidence to support the claim that these technical employees shared a special community of interest with the plant clerical employees. *Weyerhaeuser Co*., 173 NLRB 1170, 1172 (1968); see also *Meramec Mining Co*., 134 NLRB 1675 (1962); *Hazelton Laboratories, Inc.*, 136 NLRB 1609, 1611 (1962); *Robertshaw-Fulton Controls Co*., 137 NLRB 85, 86 (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, Inc.*, 204 NLRB 255 (1973). The same technical categories (systems analysts and programmers) were in issue in *Ohio Casualty Insurance Co*., 175 NLRB 860, 861 (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, 480–481 (1974); *Lundy Packing Co*., 314 NLRB 1042, 1044–1045 (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. See *Pratt & Whitney*, 327 NLRB 1213, 1215–1217 (1999); *TRW Carr Division*, 266 NLRB 326 (1983); *Western Electric*, 268 NLRB 351, 352 (1983); *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); *Aerojet General Corp.*, 131 NLRB 1094 (1961); *Allis-Chalmers Mfg. Co*., 117 NLRB 749 (1957); *Solar Aircraft Co*., 116 NLRB 200 (1957). 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. See also *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2018–2020 (2011) (departmental unit of technical employees found appropriate); *TRW Carr Division*, 266 NLRB 326, 326 fn. 4 (1983) (stating if subset of technical employees share a community of interest "sufficiently distinct" from other technical, separate representation may be appropriate); *Martin Co.*, 162 NLRB 319, 322 (1966) (technical with specialized function, separate supervision, and separate work location were "identifiable group with distinct interests" and thus an appropriate unit).

At one time, the Board would not find appropriate a unit of technical and clerical employees if a party objected. See, e.g., *Otis Elevator Co.*, 116 NLRB 262 (1957). But following *Sheffield Corp.*, 134 NLRB 1101 (1962), discussed above, the Board extended its policy of not automatically excluded technical employees to cases involving clerical and technical employees. See *Budd Co.*, 136 NLRB 1153 (1962). Thus, the Board now includes technicals in a clerical unit if the two groups share a community of interest. Id. at 1155; *American Motors Corp.*, 206 NLRB 287, 288–289 (1973) (including certain technical in a clerical unit); *Worthington Corp.*, 155 NLRB 59 (1965) (finding appropriate unit of technical, plant clerical, and office clerical employees). But even after *Sheffield Corp.*, technical employees will not be included with

clerical employees when the technical employees have a community of interest apart from the clerical employees. See *Fisher Controls Co*., 192 NLRB 514, 515 (1971). 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.

For a discussion of the history of Board policy on technical employees in the research and development industry, see *Aerospace Corp*., 331 NLRB 561 (2000) (holding Board precedent did not require facilitywide units and thus permitting election in unit confined to maintenance employees).

19-510 Technical Employees—Health Care

470-3300

Technical employees are an appropriate unit in acute care hospitals under the Health Care Rule. See Board's Rules and Regulations sec. 103.30(a)(4); 284 NLRB 1515, 1553 (1987). For a discussion of technical units under the Health Care Rule, see *Meriter Hospital*, 306 NLRB 598 (1992). See also *Virtua Health, Inc.*, 344 NLRB 604 (2005), *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994), *Faribault Clinic*, 308 NLRB 131 (1992), and *Park Manor Care Center*, 305 NLRB 872 (1991), but note that these cases involve application of the "empirical" or "pragmatic" community of interest test the Board overruled in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013). See also *San Juan Regional Medical Center*, 307 NLRB 117 (1992) (finding biomedical technicians not to be technical employees); *Mercy Health Services North*, 311 NLRB 1091 (1993) (same).

For a discussion of a technical employees' unit in a psychiatric hospital, see *Brattleboro Retreat*, 310 NLRB 615 (1993), but here too note that the case applied the since-overruled *Park Manor Care Center*, 305 NLRB 872 (1991). See also *Lincoln Park Nursing & Convalescent Home*, 318 NLRB 1160 (1995), and *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995), both also decided under *Park Manor*.

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, 299 (1987). See also *Lundy Packing Co*., 314 NLRB 1042, 1043–1044 (1994), where the Board found that such employees were not required to be included in a production and maintenance unit because they did not share an "overwhelming community of interest" with those employees. The Fourth Circuit denied enforcement of the resultant refusal-to-bargain case, holding that the Board had given controlling weight to the extent of organization. See *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995).

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. This chapter treats questions pertaining 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.

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. *Post Houses, Inc.*, 161 NLRB 1159, 1172–1173 (1966); *Sears, Roebuck & Co.*, 112 NLRB 559, 569 fn. 28 (1955).

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. *Farmers Insurance Group*, 143 NLRB 240, 244–245 (1979); see *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819–820 (2003); *Fleming Foods*, 313 NLRB 948 (1994); *Pat's Blue Ribbons*, 286 NLRB 918 (1987). Such part-time employees are described as "regular part-time employees."

In *Arlington Masonry Supply, Inc*., 339 NLRB 817, 819 (2003), the Board described its policy for determining part-time eligibility as follows:

> 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).

Many Board decisions in this area elaborate on "regularity." As further discussed in *Arlington Masonry Supply*, the standard the Board frequently uses to determine "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 id. at 819 (citing *Davison-Paxon Co.*, 185 NLRB 21 (1970), discussed in more detail in section 20-120). The "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 1115 (2010).

In examining regularity, the work history of the employees in question will of course be considered (*Columbus Plaza Motor Hotel*, 148 NLRB 1053, 1056–1057 (1964)), as will the turnover rate among that classification (*Lewis & Coker Super Markets*, 145 NLRB 970, 972 (1964); *Vindicator Printing Co.*, 146 NLRB 871, 878 (1964)). For example, in *Fresno Auto Auction, Inc.*, 167 NLRB 878, 879 (1967), the Board stated that "[i]n determining the relative permanence or regularity of the employment in the proposed unit," the fact that, although the number and identity of employees fluctuated from week to week, a substantial number reported

and worked "fairly regularly" over a period of months "outweigh[ed] 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, 2 (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).

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).

Various standards, such as hours worked per day or week, or days worked per calendar period, have been applied in different industries or factual situations to determine whether a part-time employee is regular or casual. As indicated above, the most commonly-used standard is that set forth in *Davison-Paxon Co*., 185 NLRB 21, 23–24 (1970) (regular part-time employees average 4 hours a week in the quarter preceding the eligibility date).

In special circumstances, the Board may modify the *Davison-Paxon* formula. See *Columbus Symphony Orchestra*, 350 NLRB 523, 524–525 (2007); *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994). For example, where there is a wide disparity in the numbers of hours worked by part-time employees, the Board may fashion another formula. See, e.g., *Marquette General Hospital*, 218 NLRB 713, 714 (1975). Compare *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990) (applying *Davison-Paxon* in absence of disparity); *Northern California Visiting Nurses Assn*., 299 NLRB 980 (1990) (same); see also *Beverly Manor Nursing Home*, 310 NLRB 538, 538 fn. 3 (1993).

The Board has indicated that the formula applied should be "equitable," and that selecting such a formula depends on balancing the length, regularity, and currency of employment, as well as the seasonal nature of the industry where relevant. *C. T. L. Testing Laboratories*, 150 NLRB 982, 985 (1965).

The following are examples of formulas the Board has employed, differing from *Davison-Paxon*; the industries involved have been noted below, but it should be emphasized that the Board has not always emphasized the particular nature of the industry in fashioning an equitable formula:

> Employees who have worked a minimum of 15 days in either of the two 3-month periods immediately preceding the issuance of the Board's decision. *C. T. L. Testing Laboratories*, 150 NLRB 982, 985 (1962) (concrete inspectors). See sec. 23-420 for a discussion of the formula used for construction industry employers.
>
> Part-time employees who worked a minimum of 15 days in the calendar quarter before the eligibility date. *Scoa, Inc*., 140 NLRB 1379, 1381–1382 (1963) (retail); see also *Motor Transport Labor Relations*, 139 NLRB 70, 72 (1962) (employees who worked a total of 15 days for one or more of the employer association's members covered by the existing contract during the calendar quarter preceding the eligibility date) (drivers and related classifications).
>
> Employees who have worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the date of issuance of decision. *Marquette General Hospital*, 218 NLRB 713 (1975).
>
> Part-time taxi drivers working 1 or 2 days a week (*Jat Transportation Corp*., 128 NLRB 780, 786 (1960)), at least 26 days (i.e., 2 days a week) during the quarter preceding the Board's decision (*Cab Operating Corp.*, 153 NLRB 878, 883–884 (1965)), and at least 2 days per week in 8 of the last 10 full weeks preceding the direction of election (*Checker Cab Co*., 141 NLRB 583, 589 (1963)). See also sec. 23-440.

All part-time beer delivery employees who worked at least 8 hours per week. *Chester County Beer Distributors Assn.*, 133 NLRB 771, 774 (1961).

Insurance agents who worked 20 hours per week in the quarter preceding the eligibility date. *Farmers Insurance Group*, 143 NLRB 240, 245 (1963).

Although not an eligibility formula as such, the Board has noted that in department store cases, employees who regularly work an average of 4 hours or more per week are considered eligible regular part-time employees. *Leaders-Nameoki, Inc.*, 237 NLRB 1269 (1978); *Allied Stores of Ohio, Inc.*, 175 NLRB 966, 969 (1969).

Part-time employees (of a newspaper publisher and printer) working 9 days (approximately one-quarter of available working days) during the 13-week quarter preceding the election. *Suburban Newspaper Group*, 195 NLRB 438, 440 (1972).

Employees who have been employed during two theatrical productions for a total of 5 working days over a 1-year period, or who have been employed by the employer for at least 15 days over a 2-year period. *Juilliard School*, 208 NLRB 153, 155 (1974). See sec. 23-460 for eligibility formulas in the entertainment industry.

Language teachers who have who have taught in the last year and have taught on more than one occasion (day) during that time. *Berlitz School of Languages of America*, 231 NLRB 766, 767 (1977); see also sec. 23-470.

On-call nurses who have worked a minimum of 30 hours in the 11-week period immediately preceding the date of the decision and direction of election. *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975).

Active "extra" employees who worked at least 720 hours during the preceding year. *Bailey Department Stores Co*., 120 NLRB 1239, 1244 (1958).

See sec. 23-430 for other industry-specific formulas.

For an example of tabulating working hours, for the purposes of determining eligibility under the *Davison-Paxon* formula, see *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997) (for home health aide, stating hours of home visits, paperwork, trips to office to deliver paperwork, and time spent consulting with other health care personnel were countable).

Thus far, this section has focused on the regularity of employment. With respect to tenure, 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 dispositive. In *New York Display & Die Cutting Corp.*, 341 NLRB 930, 931 (2004), the Board found regular part-time status for an employee hired 9 days before the election (and who was working on the eligibility and election date) and averaged 14.25 hours a week from the date of hire to the date of the election (rather than to the eligibility date), thus meeting the *Davison-Paxon* standard.

As has been noted, the similarity of interests between full-time and part-time employees is also a relevant factor. *V.I.P. Movers*, 232 NLRB 14, 15 (1977) (difference insufficient to warrant exclusion); *Newburgh Mfg. Co*., 151 NLRB 763, 766 (1965) (finding part-time employees did not, for the most part, share "a substantial" interest with full-time employees); see also *L & A Investment Corp. of Arizona*, 221 NLRB 1206, 1207 (1975); *Mensh Corp*., 159 NLRB 156, 158 (1966); *Berea Publishing Co*., 140 NLRB 516, 518–519 (1963); *Lancaster Welded Products*, 130 NLRB 1478 (1961); *Great Atlantic & Pacific Tea Co*., 119 NLRB 603, 607 (1957).

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 or her community of interest with employees at his or her part-time employment if the other criteria are met. *Tri-State Transportation Co.*, 289 NLRB 356 (1988); *Joclin Mfg. Co*., 144 NLRB 778, 781–782 (1963); *V.I.P. Radio*, 128 NLRB 113 (1960). But where such an employee will only work at his or her part-time job as his or her 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, 800 (1964).

See also sections 20-120 and 20-140.

20-120 "On-Call" Employees

362-6734

460-5067-8200

The Board has described "on-call" employees as "contingent" or "extra" employees who are on call to work for indefinite periods of time, such as those who work on an irregular and unscheduled basis. *Syracuse University*, 325 NLRB 162 (1997). "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 as "casual" employees. *Piggly Wiggly El Dorado Co.*, 154 NLRB 445, 451 (1965); *G. C. Murphy Co.*, 128 NLRB 908, 909–910 (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*., 185 NLRB 21, 23–24 (1970); *Wadsworth Theatre Management*, 349 NLRB 122 (2007); *Steppenwolf Theatre Co.*, 342 NLRB 69, 71–72 (2004); *Berlitz School of Languages of America*, 231 NLRB 766 (1977); *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975); *Columbus Plaza Motor Hotel*, 148 NLRB 1053, 1056 (1964) ("extra" employees); *Bailey Department Stores Co*., 120 NLRB 1239 (1958) (extra employees); *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994).

Employees who work regularly in one department and irregularly substitute in another are not "on-call" employees, but instead are akin to dual-function employees. *Syracuse University*, 325 NLRB 162 (1997); see also section 20-500.

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).

For related discussion see Irregular Part-Time Employees, section 20-140.

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, 6 (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, Inc.*, 190 NLRB 478 (1971), of including regular, part-time faculty in the same unit with full-time faculty. Thus, the Board now "exclude[s] all adjunct professors and part-time faculty members who are not employed in 'tenure track' positions." *New York University*, 205

NLRB at 6. See also *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 share a community of interest. *University of San Francisco*, 265 NLRB 1221 (1982). Cf. *Goddard College*, 216 NLRB 457 (1975) (no part-time unit because employees sought didn't share a community of interest).

20-140 Irregular Part-Time Employees

362-6730

460-5067-7700

Part-time employees whose work periods are sporadic or casual 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); *Manncraft Exhibitors Services*, 212 NLRB 923 (1974); see also *Mercury Distribution Carriers*, 312 NLRB 840, 840 fn. 1 (1993) (stating option to turn down work and fact employee did not call in every day did not preclude finding regular part-time status). Infrequent employment also leads to such a finding. *Callahan-Cleveland, Inc*., 120 NLRB 1355, 1357 (1958); *Colombia Music & Electronics*, 196 NLRB 388 (1972).

For related discussion, see section 20-120.

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 or uncertain and they are otherwise eligible, they are permitted to vote. *Personal Products Corp*., 114 NLRB 959, 960 (1955); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433, 1438 (1958); *United States Aluminum Corp*., 305 NLRB 719 (1991); *NLRB v. New England Lithographic Co*., 589 F.2d 29, 32 (1st Cir. 1978).

Conversely, 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, 1442 fn. 4 (1960); *Owens-Corning Fiberglass Corp.*, 140 NLRB 1323, 1325 (1963); *Sealite, Inc*., 125 NLRB 619 (1959); *E. F. Drew & Co*., 133 NLRB 155, 156–157 (1961). Likewise, 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*, 339 NLRB 127 (2003).

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. Id. 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); *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992). See

also *WDAF Fox 4*, 328 NLRB 3 (1999) (finding that tenure was uncertain as of the eligibility date because employer had already extended employee's initial tenure of employment).

Where the employer draws "temporary" employees from the same labor force, such employees are employed every year in substantial numbers for substantial periods of time, are composed primarily of former employees, and work with and do the same kind of work as permanent employees, they are included in the unit. See *F. A. Bartlett Tree Expert Co.*, 137 NLRB 501 (1962). Cf. *Tol-Pac, Inc*., 128 NLRB 1439 (1960) (laborers included where half recalled); *Recipe Foods, Inc.*, 145 NLRB 924 (1964) ("temporary" employees not recalled in subsequent years excluded); *LaRonde Bar & Restaurant*, 145 NLRB 270, 272 fn. 6 (1963) (pool attendants excluded where no evidence of recurring jobs).

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, 1257 (2001); *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, 769 (1965); see also *Textile Workers Union of America*, 138 NLRB 269, 269 fn. 3 (1962); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433, 1437–1438 (1958); *Personal Products Corp*., 114 NLRB 959, 960 (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 Co.*, 589 F.2d 29, 34 (1st Cir. 1978).

In *Evergreen Legal Services*, 246 NLRB 964, 965 (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 further discussion of trainees.

In *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001)—a case decided under *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), see section 14-600—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 between the two groups.

In an academic setting, terminal contract faculty members who are not being rehired after the expiration of their current contracts nevertheless share a community of interest during with their employment with, and therefore are properly included in, an overall faculty bargaining unit. *Goucher College*, 364 NLRB No. 71, slip op. at 2 (2016); *University of Vermont*, 223 NLRB 423, 427 (1976); *Rensselaer Polytechnic Institute*, 218 NLRB 1435, 1437 (1975); *Manhattan College*, 195 NLRB 65, 66 (1972); see also *Columbia University*, 364 NLRB No. 90, slip op. at 20–21 (2016) (rejecting argument undergraduate and terminal Master's degree assistants should be excluded as temporary employees merely because they are employed for relatively short, finite periods of time).

The foregoing cases deal with whether temporary employees can be included in a unit of other employees. There are, however, situations where temporary employees may be eligible for collective bargaining under the Act.

Employees in a labor pool who are hired out to the 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. See also *Volt Technical Corp.*, 232 NLRB 321, 322 (1977).

Likewise, in *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147 (2010), the Board held that musicians who work intermittently constituted an appropriate unit. The Board rejected the argument that the musicians were all ineligible temporary employees, nothing that (1) there are

many industries (such as acting and construction) in which there is successful collective bargaining despite employees who work intermittently with no expectation of continued employment with a particular employer; and (2) in cases where temporary employees were excluded, it was because they lacked a community of interest with the unit employees, and there are no cases in which a petition was dismissed solely because the unit sought was composed of temporary employees. Having found the unit appropriate, the Board applied the *Juilliard* formula (208 NLRB 153 (1974)—see sections 20-100 and 23-460) to determine eligibility.

For a discussion of students as temporary employees, see section 20-400.

20-300 Seasonal Employees

460-5067-5600

In deciding whether seasonal employees are eligible to vote, the Board assesses whether they share sufficient interests in employment conditions with other employees. See *Kelly Brothers Nurseries*, 140 NLRB 82, 85–86 (1962). That determination depends on whether seasonal employees have a reasonable expectation of reemployment in the foreseeable future; if so, they are included in the bargaining unit. See *Winkie Mfg. Co. v. NLRB*, 348 F.3d 254, 257 (7th Cir. 2003), affg. 338 NLRB 787 (2003); *L & B Cooling, Inc.*, 267 NLRB 1 (1983); *Knapp-Sherrill Co*., 196 NLRB 1072, 1072 fn. 2 (1972); *Baumer Foods, Inc.*, 190 NLRB 690 (1971); *California Vegetable Concentrates, Inc.*, 137 NLRB 1779 (1962); *P. G. Gray*, 128 NLRB 1026, 1028 (1960); *Musgrave Mfg. Co*., 124 NLRB 258, 260–261 (1959); see also *Flat Rate Movers, Ltd.*, 357 NLRB 1321 (2011).

Temporary, extra, or casual seasonal employees are excluded. *L & B Cooling, Inc.*, 267 NLRB 1 (1983); *Post Houses, Inc.*, 161 NLRB 1159, 1172–1173 (1966); *Root Dry Goods Co*., 126 NLRB 953, 955 fn. 10 (1960); *F. W. Woolworth Co.*, 119 NLRB 480, 484 (1957).

In considering whether seasonal employees have a reasonable expectation of future reemployment, the Board regularly considers factors such as the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the employer's recall or preference policy regarding the seasonal employees. See, e.g., *Macy's East*, 327 NLRB 73 (1998); *Maine Apple Growers*, 254 NLRB 501, 502 (1981).

20-310 Size of the Labor Force

460-5067-5600

A fixed labor force with potential employees residing in the area favors inclusion, whereas an indefinite or migratory labor force does not. *L & B Cooling, Inc.*, 267 NLRB 1, 2 (1983); see also *United Telecontrol Electronics*, 239 NLRB 1057, 1058 fn. 3 (1978) (statewide group of unemployed people "so vast and everchanging as to preclude it from being classified as an identifiable labor market area" from whichemployer draws labor force); *Maine Apple Growers*, 254 NLRB 501, 502 (1981) (local labor drawn from small pool favors inclusion); *Macy's East*, 327 NLRB 73, 74 (1998) (lack of evidence concerning size of available labor force favors exclusion).

More generally, the fact that an employer draws from the same labor force each season favors inclusion. *Maine Apple Growers*, 254 NLRB 501, 503 (1981); *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82, 85–86 (1962); *Carol Management Corp.*, 133 NLRB 1126, 1129 (1961); *Baumer Foods, Inc.*, 190 NLRB 690 (1971).

20-320 Stability of Labor Requirements

460-5067-5600

A relatively stabilized demand for, and dependence on, seasonal employees favors inclusion. See *Kelly Brothers Nurseries*, 140 NLRB 82, 85 (1962); *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1781 (1962); *Micro Metalizing Co.*, 134 NLRB 293 (1961). If record evidence

consists only of a single season's employment for the seasonal employees at issue, "there is no pattern of seasonal employment from which" to extrapolate the employer's labor requirements and the Board "cannot conclude" this factor favors inclusion. *L & B Cooling, Inc.*, 267 NLRB 1, 3 (1983).

20-330 Actual Season-to-Season Reemployment

460-5067-5600

If an employer rehires a "substantial portion" of seasonal employees, this supports finding the seasonal employees have a reasonable expectation of future reemployment. See *Kelly Brothers Nurseries*, 140 NLRB 82, 85 (1962). The Board has never laid a particular percentage requirement on this factor, but it has noted that it "has included seasonals whose return rate is in the 30-percent range." *Saltwater, Inc.*, 324 NLRB 343, 343 (1997). Compare *Seneca Foods Corp.*, 248 NLRB 1119 (1980) (reemployment rate less than 4 percent does not favor reasonable expectation of future employment); *United Telecontrol Electronics*, 239 NLRB 1057, 1057–1058 (1978) (total of 17.26 percent of seasonal employees returning over three-year period was "insubstantial number"); *Freeman Loader Corp.*, 127 NLRB 514 (1960) (although employer was willing to rehire seasonal employees, only "occasionally" had any returned); *Root Dry Goods Co.*, 126 NLRB 953, 955 fn. 10 (1960) (holiday "extras" who generally did not return each year excluded).

If there is no evidence concerning actual season-to-season reemployment because an employers has existed only for a short time, this lack of evidence "undercuts any finding that the . . . seasonal employees ha[ve] a reasonable expectation of reemployment." *L & B Cooling, Inc.*, 267 NLRB 1, 3 (1983); see also *Maine Sugar Industries*, 169 NLRB 186 (1968) (where there was no evidence as to what percentage of seasonal employees were returning, Board could not find "a sufficiently large number of temporary seasonal employees has a demonstrable expectation of being rehired").

20-340 Employer's Preference or Recall Policy

460-5067-5600

The fact that former employees are given preference in rehiring or recall, whether or not the employer uses a preferential hiring list, favors inclusion. *Brown Cigar Co.*, 124 NLRB 1435, 1437 (1959); *Micro Metalizing Co.*, 134 NLRB 293, 294–295 (1961). If other factors favor a reasonable expectation of future reemployment, it is only necessary to show that seasonal employees are permitted to reapply the next season and that some of them are in fact rehired. See *Maine Apple Growers*, 254 NLRB 501, 503 (1981).

20-350 Similarity of Duties, etc.

460-5067-5600

The Board also regularly considers the degree to which seasonal and permanent employees share terms and conditions of employment, but whether the seasonal employees have a reasonable expectation of future employment does not necessarily turn on this factor. Compare *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1780–1781 (1962) (seasonal employees who differed from regular employees only in terms of benefits included in unit), with *L & B Cooling, Inc.*, 267 NLRB 1, 1–3 (1983) (although "extra seasonal" employees at issue did the same work, had the same supervisors, were similarly paid, and were part of the same labor pool as other employees, they had no reasonable expectation of future employment and were excluded), and *Flat Rate Movers, Ltd.*, 357 NLRB 1321, 1332 (2011) (excluding despite the fact seasonal employees perform the same work under basically the same conditions of employment as permanent work force). See also *Georgia Highway Express, Inc.*, 150 NLRB 1649, 1650 fn. 4 (1965) (citing differences in terms and conditions of employment in excluding peak period laborers as casual employees).

With respect to this factor, the Board has stated that bargaining history confined to a unit of year-round employees is not controlling with respect to the issue of the unit placement of the employer's seasonal employees. Accordingly, where other factors favor their inclusion, the continued exclusion of seasonals from an historical unit is not warranted. *William J. Keller, Inc*., 198 NLRB 1144 (1972).

20-360 Transition

460-5067-5600

The Board has also considered whether seasonal employees have become permanent employees, but the Board has not consistently discussed this consideration. Compare *Freeman Loader Corp.*, 127 NLRB 514, 515 (1960) (seasonal employees excluded based, inter alia, on fact they rarely became permanent employees), with *Baumer Foods, Inc.*, 190 NLRB 690 (1971) (no mention of whether seasonal employees are ever hired as regular employees). In other cases, the Board has mentioned this circumstance without necessarily specifically relying on it. *California Vegetable Concentrates, Inc*., 137 NLRB 1779, 1780–1781 (1962); see also *Flat Rate Movers, Ltd.*, 357 NLRB 1321, 1332 (2011) (commenting that college student seasonal workers had little likelihood of becoming permanent employees).

20-370 Timing of Seasonal Elections

370-0750-4900

Board policy is to direct elections involving seasonal employees at or 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, 710 (1955); *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974). That said, circumstances may be such that the *highest* peak is not required. *Elsa Canning Co*., 154 NLRB 1810, 1812–1813 (1965); *Saltwater, Inc.*, 324 NLRB 343, 344 (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. *Baugh Chemical Co*., 150 NLRB 1034, 1035–1036 (1965). Cf. *Aspen Skiing Corp*., 143 NLRB 707, 711 (1963) (directing immediate election in view of unopposed request, number of summer employees and high rate of reemployment).

The delay in conducting the election will not require a new showing of interest. *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974).

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, 1000–1002 (1977), the Board described four categories of cases in which the issue of student eligibility to vote is presented. Although, as noted below, *St. Clare's Hospital* was subsequently overruled, and subsequent developments (including *Columbia University*, 364 NLRB No. 90 (2017)) may have limited the legal significance of these four categories, they remain useful as a factual framework for discussing Board precedent concerning student workers.

a. Students Employed By a Commercial Employer in a Capcity Unrelated to the Student's Course of Study

362-6736

460-5067-4500

In such situations, students may be included in a petitioned-for unit of nonstudent employees if

the students meet the community-of-interest test and are otherwise eligible. See, e.g., *System Auto Park & Garage*, 248 NLRB 948 (1980); *Hearst Corp., San Antonio Light Div.*, 221 NLRB 324 (1975); *Mount Sinai Hospital*, 233 NLRB 507, 508 (1977); *Gruber's Super Market, Inc.*, 201 NLRB 612, 613 fn. 5 (1973); *Fairfax Family Fund, Inc.*, 195 NLRB 306, 309 (1972); *Pittsburgh Metallurgical Co.*, 95 NLRB 1 (1951); *Burrows & Sanborn, Inc.*, 84 NLRB 304, 307 (1949). If the students do not share a community of interest, they may be represented separately if such a unit would be appropriate. See, e.g., *Six Flags Over Georgia, Inc.*, 215 NLRB 809 (1974). If a separate unit is not appropriate, however, and the students' employment is sporadic and/or the students do not share a community of interest with regular employees, they are excluded. See, e.g., *Beverly Manor Nursing Home*, 310 NLRB 538, 538 fn. 3 (1993); *Shady Oaks*, 229 NLRB 54, 55 (1977); *Post Houses, Inc.*, 161 NLRB 1159, 1171–1172 (1966); *Giordano Lumber Co.*, 133 NLRB 205, 207 (1961); see also *Leland Stanford Jr. University*, 194 NLRB 1210, 1214 & fn. 26 (1972) (excluding student firefighters from "craft-type" unit of those possessing typical firefighter skills where students did not possess such skills and training).

With particular respect to summer student employees, a student whose employment will terminate beginning with the school year is excluded as a temporary employee. *J.K. Pulley Co.*, 338 NLRB 1152 (2003); *Georgia-Pacific Corp.*, 195 NLRB 258, 259 (1972); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971); *Fisher Controls Co.*, 192 NLRB 514, 515 (1971); *Walgreen Louisiana Co.*, 186 NLRB 129, 130 (1970). But a student who continues to work on a regular part-time basis after school starts may be included. See *Crest Wine & Spirits*, 168 NLRB 754 (1967); *Sandy's Stores*, 163 NLRB 728, 729 (1967).

b. Students Employed By Their Own Educational Institution in a Capcity Unrelated to the Student's Course of Study

362-6736

460-5067-4500

Historically, the Board generally excluded such students from units that included nonstudent employees (*Georgetown University*, 200 NLRB 215, 216 (1972); *Cornell University*, 202 NLRB 290, 291–292 (1973); *Barnard College*, 204 NLRB 1134 (1973)), and would not afford them separate representation (*San Francisco Art Institute*, 226 NLRB 1251 (1976)), reasoning that the employment is secondary to the students' primary interest of acquiring an education. Cf. *Saga Food Service*, 212 NLRB 786 (1974) (excluding students from unit of cafeteria workers employed by university contractor and finding it would not effectuate purposes of the Act to direct an election in a unit confined to student workers based on fact that "their primary concern is their studies"). But see *University of West Los Angeles*, 321 NLRB 61 (1996) (including students in unit with other employees where they shared a community of interest and the students' status as employees was not directly or indirectly related to their continued enrollment as students).

In *Columbia University*, 364 NLRB No. 90, slip op. at 20 fn. 130 (2016), however, the Board overruled "cases like *San Francisco Art Institute* . . . [t]o the extent that [they] suggest that the mere fact of being a *student* in short-term employment with one's school renders one's interests in the employment relationship too 'tenuous'" to be accorded bargaining rights.

c. Students Employed By a Commercial Employer in a Capcity Related to the Student's Course of Study

362-6736

460-5067-4500

The Board historically excludes such students from the unit. See, e.g., *Pawating Hospital Association*, 222 NLRB 672 (1976); *Highview, Inc.*, 223 NLRB 646, 649 (1976); *Colecraft Mfg.*, 162 NLRB 680, 688–689 (1967). In the foregoing cases the Board emphasized that the students' interests differed from those of other employees, and particularly singled out the fact that few, if

any, students remained with the employer following conclusion of their academic program. Compare *Parkwood IGA Foodliner*, 210 NLRB 349 (1974), in which the Board included two high school students in a unit where they had begun working for the employer, subsequently enrolled in a program which gave them school credit for their work, the record showed they were an integral part of the store's work force, and there was no indication their employment would terminate at the end of the program.

d. Students Who Perform Services at Their Educational Institution Directly Related to Their Educational Program

362-6736

460-5067-4500

The Board's approach to this type of student has varied over time. In *Adelphi University*, 195 NLRB 639 (1972), the Board excluded graduate student assistants from a unit of faculty members, holding they did not share a community of interest. In *Leland Stanford Junior University*, 214 NLRB 621, 623 (1974), the Board went further, holding that certain university research assistants were "primarily students" and thus not statutory employees. The Board subsequently extended this rationale to house staff at teaching hospitals. *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976); *St. Clare's Hospital*, 229 NLRB 1000 (1977).

In *Boston Medical Center*, 330 NLRB 152 (1999), the Board overruled *Cedars-Sinai* and *St. Clare's Hospital* and held that interns, residents, and clinical fellows (i.e., house staff) at teaching hospitals were statutory employees entitled to engage in collective bargaining. See also *St. Barnabas Hospital*, 355 NLRB 233 (2010), reaffirming *Boston Medical Center*.

With respect to graduate assistants, in *New York University*, 332 NLRB 1205 (2000), the Board held they were statutory employees. The Board reversed *New York University* in *Brown University*, 342 NLRB 483 (2004), but subsequently overruled *Brown University* in *Columbia University*, 364 NLRB No. 90 (2016). The petitioned-for unit in *Columbia University* consisted of both graduate and undergraduate teaching assistants, as well as graduate research assistants, which the Board found was an appropriate unit. The Board also rejected an argument that certain of the petitioned-for classifications consisted of temporary employees who could not be included in the unit. Id., slip op. at 20–21.

20-500 Dual-Function Employees

177-8501-7000

362-6790

460-5067-4900

Dual-function employees are individuals who perform both unit and nonunit work for the employer. 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, 519 (1963); *Wilson Engraving Co*., 252 NLRB 333, 334 (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." *Berea Publishing Co.*, 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, 797 (2002); *Ansted Center*, 326 NLRB 1208 (1998); *Air Liquide America Corp*., 324 NLRB 661, 662 (1997); *Avco Corp.*, 308 NLRB 1045

(1992); *Continental Cablevision*, 298 NLRB 973, 975 (1990); *Alpha School Bus Co*., 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987).

Berea Publishing overruled cases requiring that a dual-function employee spend over 50 percent of his or her time performing unit work to be included in the unit (see, e.g., *Denver-Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184 (1961), and restored the prior longstanding "substantial interest" rule set forth in *Ocala Star Banner*, 97 NLRB 384 (1951). Cf. *Grocers Supply Co.*, 160 NLRB 485, 487 fn. 2 (1966) (although citing *Denver-Colorado Springs-Pueblo-Motor Way*, reaching a result consistent with *Berea Publishing*).

There is no bright line rule regarding the amount of time required to be spent performing unit work to warrant the inclusion or exclusion of dual-function employees; rather, the Board makes this determination according to the facts of each case. *Bredero Shaw*, 345 NLRB 782, 786 (2005); *Martin Enterprises*, 325 NLRB 714, 715 (1998). Consistent with *Berea Publishing*, the Board has found dual-function employees have a substantial interest and should be included in a unit when the dual-function employees perform unit functions for less than half the time. See, e.g., *Wilson Engraving Co.*, 252 NLRB 333, 334 (1980).

That said, the Board generally finds that dual-function employees should be included in a bargaining unit if they spend 25 percent or more of their time performing unit work. *WLVI Inc*., 349 NLRB 683, 686 fn. 5 (2007); *Avco Corp.*, 308 NLRB 1045, 1047 (1992). Thus, in *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002), the Board included a dual-function employee who spent at least 25 to 30 percent of his time performing unit work. By contrast, 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, 563 (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, 817 fn. 3 (2003) (excluding employee who spent 15 to 25 percent of his time performing unit work); *Martin Enterprises*, 325 NLRB 714, 715 (1998) (excluding individual who spent at most 10 percent of his time doing unit work); *Pacific Lincoln-Mercury, Inc.*, 312 NLRB 901, 901 fn. 4 (1993) (noting 5 to 10 percent of time spent doing unit is insufficient); *Continental Cablevision of St. Louis*, 298 NLRB 973, 974 (1990) (excluding dual-function employees who averaged 17.28 percent of total hours spent on unit work).

As stated above, the inquiry is not limited to the percentage of time spent on unit work, but also whether the dual-function employees share a community of interest with unit employees. See, e.g., *Landing Construction Co*., 273 NLRB 1288 (1984) (individuals did not perform significant amount of work constituting 50 percent of unit work); *U.S. Pollution Control, Inc.*, 278 NLRB 274 (1986) (excluding individual who did not share community of interest with unit employees). On a related note, the Board has indicated that *Berea Publishing* does not apply where individuals perform unit work irregularly, as an integral part of their nonunit work, or where unit work is merely incidental to their primary responsibilities. See *W. C. Hargis & Sons*, 164 NLRB 1042, 1048 fn. 35 (1967) (individuals spent substantially less than 50 percent of their time on unit work and did so irregularly or as integral part of nonunit work); *Continental Cablevision of St. Louis*, 298 NLRB 973 (1990) (unit work merely incidental to primary responsibilities);

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, 1030 fn. 1 (1987); see also *Oxford Chemicals*, 286 NLRB 187, 188 (1987) (stating that once it is shown dual-function employees have

substantial and continuing interest in unit's terms and conditions of employment, "it is both unnecessary and inappropriate to evaluate other aspects of the dual-function employee's terms and conditions of employment in a kind of second tier community-of-interest analysis").

Dual-function analysis does not apply where the employee has ceased performing nonunit work by the eligibility date. *Meadow Valley Contractors*, 314 NLRB 217 (1994); see also *Martin Enterprises*, 325 NLRB 714, 715 (1998) (for transferred employee to qualify as dual-function employee, qualification must be based on regular and substantial performance of unit work after transfer).

The placement of dual-function employees is not resolved by use of the *Davison-Paxon* formula (see sec. 20-100). *Columbia College*, 346 NLRB 726, 729 fn. 10 (2006); *Martin Enterprises*, 325 NLRB 714, 715 (1998); *Syracuse University*, 325 NLRB 162 (1997).

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, 226 (2006).

The dual-function analysis cannot be used to "create more than one unit consisting of an entire work force just because all employees" perform several functions. *Sunray Ltd*., 258 NLRB 517, 518 (1981); see also *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262, 1266 (D.C. Cir. 1991) (stating two unions "simply cannot be the 'exclusive' bargaining representative of the same employee with respect to the same conditions of employment").

Where there are two units, however, and an employee belongs to both units by virtue of his or her dual-function status, that employee may be able to vote in both elections if the time spent and work performed by the dual-function employee in one job classification is distinct and separate from time spent and work performed in another classification. *KCAL-TV*, 331 NLRB 323 (2000).

The Board will not include dual-function employees in a petitioned-for unit where they are already expressly included in a unit covered by a contract with bar qualities. *Otasco, Inc.*, 278 NLRB 376 (1986); see also *Davis Supermarkets*, 306 NLRB 426, 428 (1992). But see *Columbia College*, 346 NLRB 726, 729–730 (2006), where the Board held that an existing contract covering part-time faculty did not bar the inclusion of part-time faculty who also worked as tutors in petitioned for unit including tutors, given that the "the dual-function tutors' job duties as part-time faculty are separate and independent from their duties as tutors," and thus the dual-function tutors/part-time faculty did not hold "a single, integrated job with responsibilities spanning multiple classifications." See also id. at 730 fn. 12 (distinguishing *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991).

For a discussion of the dual-function issue in situations where employees have out-of-unit supervisory responsibilities, see section 17-518.

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, 1254–1255 (1961); *Johnson's 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, 816 (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, 1363 (1962); *Sheffield Corp*., 123 NLRB 1454, 1457–1458 (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, 1398 (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, 1270–1271 (1963); see also *Big "N," Department Store No. 307*, 200 NLRB 935, 936 (1972); *Johnson's Auto Spring Service*, 221 NLRB 809 (1975); section 17-516. With respect to management trainees, the Board applies a four-part test to determine whether, under community-of-interest principles, they should be included in a unit. See *Nationsway Transport Service*, 316 NLRB 4 (1995) (citing *Curtis Industries*, 218 NLRB 1447, 1452 (1975)).

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, 1041 (1957); see also *Data Technology Corp*., 281 NLRB 1005, 1006 fn. 3 (1986). Employees in a training program being trained to perform a variety of functions, many of whom are assigned to production classifications on complete of the program, were included in the unit. *UTD Corp.*, 165 NLRB 346 (1967); see also *General Electric Co.*, 131 NLRB 100, 104–105 (1961).

Where trainees have different backgrounds from the employees in the unit and have a good probability of achieving supervisory status, however, their interests are different from production and maintenance employees and they are excluded from such a unit. *Cherokee Textile Mills, Inc.*, 117 NLRB 350, 351 (1957); *WTOP, Inc*., 115 NLRB 758 (1956); see also *M. O'Neil Co*., 175 NLRB 514, 517 (1969).

Aside from supervisory trainees, the Board will exclude other types of trainees if they do not share a sufficient community of interest with other employees. Thus, the Board excluded "sales trainees" from a warehouse unit where the trainees were paid more than warehouse employees, received bonuses for which others were not eligible, did not punch the clock, and would not progress to warehouse positions (but instead would become sales employees or be terminated). *Garrett Supply Co.*, 165 NLRB 561, 562 (1967); see also *East Dayton Tool & Die Co.*, 194 NLRB 266 (1972) (former shop employee excluded where current status and duties as sales trainee aligned him with sales engineers rather than rank-and-file employees in bargaining unit).

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, 136 (1959).

See section 20-200 for a case concerning employees working under Comprehensive Employment and Training Act (CETA) programs.

20-630 Clients (Rehabilitation)

177-2478

460-5067-9500

Disabled 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. The touchstone for this determination is the nature of the relationship between the employer and the individual. If it is a typical industrial relationship, the individuals are statutory employees, but if the relationship is rehabilitative with working conditions that are not typical of the private sector, the individuals are not statutory employees. See id. at 768; see also *Brevard Achievement Center*, 342 NLRB 982 (2004). The burden of establishing a "primarily rehabilitate" relationship rests with the employer (as the party asserting

such status). *Goodwill Industries of North Georgia, Inc.*, 350 NLRB 32, 35 (2007).

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 non-disabled 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, 766 (1991).

In *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995), the Board found that a group of disabled workers were employees as their relationship with the employer was "characterized by business considerations more typical of service employment in the private sectors." See also *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, rather than directing an election to determine whether an appropriate unit of employees wish to be represented, voting groups are instead established to ascertain the wishes of certain employees with respect to a unit with an existing collective-bargaining representative through 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). Note, however, that not all self-determination elections are *Armour-Globe* elections.

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) separate craft or traditional departments are sought by one union, with another seeking an overall unit, and there is no prior plantwide bargaining history; (4) 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 (5) the issue is the inclusion of a group in an existing unit as against remaining unrepresented.

When employees elect, through a self-determination election, to join a unit already covered by a collective-bargaining agreement, these employees do not automatically come under the terms of the existing agreement. *UMass Memorial Medical Center*, 349 NLRB 369, 370–371 (2007); *Wells Fargo Armored Service Corp*., 300 NLRB 1104 (1990); *Federal-Mogul Corp.*, 209 NLRB 343 (1974).

Examples of each type of self-determination election are set forth 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 at the end of this chapter.

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. *Martin-Marietta Corp*., 139 NLRB 925 (1962); see also *City Electric, Inc*., 225 NLRB 325 (1976) (similar situation in two-location unit).

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, Inc.*, 151 NLRB 861, 865–866 (1965).

See section 21–600 for a 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).

It should be noted that a severance election cannot result in a no-union choice; rather, the choices on the ballot are limited to the unions involved. *American Tobacco Co.*, 115 NLRB 218 (1956); see also *General Dynamics/Telecommunications*, 140 NLRB 1286 (1963); *Allan, Lane & Scott*, 137 NLRB 223 (1962).

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, 1117–1118 (1961); see *BP 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 section 21–600 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, 612 fn. 1 (1988); *Centralia Convalescent Center*, 295 NLRB 42 (1989). Cf. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999) (finding region had been put on notice of professional employee status issue and remanding for hearing to take evidence to determine whether *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).

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, 643 (1973).

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 a subsequent *Sonotone* election in the same unit regardless of whether the professionals have previously voted for inclusion in the overall unit. *American Medical Response, Inc.*, 344 NLRB 1406, 1408–1409 (2005).

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, 1060–1061 (1981). Compare *Corporacion de Servicios Legales*, 289 NLRB 612, 613 (1988); *Group Health Assn.*, 317 NLRB 238, 244 fn. 21 (1995).

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

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 provided that the employees to be added constitute an identifiable, distinct segment and share a community of interest with unit employees. See, e.g., *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972). 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. *Mount Sinai Hospital*, 233 NLRB 507 (1977); see also *Warner-Lambert Co.*, 298 NLRB 993, 996 (1990). 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., *Chrysler Corp.*, 194 NLRB 183 (1971), and cases cited therein at fn. 4.

By way of example, in *University of Pittsburgh Medical Center*, 313 NLRB 1341 (1994), the Board directed self-determination election to determine whether the petitioned-for voting group of telecommunication specialists wished to be added to an existing unit of skilled maintenance employees. The Board found that the telecommunications specialists were also skilled maintenance employees and thus could be added to the existing unit, and then found that they were an appropriate voting group and that other employees at a related facility did not need to be added to the voting group.

The Board's policy barring unit clarification petitions during the term of a contract that covers the classifications in question does not apply to petitions for self-determination elections. *UMass Memorial Medical Center*, 349 NLRB 369 (2007).

Where a union demanded recognition of certain employees, claiming they were an accretion to the existing unit it represented, the Board, upon finding that the employees were not in fact an

accretion but were entitled to a self-determination election, processed the employer's petition, providing a vote for the union would add them to the existing unit, while a vote against the union would show their desire to remain outside the unit. *Photype, Inc*., 145 NLRB 1268, 1272–1273 (1964). Cf. *Carr-Gottstein Foods Co.*, 307 NLRB 1318, 1319 (1992), in which the Board commented that because the union only sought the accrete the employees involved, there was no demand for recognition and the petition would ordinarily be dismissed, but nevertheless directed a self-determination election to avoid the possibility that the employees would, by virtue of an arbitrator's decision, be "accreted" to the unit without being given an opportunity to express their representational desires.

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); *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1524 fn. 6 (1964).

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).

As *Rostone Corp*. indicates, 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 an appropriate "residual" group as the "only remaining unrepresented employees" (see section 12-400) or may appropriately be added to the existing unit through a self-determination election. Thus, in *U. S. Steel Corp.*, 137 NLRB 1372 (1962), the Board directed an election among the only remaining unrepresented employees, giving them the options of (1) representation by the petitioner in a separate unit, (2) joining the intervenor's existing unit, or (3) remaining unrepresented.

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).

Thus, employees who were excluded from the existing unit through "historical accident rather than upon the basis of any real difference in function 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 is also apparent, in the light of this reasoning, that when the unrepresented employees constitute an appropriate unit by themselves, the rule as enunciated in *D. V. Displays Corp*., 134 NLRB at 571, does not apply since "no true fringe group" is involved. A self-determination election is therefore in order in such circumstances. *Bell Bakeries of St. Petersburg*, 139 NLRB 1344, 1350 (1962). For an example of a nonaccretion finding and a resulting self-determination election, see *Almacs Inc.*, 176 NLRB 671 (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. *Bell Bakeries of St. Petersburg*, 139 NLRB 1344, 1350 (1962). 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, 299 (1963). See also *Armstrong Rubber Co*., 144 NLRB 1115, 1119 (1963), in which a second union sought to represent the plant clericals separately and the Board found such an arrangement permissible. For a discussion of the effects of such an election on a later filed decertification petition see *Beloit Corp*., 310 NLRB 637 (1993).

With respect to the health care industry, the Board has noted that a self-determination election does not implicate undue proliferation, given that the procedure simply adds employees to an existing unit. See *St. John's Hospital*, 307 NLRB 767 (1992). See also *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011), and *Rush University Medical Center v. NLRB*, 833 F.3d 202 (D.C. Cir. 2016), 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 *American Potash & Chemical Corp*., 107 NLRB 1418, 1427 fn. 12 (1954) (adopting the dissenting opinion in *Pacific Intermountain Express* Co., 105 NLRB 480, 482–485 (1953)). It was subsequently spelled out in greater detail in *Felix Half & Brother, Inc*., 132 NLRB 1523 (1961).

In *Felix Half & Brother*, 132 NLRB at 1524–1525, 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, the Board directed elections 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, 873 (1978); *Sherwin-Williams Co*., 173 NLRB 316, 317 fn. 5 (1969); *Parke Davis & Co*., 173 NLRB 313, 315 fn. 11 (1969); *Penn-Keystone Realty Corp*., 191 NLRB 800, 804 fn. 24 (1971).

22. REPRESENTATION CASE PROCEDURES AFFECTING THE ELECTION

As discussed in earlier chapters, 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, focusing on the procedural steps 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 chapter 24.

This chapter is designed to provide a general overview of representation case procedures only; the reader should refer to the Board's Rules and Regulations, Section 102.69 and 102.70, and NLRB Casehandling Manual section 11300 through 11478 for guidance on specific procedural matters.

Note also that the 2014 amendments to the Board's election procedures have granted regional directors discretion to defer litigation of matters that are not relevant to the determination of whether a question concerning representation exists. See GC Memo 15-06, "Guidance Memorandum on Representation Case Procedures," p. 12–19 (Apr. 6, 2015), which discusses which issues must be litigated and which issues may be deferred for post-election proceedings, if necessary.

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 628 (2011). The parties' positions regarding the election date and other election details are solicited at the preelection hearing. Rules sec. 102.66(g)(1). Under Rules section 102.67(b), the regional director "shall schedule the election for the earliest date practicable consistent with these rules." CHM section 11302.1 states that an election "shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served on the parties, unless this requirement is waived by the parties entitled to the list." 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, 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. 11306.1. All elections are by secret ballot. See Rules sec. 102.69(a).

22-103 The Question and Choices on the Ballot

370-4200 et seq.

The question on the ballot accords with the election agreement or direction of election. See CHM sec. 11306.2. Where a self-determination election is held in which professionals are involved, see CHM sec. 11090.1 with respect to the wording; see also section 21-400. 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 section 102.69(a). See also chapter 8.

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. See *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954) (place); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (mail ballot).

With respect to rerun elections (discussed in more detail at 22-121), in *Austal USA, LLC*, 357 NLRB 329, 331 (2011), the Board stated that it could not determine if the regional director had exercised discretion in deciding the site of the rerun election, and set out four factors to be considered in making such a decision. In *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1821–1823 (2011), the Board elaborated further on these factors. For more in this issue, see OM Memo 12–50, "Guideline Memorandum for Evaluating Location of Rerun Elections" (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. For more on selecting the site, see CHM section 11302.2.

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 sec. 11316; see also 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. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and advises employees that the individuals are neither included in, nor excluded from, the unit inasmuch as the regional director has permitted them to vote subject to challenge, and that their eligibility or inclusion will be resolved, if necessary, following the election. Copies of the notice must be posted in conspicuous places by the employer, including all places where notices to employees in the unit are customarily posted, and the employer must also distribute the notice electronically if the employer customarily communicates with employees in the unit electronically. The notice must be posted at least 3 full working days before the election. Rules secs. 102.62(e), 102.67(b) and (k); see also CHM secs. 11314–11315; 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); CHM sec. 11351.1.

22-107 Voting Eligibility

362-6708

Voting eligibility is discussed in chapter 23. The voter list requirements (historically referred to as the *Excelsior* rule after *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966)) are treated in section 24-324. For other significant details, see Rules secs. 102.62(d), 102.67(l); CHM secs. 11312–11313.

22-108 Observers

370-4900

In a manual election, any party may be represented by observers of its own selection, subject to such limitations the regional director may prescribe. Rules sec. 102.69(a). Each party is permitted to be represented by an equal number of observers, although a party may waive the opportunity to be represented by an observer; ordinarily, observers for all parties should be employees of the employer, although there may be exceptions. CHM sec. 11310. Parties must be given "a *reasonable* opportunity" to obtain an equal number of observers. *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1426 (2010). The privilege of having observers is extended to parties; nonparticipating unions or "no-union" groups should not be permitted to select observers. CHM sec. 11310.3; see also 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. See CHM sec. 11324; sec. 24-422.

22-110 Mail Ballots

370-6300

370-6375

The Board's longstanding rule is that elections should, as a general rule, be conducted manually, but a regional director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conclude an election by mail ballot (or a combination of mail and manual ballots). The Board has stated that at least three situations "normally suggest the propriety of using mail ballots": (1) where eligible voters are "scattered" over a wide geographic area due to their job duties; (2) where they are "scattered" in that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, lockout or picketing in progress. In such situations, a regional director may also consider the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of Board resources. *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998); see also *Willamette Industries*, 322 NLRB 856 (1997); *London's Farm Dairy, Inc.*, 323 NLRB 1057 (1997); *Reynolds Wheels International*, 323 NLRB 1062 (1997); CHM sec. 11301.2.

A regional director cannot, however, order a mail ballot election where the parties' stipulated election agreement calls for a manual election, absent special circumstances. *T & L Leasing*, 318 NLRB 324 (1995).

In mixed manual-mail elections, mail ballots are sent to those eligible voters who cannot vote in person. For more on mixed manual-mail elections, see CHM section 11335.

Mail ballots are not sent to employees in temporary layoff status unless all parties agree. CHM sec. 11336.

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).

Ballots received after the due date but before the ballot count should be counted. *Watkins*

Construction Co., 332 NLRB 828 (2000). Ballots received after the count are excluded. See, e.g., *Classic Valet Parking*, 363 NLRB No. 23 (2015); *Premier Utility Services*, 363 NLRB No. 159 (2016); *NCR Corp. v. NLRB*, 840 F.3d 838 (D.C. Cir. 2016).

For further discussion of mail ballots, see section 24-427.

22-111 Absentee Ballots

370-6301

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). See also CHM sec. 11302.4.

22-112 Challenges

370-5600

Any party and Board agents may challenge the eligibility of any voter for good cause. Rules sec. 102.69(a). The Board agent must challenge anyone whose name is not on the eligibility list or has been permitted to vote subject to challenge, and must challenge anyone the agent knows or has reason to believe is ineligible to vote. CHM Sec. 11338.2(b). But "[t]he 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 observer 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, if feasible. CHM sec. 11338.5. The merit of the challenge should not be argued. CHM sec. 11338.6. 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. CHM sec. 11338.7. For more on the challenge procedure, see Rules sec. 102.69(a); CHM sec. 11338. Regional directors and the Board have long exercised discretion in deciding whether to allow certain individuals to vote subject to challenge and to resolve their eligibility, if necessary, following the election. See, e.g., *Silver Cross Hospital*, 350 NLRB 114 (2007). Under the 2014 amendments to the Board's election procedures, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. Rules sec. 102.64(a). In such situations, the regional director will direct that potentially affected individuals vote subject to challenges. Rules sec. 102.67(b).

Where an individual's eligibility has been fully litigated at the preelection hearing, and the regional director has found that the individual is included in the unit, that person should be permitted to vote without challenge unless there have been changed circumstances. See *Anheuser-Busch, LLC*, 365 NLRB No. 70 (2017); CHM sec. 11338.7; see also Rules sec. 102.65(e)(3).

Generally postelection challenges are not permitted. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 328–329 (1946); *Poplar Living Center*, 300 NLRB 888, 888 fn. 2 (1990); CHM sec. 11392.5. The exception is where the party knows of the ineligibility, suppressed the facts, and would otherwise benefit from its actions. See *Lakewood Engineering & Mfg*., 341 NLRB 699, 700 (2004); *Solvent Services*, 313 NLRB 645, 646 (1994); *Atlantic Industrial Constructors, Inc*., 324 NLRB 355, 355 fn. 2 (1997). See also *CHS, Inc.*, 357 NLRB 514 (2001), discussed more fully in section 22-116.

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).

For a discussion of Agency guidelines for handling challenge ballots see *Paprikas Fono*, 273 NLRB 1326 (1984).

See also section 22-116.

22-113 The Count

370-7700

For the details of the counting of ballots, see Rules sec. 102.69(a); CHM sec. 11340.

22-114 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. See also Rules sec. 102.69(a).

22-115 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. But see CHM section 11350.1 and Rules section 102.70, which discuss exceptions to this policy.

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 23-220.

22-116 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. CHM sec. 11362.1. As noted in sec. 22-112, postelection challenges are generally not permitted.

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 514 (2011); *Coca Cola Bottling of Miami*, 237 NLRB 936, 952 (1978).

The investigation is nonadversarial, insofar as the Agency is concerned. CHM sec. 11362.2. The regional director has the authority to resolve challenges administratively, by hearing, or by a combination of both. CHM sec. 11364. If the regional director determines a hearing is not warranted, he or she will issue a decision disposing of the challenges. The regional director will direct a hearing if he or she determines that the challenges raise substantial and material factual issues. Following the hearing, the hearing officer will prepare a report recommending disposition of the challenges; exceptions may be filed with the regional director, who will then decide the matter upon the record. Rules sec. 102.69(c)(1). Resolution of the challenges by agreement is permitted. CHM sec. 11361.1.

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 *International Ladies' Garment Workers' Union*, 137 NLRB 1681

(1962); *Monarch Federal Savings & Loan Assn.*, 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.

Board review of decisions on challenged ballots is obtained by filing a request for review pursuant to the procedures set forth in Rules section 102.67. See also Rules sec. 102.69(c)(2). With respect to the time in which to file a request for review following a decision to open and count ballots, see GC Memo 15-06, "Guidance Memorandum of Representation Case Procedure Changes," p. 27 (Apr. 6, 2015).

In the event there are both objections and determinative challenges, they are ordinarily processed simultaneously, but they may be treated separately under certain circumstances. For example, the resolution of some or all challenges may moot the objections of one party. See CHM sec. 11360.3; *Pine Shores, Inc*., 321 NLRB 1437 (1996) (Board resolved challenges first, stating it would only direct a new election if the petitioner won the election); *Skyline Builders, Inc.*, 340 NLRB 109 (2003) (stating challenges should be resolved before objections, as a union victory would make it unnecessary to consider the union's objections).

Following resolution of challenges, a revised tally of ballots issues. Rules sec. 102.69(e); CHM sec. 11378.1.

See also section 22-110.

22-117 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 at some length chapter 24. 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. CHM sec. 11392.1.

Objections must be filed within 7 days after the tally of ballots has been prepared. Rules sec. 102.69(a); see also *Medtrans*, 326 NLRB 925, 925 fn. 2 (1998). 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. Rules sec. 102.69(a); CHM sec. 11392.4. They must contain a statement of the reasons therefor, couched in specific, as distinguished from conclusory terms. Rules sec. 102.69(a); CHM sec. 11392.5. Put differently, the objections must provide "meaningful notice" of the conduct alleged. *Factor Sales, Inc.*, 347 NLRB 747 (2006).

The Board has long required that 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). Pursuant to the 2014 amendments to the Board's election procedures, the objecting party now must file a written offer of proof at the same time objections are filed (although the regional director can extend the time upon a showing of good cause). Rules sec. 102.69(a). The Board's prior practice was that evidence supporting the objections be filed within 7 days of filing objections. *Craftmatic Comfort Mfg. Corp.*, 299 NLRB 514 (1990); *Goody's Family Clothing*, 308 NLRB 181 (1992). The offer of proof lists witnesses and a summary of their anticipated testimony. Rules sec. 102.66(c); CHM sec. 11392.6. This is consistent with the Board's practice prior to the 2014 amendments. See *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983).

As provided by Rules sec. 102.69(a), objections will be overruled where the objecting party fails to include an offer of proof with objections, or to serve a copy of the objections on the other parties, *Aramark Uniform & Career Apparel*, 364 NLRB No. 120 (2016).

Service requirements are set out at Rules sections 102.2 through 102.7, but note that under the 2014 amendments, the party filing objections must now serve the objections, along with the short statement, on the other parties. Rules sec. 102.69(a).

In *Greenville Skilled Nursing & Rehabilitation Center*, 356 NLRB 1058 (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.

22-118 Investigation of Objections

393-7022

The 2014 amendments to the Board's election procedures codify existing practices permitting the regional director to investigate determinative challenges and objections by examining evidence offered in support thereof to determine if a hearing is warranted. 79 Fed. Reg. 74412 (Dec. 15, 2014).

If the regional director conducts an investigation of the objections, the investigation of objections is nonadversarial, insofar as the Agency is concerned. CHM sec. 11392.10. 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. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); see also CHM sec. 11392.11. But if, in the Regional Director's discretion, the additional circumstances reveal matters that are related to the alleged objectionable conduct (*Renco Electronics, Inc.*, 325 NLRB 1196 (1998)), or which raise substantial and material issues affecting the conduct of the election, this aspect is considered. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); *Burns International Security Services*, 256 NLRB 959 (1981); see also CHM sec. 11392.11. For a discussion of the authority of the hearing officer to consider unalleged conduct see *Precision Products Group, Inc.*, 319 NLRB 640 (1995). Compare *Pacific Beach Hotel*, 342 NLRB 372, 373 (2004).

The regional director issues a decision at the conclusion of the investigation if he or she concludes that a hearing is not warranted. See Rules sec. 102.69(c)(1)(i).

22-119 Hearing on Objections

393-7033

If the regional director concludes that the evidence described in the offer of proof accompanying objections could be grounds for setting aside the election if introduced at a hearing, he or she will direct a hearing. Rules sec. 102.69(c)(1)(ii). 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 specific evidence at a hearing that, if credited, would warrant setting aside the election." *Transcare New York, Inc.*, 355 NLRB 326 (2010); see also *Durham School Services, LP v. NLRB*, 821 F.3d 52 (D.C. Cir. 2016) (agreeing with Board that employer's offer of proof was insufficient to warrant hearing).

Objections may be adjusted by voluntary agreement of the parties. CHM sec. 11391.2.

If challenges and objections arise in the same matter, they ordinarily are processed simultaneously (CHM sec. 11390.3), so it is possible that if both challenges and objections merit a hearing, they will be dealt with at a single hearing. 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); Rules sec. 102.69(c)(1)(ii). Appropriate recommendations are then made in the judge's decision and, except in the case of an election held pursuant to a consent-election agreement (see Rules sec. 102.62(a) and (c)), the case is transferred to the Board. Rules sec. 102.69(c)(1)(ii) and (c)(2). Where a consent agreement

is involved, the cases are severed following the judge's decision and the representation case is transferred to the regional director for further processing. Rules sec. 102.69(c)(1)(ii).

The objections/challenges hearing is conducted by a hearing officer. 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 11428-11430. See also Rules sec. 102.69(c)(1)(iii). Where necessary, the Board will provide interpreter services at Agency cost in representation hearings. *George Joseph Orchard Siding, Inc*., 325 NLRB 252 (1998).

Following the hearing, the hearing officer prepares a report recommending disposition of the issues. CHM sec. 11432. 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 regional director. See CHM section 11434.

a. Subpoenas

Subpoenas are available to the parties subject to the standards set out in Rules 102.66(f). 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, 879 fn. 2 (1999). Compare *Woodcrest Health Care Center*, 359 NLRB 522 (2013), incorporated by reference at 361 NLRB No. 117 (2014) (finding hearing officer erred in not issuing requested subpoenas but concluding error was harmless under the circumstances), enfd. sub nom. *800 River Road Operating Co. v. NLRB*, 846 F.3d 378, 386–389 (D.C. Cir. 2017). See *Best Western City View Motor Inn*, 325 NLRB 1186 (1998), and 327 NLRB 468 (1999), for a further discussion of service and enforcement of representation case hearing subpoenas. See also *Associated Rubber Co*., 332 NLRB 1588 (2000) (affirming hearing officer's decision not to require enforcement of the subpoena); *Marian Manor for the Aged*, 333 NLRB 1084 (2001) (same, given lack of showing information sought could not be obtained from employer's own employees); *Skyline Builders, Inc.*, 340 NLRB 109 (2003) (same).

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 sec. 102.118(a)(1). See *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 879 fn. 2 (1999), and the cases cited therein, 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-examination. These statements must be returned by the end of the hearing. See *Wal-Mart Stores*, 339 NLRB 64 (2003), an unfair labor practice case.

22-120 The Decision

393-7077

A decision is made by the regional director after having considered the hearing officer'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 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. CHM sec. 11436.

Under the 2014 amendments to the Board's election procedures, the regional director's decision may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If the election was a consent election held pursuant to Rules section 102.62(a) or (c), the regional director's decision is not subject to Board review; otherwise, the parties can request review pursuant to Rules section 102.67 (unless the representation case has been consolidated with an unfair labor practice case, in which case section 102.46 governs). See Rules sec. 102.69(c)(1)(iii) and (c)(2).

If review is requested, information not provided prior to the regional director's decision is not considered. See *Gannett Satellite Information Network,* 330 NLRB 315 (1999).

22-121 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); *Vemco, Inc*., 315 NLRB 200 (1994). A new showing of interest is not required. *River City Elevator Co.*, 339 NLRB 616 (2003).

The eligibility period for a rerun election is customarily the latest completed payroll period preceding the issuance of the notice of rerun election. See CHM sec. 11436.

The timing and conditions for a rerun election are described in CHM section 11452. For a discussion of policy as to the site of a rerun election, see sec. 22-105; *Austal USA, LLC*, 357 NLRB 329 (2011); *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1819–1823 (2011). The standard notice of election, where modified to explain why the original election was set aside, is found in CHM section 11452.3. 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. CHM sec. 11456. The results of a rerun election may call for a "runoff" (see sec. 22–115), but not if the original election being rerun was itself a runoff or severance election. See CHM sec. 11456.2. The usual objections procedures apply. CHM sec. 11456.3.

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.

22-122 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, see CHM sec. 11470. If not, a certification of results is issued. See CHM sec. 11470. In a self-determination election, a certification of results issues no matter the tally. See CHM sec. 11091. A certification issued by the regional director has the same force and effect as one issued by the Board. Id. In all cases of elections conducted pursuant to a consent agreement, the certification is issued by the regional director. CHM section 11472.1. Further, under the 2014 amendments to the Board's election procedures, the regional director will issue the certification in almost all circumstances where the election is conducted pursuant to a stipulated election agreement or by direction of the regional director or Board. CHM secs. 11472.2 and 11472.3. The prior practice in

cases of stipulated election agreements was that the regional director would issue the certification only where no objections were filed and challenges were not determinative, otherwise the Board would issue the certification. The prior practice for directed elections was similar, although a regional director could also issue the certification in certain circumstances.

As to those cases in which a unit category was not resolved and the union was certified, see GC Memo 12–04, "Guidance Memorandum on Representation Case Procedure Changes," p. 35 (Apr. 6, 2015), for a discussion of how the certified unit will be described.

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 appropriate procedure in such a case, see *Salem Village I, Inc*., 263 NLRB 704 (1982).

An alleged postelection loss of majority support is not relevant to the question of whether a union should be certified as the result of a properly conducted Board election. *Community Support Network*, 363 NLRB No. 78 (2016). Further, an employer is not relieved of its obligation to bargain with a certified representative pending Board consideration of a request for review. *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84, slip op. at 2 (2017) (citing *Benchmark Industries*, 262 NLRB 247, 248 (1982), enfd. mem. 724 F.2d 974 (5th Cir. 1984)).

For information on post-certification proceedings see section 3–900.

22-123 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 *Laborers Local 840 (C. A. Blinne Construction Co.)*, 135 NLRB 1153, 1156 (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 *Retail Wholesale Union District 65 (Eastern Camera & Photo 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 *C. A. 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. *C. A. Blinne*, 135 NLRB 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, Inc.*, 156 NLRB 1236, 1242 fn. 14 (1966).

Petitions filed *after* 30 days are processed under normal representation case procedures and do not serve as a defense to 8(b)(7)(C) picketing which has exceeded 30 days. See *Local Joint Executive Board Hotel Employees (Crown Cafeteria)*, 135 NLRB 1183, 1185 fn. 4 (1962); *Chicago Printing Pressmen's (Moore Laminating, Inc.)*, 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 ordinarily arise by way of challenges at the polling place at the time of the election. Such questions may also be raised in a party's statement of position prior to a preelection hearing or entrance into an election agreement.

This chapter treats 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 chapter 19, 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). Unpaid volunteers are not. *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999). Compare *Seattle Opera Assn.*, 331 NLRB 1072 (2000). Aliens, whether legally or illegally 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 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, e.g., *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf States Asphalt Co.*, 106 NLRB 1212, 1214 (1953); *Reade Mfg. Co.*, 100 NLRB 87, 89 (1951); *Bill Heath, Inc.*, 89 NLRB 1555 (1949); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835, 842 (8th Cir. 1968); *Beverly Manor Nursing Home*, 310 NLRB 538, 538 fn. 3 (1993).

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, 1047 (2003); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 820 fn. 15 (2003). Thus, individuals 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). Similarly, in *Jam Productions, Ltd.*, 338 NLRB 1117 (2003), the Board overruled challenges to voters based on a loss of business after the eligibility (which the employer claimed had rendered the voters ineligible casual employees). See also *North General Hospital*, 314 NLRB 14, 15 (1994) (fact certain employees may be permanently laid off soon after election irrelevant to eligibility).

The employee must be employed and working on the established eligibility date, unless absent for reasons specified in the direction of election. See, e.g., *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973). Those reasons may include illness, vacation, temporary layoff status, economic striker 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); *Barry Controls, Inc.*, 113 NLRB 26 (1955).

With respect to the eligibility date, there is no requirement that, in cases of postponed initial elections, the region should, of its own accord, change a stipulated eligibility date in the absence of a party raising this issue. *Tekweld Solutions, Inc.*, 361 NLRB No. 18 (2014), enfd. 639 Fed. Appx. 16 (2d Cir. 2016).

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); *Greenspan Engraving Corp*., 137 NLRB 1308 (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, 352 (7th Cir. 1985); *Speedway Petroleum*, 269 NLRB 926, 926 fn. 1 (1984); *F & M Importing Co*., 237 NLRB 628, 632–633 (1978). Compare *CWM, Inc.*, 306 NLRB 495 (1992). But employees doing unit work on "on-the-job training" are eligible to vote. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007).

An employee 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. Cf. *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997). Similarly, an employee hired to work at one facility, but being trained at a second, was not included in a unit at the second facility. *Renal Care of Buffalo*, 347 NLRB 1284 (2006).

For a summary of cases dealing with the eligibility of recently hired employees, see *Dynacorp/Dynair Services*, 320 NLRB 120 (1995); see also *Pep Boys–Manny, Moe & Jack*, 339 NLRB 421 (2003).

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 Community Hospital v. NLRB*, 708 F.2d 1436, 1444 (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); *Whiting Corp*., 99 NLRB 117, 122–123 (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, 847 (1997); *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 the 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. *Leather by Grant*,

206 NLRB 961, 961 fn. 1 (1973) Payroll eligibility is conferred by some work during the payroll eligibility period. Id.

23-113 Discharged Employees

362-6766-7000

362-6766-8000

In *Choc-Ola Bottlers, Inc.*, 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 found 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, Inc. v. NLRB*, 478 F.2d 461, 464 (7th Cir. 1973). Compare *Fairview Hospital*, 174 NLRB 924, 928, 930 (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 *Plymouth Towing Co.*, 178 NLRB 651 (1969) (ballot counted where individual was employed at time of balloting but discharged before the count); *Ely & Walker*, 151 NLRB 636, 654 (1965) (individuals unlawfully discharged before election found eligible); *Walter Packing*, 241 NLRB 131, 132 (1979) (individual ineligible where he was informed of termination on election day and did not actually work on that day).

In *Community Action Commission of Fayette County*, 338 NLRB 664, 666 (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. Penney 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. *Champion Farm Div. of 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, 591–592 (1955). This same policy applies with respect to pending grievances, *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1366–1367 (1962), and other litigation where reinstatement is possible. *Grand Lodge Int'l Association of Machinists*, 159 NLRB 137, 143 (1966). See also *Curtis Industries*, 310 NLRB 1212 (1993), applying this same principle in the case of strikers whom the employer contends are permanently replaced but are the subject of litigation contending they were not legally permanently replaced.

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, 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); *Wright Mfg. Co*., 106 NLRB 1234, 1236–1237 (1953). For cases reaffirming this rule, see *Home Care Network, Inc.*, 347 NLRB 859 (2006); *Agar Supply Co*., 337 NLRB 1267, 1268 (2002) (indicating rule could be applied to maternity leave too); *Supervalu, Inc*., 328 NLRB 52 (1999) (mentioning disability leave as well); *Pepsi-Cola Co*., 315 NLRB 1322, 1323 (1995); *Associated Constructors*, 315 NLRB 1255, 1255 fn. 3 (1995); *Vanalco, Inc*., 315 NLRB 618 (1994); and *Thorn Americas, Inc.*, 314 NLRB 943 (1994). See also *Abbott Ambulance of Illinois v. NLRB*, 522 F.3d 447, 450–451 (D.C. Cir. 2008).

The Board requires that the employee have done unit work before going on sick leave, however. *A & J Cartage*, 309 NLRB 319 (1992).

23-115 Laid-Off Employees

362-6766-1000

The test applicable to the eligibility of laid-off employees is "whether there exists a reasonable expectancy of employment in the near future." *Higgins, Inc.*, 111 NLRB 797, 799 (1955); see *Pavilion at Crossing Pointe*, 344 NLRB 582, 583 (2005); *Madison Industries*, 311 NLRB 865, 866 (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 Co.*, 302 NLRB 67 (1991), the Board, after summarizing case law concerning layoffs and eligibility, 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. See also *MJM Studios of New York*, 338 NLRB 980 (2003). For an application of the temporary layoff rule in a mail ballot case, see *Dredge Operators*, 306 NLRB 924 (1992).

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, 590 fn. 4 (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, 113 (1973); *Tomadur, Inc*., 196 NLRB 706 (1972).

23-116 Retirees/Social Security Annuitants

362-6715

362-6742-8000

Retired employees are not employees within the meaning of the Act. See *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); see also *Mississippi Power Co*., 332 NLRB 530 (2000) (rejecting suggestion "future retirees" should be ineligible). 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, Inc.*, 176 NLRB 939, 940–941 (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 R. 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, 1677 (1960); *Kingsport Press*, 146 NLRB 1111, 1113 (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*, 146 NLRB at 1112 fn. 4; *Northshore Fabricators & Erectors, Inc.*, 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, Inc.*, 126 NLRB 553, 554 (1960); see also *Times Square Stores Corp.*, 79 NLRB 361, 364 (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, 1359 (1962). The nature of the evidence which might rebut the presumption, said the Board in that case, would be 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, will not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote." Id. at 1359–1360; see also *National Gypsum Co.*, 133 NLRB 1492, 1493 (1961); *Akron Engraving Co.*, 170 NLRB 232, 233–234 (1968) (accepting job with better benefits does not establish forfeiture of eligibility); *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1362–1363 (1962). The fact that strikers have signed quit slips in order to obtain vacation pay is not necessarily sufficient to establish they had abandoned their interest in their jobs. *Roylyn, Inc.*, 178 NLRB 197 (1969); see also *P.B.R. Co.*, 216 NLRB 602 (1975); *Virginia Concrete Co.*, 316 NLRB 261 (1995).

Economic strikers may also be found ineligible if their jobs have been eliminated for valid, substantial, nonstrike-related economic reasons. *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989); see also *St. Joe Minerals Corp.*, 295 NLRB 517 (1989). Compare *Globe Molded Plastics Co.*, 200 NLRB 377 (1972) (fact employer had lost certain work or obtaining new customers was difficult not type of elimination of jobs for economic reasons warranting disenfranchising economic strikers otherwise eligible); *Omahaline Hydraulics Co.*, 340 NLRB 916 (2003) (employer did not meet burden of establishing that jobs had been eliminated).

Economic strikers may also lose their eligibility if they are discharged (or the employer refuses to reinstate them) for misconduct rendering them unsuitable for reemployment. *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989).

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 these principles, see *Q-T Tool Co.*, 199 NLRB 500 (1972); see also *NLRB v. Neuro Affiliates Co.*, 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, 636 (1972); *Gulf States Paper Corp*., 219 NLRB 806 (1975); *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, 120–121 (1987).

In *Brooks Research & Mfg., Inc.*, 202 NLRB 634, 636 (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), cert denied 397 U.S. 920 (1970)], 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 Corp.*, 195 NLRB 634 (1972), 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.

d. As in all challenge situations, the Board generally does not resolve eligibility questions concerning replaced economic strikers unless the ballots are determinative. *Universal Mfg. Co.*, 197 NLRB 618 (1972).

e. Replaced former economic strikers who have unconditionally applied for reinstatement 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).

Permanently replaced strikers who are contesting that action in litigation may vote by challenge. *Curtis Industries*, 310 NLRB 1212 (1993); *Mono-Trade Co.*, 323 NLRB 298 (1997); *Morgan Services*, 339 NLRB 463 (2003). See a related discussion in secs. 23-113 and 23-300.

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). The presumption can be overcome if the employer shows a mutual understanding between itself and the replacement that they are permanent. Id. Note that prior to this decision, in representation cases the Board presumed that replacements were permanent in representation cases. See *Akron Engraving Co.*, 170 NLRB 232 (1968); *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962).

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. *St. Joe Minerals Corp.*, 295 NLRB 517 (1989).

Temporary replacements are not eligible to vote. See *Harter Equipment*, 293 NLRB 647 (1989) (involving replacements for locked-out employees).

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, 1501 (1969).

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, Inc.*, 126 NLRB 553 (1960); *Pipe Machinery Co*., 76 NLRB 247 (1948).

i. In an unusual situation where economic strikers and seasonal employees are involved, the Board approved a 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 Co.*, 139 NLRB 601, 604 (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

362-6760

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).

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 secs. 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 sec. 102.70(a); *Lane Aviation Corp*., 221 NLRB 898 (1975). Where, however, a long period of time had passed

since the eligibility date used in a prior runoff election, and there was a likelihood of substantial turnover in the unit, the Board used a current eligibility payroll period. *Interlake Steamship Co*., 178 NLRB 128, 129 (1969); see also *Caribe General Electric, Inc.*, 175 NLRB 773, 775 fn. 10 (1969) (using current payroll in view of long passage of time since date used in second runoff); *Interlake Steamship Co*., 174 NLRB 308, 309 fn. 7 (1969) (same).

See also section 22-115.

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); *Great Atlantic & Pacific Tea Co*., 121 NLRB 38 (1958).

See also section 22-121.

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, Inc.*, 140 NLRB 82, 86–87 (1962); *Toledo Marine Terminals, Inc.*, 123 NLRB 583, 585 (1959). See also *Dick Kelchner Excavating Co*., 236 NLRB 1414, 1416 (1978); *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 season." *Elsa Canning Co.*, 154 NLRB 1810, 1812–1813 (1965). Compare *Baugh Chemical Co*., 150 NLRB 1034 (1965) (directing immediate election based on circumstances). 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, 1120 (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, 33 (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. *Grand Lodge Int'l Association of Machinists*, 159 NLRB 137, 143 (1966); *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. The following examples are, of course, illustrative only, and by no means

exhaustive. 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. See sec. 20-110 for various other examples of formulas employed in specific contexts.

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); *E. W. Coslett & Sons*, 122 NLRB 961, 964 (1959).

23-420 Construction

362-3350-6000

Eligibility to vote in the construction industry elections is determined by the use of the formula first announced in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). The Board briefly significantly altered this formula in *S. K. Whitty & Co.*, 304 NLRB 776 (1991), but largely returned to the *Daniel Construction* formula in *Steiny & Co.*, 308 NLRB 1323 (1992). The formula is accordingly often referred to as the *Daniel/Steiny* or *Steiny/Daniel* formula.

Under this formula, in addition to employees eligible under standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. *Steiny & Co.*, 308 NLRB 1323, 1326 (1992); see also *Atlantic Industrial Constructors, Inc.*, 324 NLRB 355 (1997); *Brown & Root, Inc*., 314 NLRB 19, 28–29 (1994); *Delta Diversified Enterprises, Inc.*, 314 NLRB 946 (1994); *Johnson Controls, Inc*., 322 NLRB 669, 672–673 (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).

This 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 formula. *Steiny & Co.*, 308 NLRB 1323, 1328 fn. 16 (1992); *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. 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, Inc*., 150 NLRB 1679, 1680 fn. 3 (1965).

In one unusual case the Board set aside the election because the Region had set out an incomplete *Steiny/Daniel* formula prompting the employer to provide an erroneous *Excelsior* list (*Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966)), and resulting in two ineligible employees casting (potentially dispositive) unchallenged ballots. *Atlantic Industrial Constructors, Inc.*, 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, 1011–1012 (1962); *Trade Winds Drilling Co.*, 139 NLRB 1012 (1962); *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); *NLRB v. Rod-Ric Corp.*, 428 F.2d 948 (5th Cir. 1970).

23-440 Taxicabs

362-3350-9000

Part-time taxicab drivers who worked at least 26 days (i.e., 2 or more days a week) during the previous quarter 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); see also *Checker Cab Co.*, 141 NLRB 583, 589 (1962) (drivers working at least 2 days per week in 8 of the last 10 full weeks deemed eligible). Compare *Jat Transportation Corp*., 128 NLRB 780 (1960) (drivers working 1 or 2 days a week deemed eligible). See also sec. 20-110.

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, 23–24 (1970); *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994). See also *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992), enfd. 2 F.3d 35 (3d Cir. 1993), 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); *S. S. Joachim & Anne Residence*, 314 NLRB 1191, 1192–1193 (1994).

For a related discussion of on-call employees, see section 20-120.

23-460 Entertainment Industries

362-6734

The Board has a flexible approach to developing formulas suited to the conditions in different entertainment industries where employees are often hired to help on a day-by-day or production-by-production basis. See *DIC Entertainment, L.P.*, 328 NLRB 660 (1999).

In one film industry case, the Board deemed eligible employees employed on at least two productions for a minimum of 5 working days in the year preceding the decision. *Medion, Inc.*, 200 NLRB 1013 (1972). The Board applied a similar formula in another film industry case, but eliminated the 5-day requirement based on a showing that most of that employer's jobs lasted only 1 or 2 days. *American Zoetrope Productions*, 207 NLRB 621, 623 (1973).

With respect to theatrical productions, in *Juilliard School*, 208 NLRB 153, 155 (1974), the Board deemed eligible stage department employees who have been employed for two production for a total of 5 working days over a 1-year period, or who have been employed by the employer for at least 15 days over a 2-year period. Compare *Steppenwolf Theatre Co.*, 342 NLRB 69, 71–72 (2004), in which the Board declined to apply the *Juilliard School* formula to a unit of production

employees and instead applied the *Davison-Paxon* formula, reasoning that the employer—as a professional theatre—had a more regular and constant production schedule than was the case in *Juilliard School*, which involved an educational institution. See also *Wadsworth Theatre Management*, 349 NLRB 122 (2007).

In *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147 (2010), the Board rejected a contention that musicians who work intermittently were all temporary employees ineligible to vote, noting that there are many industries 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. Instead, the Board applied the *Juilliard School* formula to determine eligibility. For a further discussion temporary employees, see section 20-200 supra.

For other entertainment industry cases, see, e.g., *Blockbuster Pavilion*, 314 NLRB 129, 142–143 (1994) (outdoor amphitheater stagehands); *Society of Independent Motion Picture Producers*, 94 NLRB 110, 112 (1951) (carpenters and set erectors); *Society of Independent Motion Picture Producers*, 123 NLRB 1942, 1950 (1959) (motion picture musicians).

23-470 On-Call Teachers

362-3350-7000

362-6734

In *Berlitz School of Languages of America*, 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.

23-500 Eligibility Lists and Stipulations

23-510 Voting List (*Excelsior*)

362-6708

393-6081-6075-5000

Sections 102.62(d) and 102.67(l) of the Board's Rules require that, absent agreement of the parties to the contrary specified in an election agreement or extraordinary circumstances specified in the direction of election, the employer shall, within 2 business days after issuance of a direction of election (or approval of an election agreement), provide the regional director and the other parties a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. The employer is also required, in a separate section of the list, to provide the same information for any individuals who are permitted to vote subject to challenge. To be timely filed and served, the list must be received by the regional director and the parties within 2 business days after issuance of the direction of election or approval of election agreement, unless a longer time is specified in the agreement or direction of election. Sections 102.62(d) and 102.67(l) also set forth certain format requirements. The employer's failure to file or serve the list within the specified time or in the proper format "shall be grounds for setting aside the election whenever proper and timely objections are filed" under section 102.69(a), although the employer is estopped from objecting to a failure to comply with these requirements if it is responsible for the failure. See CHM sections 11312–11313 for further procedures for production and handling of the list.

Rules sections 102.62(d) and 102.67(l) codify and revise the rule first set forth in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). See also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (upholding the substantive validity of the *Excelsior* rule). Prior to the 2014 amendments to the Board's election procedures, the employer was afforded 7 calendar days to produce the list, was required to include only full names and home addresses on the list, and was required to

serve the list only on the regional director. See, e.g., *North Macon Health Care Facility*, 315 NLRB 359, 360 (1994); *Weyerhaeuser Co.*, 315 NLRB 963 (1994). For an explanation of the 2014 additions and changes to this rule, see 79 Fed. Reg. 74335–74361 (Dec. 15, 2014).

The voter list furnished by the employer will normally be used as the voting list at the election. CHM sec. 11312.2. Once the list is received, the Region asks the parties to check and approve the list in order to resolve eligibility questions and potentially reduce the number of challenges made at the election. CHM sec. 11312.3. The burden of checking the accuracy of the list rests with the participating union(s), not with the Board. *Kennecott Copper Corp*., 122 NLRB 370, 372 (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. *O. E. Szekely & Associates*, 117 NLRB 42, 44–45 (1957); see also *Cavanaugh Lakeview Farms*, 302 NLRB 921 (1991).

A summary of the case law dealing with *Excelsior* objections is contained in section 24-309.

23-520 Stipulated Eligibility Lists (*Norris Thermador*)

362-6703

370-3533-4000

737-7078-5000

Codifying previous policy, the Board, in *Norris-Thermador Corp.*, 119 NLRB 1301 (1958), 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." Id. at 1302. A list is sufficient even if the stipulation does not include an actual unit description. *Riveredge Hospital*, 251 NLRB 196, 197 (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, 708 (1969).

The *Norris-Thermador* rule has been strictly applied and the Board has only permitted one "narrow exception" to it. Thus, in *Banner Bedding, Inc.*, 214 NLRB 1013 (1974), the Board announced that it will accept an oral agreement (reached prior to the execution of the stipulation) only where both parties agree to its contents. See also *NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 849 F.2d 15, 19 (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 earlier stipulated election agreement. See also *Cooper Mattress Mfg. Co.*, 225 NLRB 200, 201 (1976) (apparent absence of agreement concerning eligibility of individual meant *Banner Bedding* exception was not implicated).

As noted above, *Norris-Thermador*, 119 NLRB at 1302, states that such a list is not binding if it is contrary to the Act or Board policy. The Board has elaborated on this statement in a series of cases involving alleged statutory supervisors included on the list, indicating that the inclusion of an alleged supervisor on the list did not preclude a challenge based on that individual's alleged supervisory status. See *Judd Valve Co.*, 248 NLRB 112, 112 fn. 3 (1980); *Rosehill Cemetery Assn.*, 262 NLRB 1289 (1982); *Fisher-New Center Co.*, 184 NLRB 809, 810 (1970); *Laymon Candy Co.*, 199 NLRB 547 (1972); *Lake Huron Broadcasting Corp.*, 130 NLRB 908, 909–910

(1961). Note, however, that several of these cases were overruled in *Premier Living Center*, 331 NLRB 123, 123 fn. 5 (2000). This approach is distinct from that set out in *Cruis Along Boats, Inc.*, 128 NLRB 1019 (1960), which applies to stipulations as to unit placement made at representation hearings.

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, 975 fn. 1 (1987). Thus, for example, a stipulation to include medical technologists—who are presumptive professional employees—in a unit could not "override the requirements of Section 9(b)(1)" and the case was remanded for determination of their professional status (and, if necessary, direction of a *Sonotone* election). *Pontiac Osteopathic Hospital*, 327 NLRB 1172, 1173 (1999); see also *Oberthur Technologies of America Corp.*, 362 NLRB No. 198, slip op. at 2–3 (2015) (noting that if stipulation unambiguously included two professional employees, challenges to their ballots would have to be sustained as Section 9(b)(1) prohibits type of election to which parties would have stipulated); *Cabrillo Lanes*, 202 NLRB 921, 923 fn. 12 (1973) (rejecting stipulation that would have excluded regular part-time employees from the unit); *Vent Control, Inc.*, 126 NLRB 1134, 1135 (1960) (excluding supervisor parties stipulated should be included). Compare *Hollywood Medical Center*, 275 NLRB 307, 308 (1985) (rejection of stipulation would have resulted in a postelection challenge as to agreed-upon professional employees); *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993) (upholding stipulation to sustain challenge to employee who voted at wrong time, but rejecting stipulation upholding challenges where stipulated "casual employees" in fact worked as many hours as included regular part-time employees (citing *Cruis Along Boats*, 128 NLRB 1019, 1020 (1960)).

In *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002), the Board formally adopted the test for analyzing stipulations articulated in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999). This test (which is consistent with the Board's previous, if unspoken, practice) involves three steps.

First, 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. *Caesars Tahoe*. 337 NLRB at 1097. In determining if a stipulated unit is ambiguous, the Board compares the express language of the unit description against the disputed classifications, and will find parties have a clear intent to include classifications matching the description and a clear intent to exclude classifications not matching the stipulated unit description. *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003). 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). The Board found a stipulation ambiguous where it excluded "floaters," but the employer maintained no such classification and the agreement did not define the term. *CVS Albany, LLC*, 364 NLRB No. 21, slip op. at 2 (2016).

For determinations that a stipulation was not ambiguous, see *Halsted Communications*, 347

NLRB 225 (2006); *Peirce-Phelps, Inc.*, 341 NLRB 585, 586 (2004); *G & K Services*, 340 NLRB 921, 922 (2003); *McFarling Foods, Inc.*, 336 NLRB 1140 (2001); *South Coast Hospice, Inc.*, 333 NLRB 198 (2000); *Kalustyans*, 332 NLRB 843 (2000); *Northwest Community Hospital*, 331 NLRB 307 (2000); *National Public Radio, Inc.*, 328 NLRB 75 (1999); *Highlands Regional Medical Center*, 327 NLRB 1049, 1050 (1999); *Venture Industries*, 327 NLRB 918, 919 (1999); *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997); *Pacific Lincoln-Mercury, Inc.*, 312 NLRB 901 (1993); *Windham Community Memorial Hospital*, 312 NLRB 54 (1993); *S & I Transportation*, 306 NLRB 865 (1992); *Southwest Gas Corp.*, 305 NLRB 542 (1991); *Business Records Corp.*, 300 NLRB 708 (1990); *Royal Laundry*, 277 NLRB 820, 821 (1985); *Viacom Cablevision*, 268 NLRB 633 (1984).

Second, if the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. *Caesars Tahoe*, 337 NLRB at 1097. For example, in *Gala Food Processing*, 310 NLRB 1193 (1993), the Board found that a stipulation was subject to at least two interpretations and therefore ambiguous, but the parties' intent was established by extrinsic evidence, including the petitioner's initial unit description and communications between the parties leading up to the signing of the stipulated election agreement. Similarly, in *CVS Albany, LLC*, 364 NLRB No. 21, slip op. at 2–3 (2016), the Board applied contract interpretation principles (namely, that no part of a contract's language should be construed in such a way as to be superfluous) and extrinsic evidence to determine the parties' intent.

Third, if the parties' intent still cannot be discerned, the Board determines the bargaining unit by employing its normal community-of-interest test. *Caesars Tahoe*, 337 NLRB at 1097, 1100-1101. See also *Hard Rock Holdings v. NLRB*, 672 F.3d 1117, 1121–1123 (D.C. Cir. 2012); *Laneco Construction Systems*, 339 NLRB 1048, 1050 (2003); *Kalustyans*, 332 NLRB 843 (2000); *Space Mark, Inc*., 325 NLRB 1140, 1140 fn. 1 (1998).

Because election agreements are regarded as contracts, the Board will set aside an election where a "material term" has been breached. See *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968). A regional director accordingly cannot vary the terms of a stipulated election agreement absent special circumstances. See *T & L Leasing*, 318 NLRB 324, 326–327 (1995) (setting election aside where regional director approved agreement but then directed mail ballot election where agreement contemplated manual election); *Longwood Security Services*, 364 NLRB No. 50 (2016) (noting agent's refusal to allow petitioner its designated observer was breach of stipulated election agreement); see also *Tekweld Solutions*, 361 NLRB No. 18, slip op. at 2 fn. 8 (2014), enfd. 639 Fed. Appx. 16 (2d Cir. 2016) (noting that had region changed stipulated eligibility date sua sponte, such action could have constituted a breach warranting setting election aside). A breach caused by the region must be prejudicial or "sufficiently material" to warrant setting the election aside, however. *Grant's Home Furnishings*, 229 NLRB 1305, 1306 (1977). Cf. *Consolidated Print Works*, 260 NLRB 978, 979 (1982), in which the Board rejected the regional director's setting aside an election based on a finding that a Board agent's change to the eligibility date was a material breach, given that the petitioner did not contest the change at the time or request to withdraw from the stipulation.

Where a union establishes it has reasonably relied on the acceptance of a stipulation at a hearing in not introducing evidence in support of its challenges, the Board will not accept the hearing officer's subsequent recommendation to overrule the challenges based on a rejection of that stipulation (in turn based on the lack of evidence); rather, the Board will allow the parties to proffer evidence on the eligibility of the individuals at issue. *Red Lion*, 301 NLRB 33 (1991).

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); see also *NLRB v. MEMC Electronic Materials, Inc.*, 363 F.3d 705, 708–710 (8th Cir. 2004); *Dynair Services*, 314 NLRB 161, 162 (1994); *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979).

Similarly, 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).

The Board does not consider itself bound by a bargaining history resulting from a stipulated unit in a consent election. See section 12-221.

24. INTERFERENCE WITH ELECTIONS

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.

Chapter 22 described the procedure for handling objections to elections. After considering several other procedural matters, this chapter first considers the substantive case law which deals with preelection campaign interference. It should be noted that there is considerable overlap between unlawful conduct under Section 8(a)(1) and preelection campaign interference; as this text deals with representation case law, there is only limited discussion of unfair labor practice case law. The chapter then moves on to treat matters that affect the actual conduct of the election.

24-100 Objections Procedures

By way of context, before turning to what does and does not constitute objectionable conduct, the next several sections summarize the procedural rules with respect to objections. See also CHM secs. 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, 1278 (1961); see also *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 fn. 13 (2014) (declining request to overrule *Ideal Electric*). It is the objecting party's burden to show that the conduct occurred during the critical period. *Accubuilt, Inc*., 340 NLRB 1337, 1338 (2003); *Gibraltar Steel Corp.*, 323 NLRB 601, 603 (1997); *Dollar Rent-A-Car*, 314 NLRB 1089, 1089 fn. 4 (1994). The critical period begins on the date the petition is filed 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); *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67 (2003); *Cedars-Sinai Medical Center*, 342 NLRB 596, 598 fn. 13 (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); *Lyon's Restaurants*, 234 NLRB 178 (1978) (prepetition statement employees had to join union or they would not work objectionable); *Gibson's Discount Center*, 214 NLRB 221 (1974) (prepetition union offer to waive initiation fees objectionable—see also sec. 24-327); see also *National League of Professional Baseball Clubs*, 330 NLRB 670, 676 (2000); *Harborside Healthcare, Inc.*, 343 NLRB 906, 912–913 & fn. 21 (2004); *Madison Square Garden Ct, LLC*, 350 NLRB 117, 120–121 (2007). Cf. *Durham School Services, L.P.*, 360 NLRB 708, 709 (2014) (change in payroll procedures during critical period is objectionable grant of benefit when responding to request made by employees well before organizing campaign).

The Board has on occasion confronted the question of the appropriate objections period in cases where there are two petitions. In *R. Dakin & Co.*, 191 NLRB 343 (1971), enf. denied 477 F.2d 492 (9th Cir. 1973), on remand 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 and withdrawal of an earlier petition for the same unit. See also *Carson International, Inc.*, 259

NLRB 1073 (1982). But when the first and second petition were on file at the same time and the conduct occurred before the second petition, conduct was considered as objectionable even though the first petition was withdrawn. *Monroe Tube Co.*, 220 NLRB 302, 305 (1975).

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 (an original and five copies) must be filed with the regional director within 7 days after the tally of ballots has been prepared. The objections must include a short statement of the reasons therefor. A copy of the objections, including the short statement of the reasons therefor, must also be served on each of the other parties. See Rules sec. 102.69(a). For computation of the time and date for filing and service of papers, including in representation cases, see Rules secs. 102.2 and 102.3. Note that Rules sec. 102.2(d)(ii), which provides that certain documents may be filed late upon showing good cause based on excusable neglect, does not mention objections. See also *John I. Haas, Inc.*, 301 NLRB 300 (1991) (applying "postmark rule" to objections); *Goody's Family Clothing*, 308 NLRB 181 (1992) (delivery of document to delivery service on due date will not excuse late delivery even where same day delivery is promised). Cf. *Oberthur Technologies of America Corp.*, 362 NLRB No. 198, slip op. at 3 (2015) (declining to treat exceptions to judge's decision as objections as they were filed long after objections deadline). See also sec. 22-118.

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, 980 (2003); *Consumers Energy Co.*, 337 NLRB 752 (2002).

The 2014 amendments to the Board's election procedures specify that the objecting party must simultaneously file with the regional director a written offer of proof in support of its objections when it files its objections, but that the offer of proof should not be served on the other parties. Rules sec. 102.69(a). The regional director may, however, extend the time for filing the offer of proof upon request of a party showing good cause. Rules sec. 102.69(a). The Rules require that the offer of proof be in writing. Cf. *Sacramento Steel & Supply, Inc.*, 313 NLRB 730 (1994) (in case preceding amendments, Board rejected claim evidence in support of objections had been timely "presented" by virtue of phone call). Objections are overruled where the objecting party fails to file a timely offer of proof with the objections. See *URS Federal Services*, 365 NLRB No. 1 (2016).

Note prior to the 2014 amendments, the Board required that the objecting party furnish evidence within 7 days of filing objections, see, e.g., *Craftmatic Comfort Mfg.*, 299 NLRB 514 (1990); this rule was strictly enforced. *Star Video Entertainment L.P.*, 290 NLRB 1010 (1988); *Goody's Family Clothing*, 308 NLRB 181 (1992); *Public Storage*, 295 NLRB 1034 (1989); *Koons Ford*, 308 NLRB 1067 (1992). Cf. *Kano Trucking Service*, 295 NLRB 514 (1989) (accepting late submission based on effort to comply with rule). For prior practice regarding mailed evidence and the postmark rule, see *Bi-Lo Foods*, 315 NLRB 695 (1994).

To obtain a hearing on objections, the regional director must determine that the evidence described in the offer of proof could be grounds for setting aside the election if introduced at a hearing. Rules sec. 102.69(c)(1)(ii); *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip op. at 1 fn. 2 (2017). The Board does not, however, require that the objecting party submit signed affidavits. Instead, offers of proof shall take the form of a written statement identifying each witness the party would call to testify concerning the issue and summarizing the witness's testimony. Rules secs. 102.69(a), 102.66(c); see also *Daily Grind*, 337 NLRB 655 (2002);

Heartland of Martinsburg, 313 NLRB 655 (1994).

See also sec. 22-117.

24-140 Scope of Investigation of Objections

393-7033-1100

393-7022-1700 et seq.

393-7077-2090

The 2014 amendments codify existing practices permitting the regional director to investigate objections by examining evidence offered in support thereof to determine if a hearing is warranted. 79 Fed. Reg. 74412 (Dec. 15, 2014); Rules sec. 102.69(c). A hearing is held only when the regional director determines that the evidence described in the offer of proof could be grounds for setting aside the election if introduced at a hearing. Rules sec. 102.69(c)(1)(ii); *Care Enterprises*, 306 NLRB 491 (1992); *Speakman Electric Co.*, 307 NLRB 1441 (1992). See also *Kerr-McGee Chemical Corp*., 311 NLRB 447, 447 (1993), directing 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, 1008 (1984). This restriction does not apply to evidence discovered by the regional director during the course of an investigation. In fact, the Board will permit the regional director to set aside an election based on evidence uncovered during the regional investigation even though it was not the subject of a specific objection. *American Safety Equipment Corp*., 234 NLRB 501 (1978); see also *Nelson Tree Service, Inc.*, 361 NLRB No. 161 (2014) (where regional director independently discovered evidence of objectionable conduct during unfair labor practice investigation, regional director had no discretion to ignore such evidence). Compare *Burns International Security Services*, 256 NLRB 959 (1981). For a discussion of various aspects of the problem of unalleged objections, see *White Plains Lincoln Mercury*, 288 NLRB 1133, 1136–1139 (1988). See also *Framed Picture Enterprise, Inc.*, 303 NLRB 722, 722 fn. 1 (1991).

American Safety Equipment, 234 NLRB 501 (1978), does not necessarily apply to a hearing officer, who is constrained to consider the issues encompassed by the regional director's order setting the matters for hearing. See *Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1005–1006 (6th Cir. 2012); *Precision Products Group*, 319 NLRB 640 (1995); *Iowa Lamb Corp*., 275 NLRB 185 (1985); *FleetBoston Pavilion*, 333 NLRB 655, 656–657 (2001); see also *J. K. Pulley Co.*, 338 NLRB 1152, 1153 (2003) (applying similar restriction to the hearing officer in a challenged ballot proceeding).

The Board will consider allegations of objectionable conduct that do not exactly coincide with the precise wording of the objections so long as the allegations are "sufficiently related" to the objections. See, e.g., *Labriola Baking Co.*, 361 NLRB No. 41 (2014); *Fred Meyer Stores*, 355 NLRB 541, 543 fn. 7 (2010); *Fiber Industries*, 267 NLRB 840, 840 fn. 2 (1983).

See section 22-120 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 and Waiver in Objection Cases

393-7022-8300

775-5025

787-0100

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, 668 fn. 2 (1989); *Republic Electronics*, 266 NLRB 852, 853 (1983); see also Rules sec. 102.62(d), (e) and 102.67(k), (l)

(applying estoppel principles to voter list service failures and notice of election posting or distribution failures). 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*, 266 NLRB at 853.

The Board once held that where unfair labor practice charges were withdrawn without prejudice to facilitate the determination of a representation proceeding, it would "treat the withdrawal of charges without prejudice as an automatic waiver by the petitioning union of the right to use the subject matter of those charges as basis for objections to the election." *Ellicott Machine Corp.*, 54 NLRB 732, 735 (1944). Subsequently, the Board abandoned this waiver theory, stating 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." *Great Atlantic & Pacific Tea Co.*, 101 NLRB 1118, 1120–1121 (1952). The Board accordingly formally overruled *Ellicott Machine* in *Virginia Concrete Corp.*, 338 NLRB 1182, 1184 (2003), holding that the withdrawal of an unfair labor practice charge is not a waiver of the right to file objections based on the same conduct. For more on the interplay of unfair labor practices and objections, see sections 24-231 and 24-250.

Similarly, 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, 1201 fn. 2 (1979). Under the 2014 amendments to the Board's election procedures, the same reasoning would apply to an unfair labor practice charge unaccompanied by a request to "block" a pending petition. Cf. Rules sec. 103.20.

24-200 Preelection Campaign Interference: General Principles

378-1401

Preelection campaign interference is an area characterized by a myriad of different factual situations, involving all kinds of nuances and shades of difference. Accordingly, it is impossible to give a full account of this area of law in summary form. Nonetheless, certain principles can be set forth, along with the reasoning that led to the establishment of these principles. Further, despite the large number of individual variations, certain general areas of objectionable preelection conduct can be delineated. This section examines general principles involving allegedly objectionable preelection conduct, namely the standards applied to determine whether misconduct—whether conduct that also constitutes an unfair labor practice or not—warrants setting aside an election. This section also discusses the litigation of unfair labor practices in representation cases. The tests and standards the Board has applied to determine whether specific types of preelection misconduct has occurred are discussed in more detail in section 24-300.

24-210 The Relevant Framework

In cases raising allegations of preelection campaign interference, the Board may need to address as many as three major questions: (1) whether the individuals alleged to have engaged in objectionable conduct were agents of either party (i.e., whether the conduct is attributable to one of the parties); (2) whether the conduct itself is objectionable misconduct; and (3) if the conduct is deemed objectionable, whether it warrants invalidating the election because it is "more than de minimis with respect to affecting the results of the election." See, e.g., *Mercy General Hospital*, 334 NLRB 100 (2001). The answers to questions (1) and (3), and the general type of objectionable conduct at issue (i.e., unfair labor practices vs. other types of objectionable conduct), may have ramifications on the standard to be applied to determine whether an election should be set aside. These three areas are addressed in turn below.

24-220 Party vs. Third-Party Conduct

378-1401-8700

Third-party conduct is discussed in more detail in section 24-320 below. For the purposes of this section, the important point is that if alleged misconduct cannot be attributed to one of the parties, the Board will only set aside the election if the misconduct "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). This standard is more difficult to meet than the standard applied to party conduct, discussed in more detail below.

Unsurprisingly, the Board often must determine whether the alleged misconduct is attributable to a party; if it is not, the third-party standard will apply. Generally, the Board applies common law principles of agency, including principles of apparent and actual authority, in determining whether alleged misconduct is attributable to a party. See, e.g., *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012); *Mar-Jam Supply Co.*, 337 NLRB 337 (2001); *Cooper Industries*, 328 NLRB 145 (1999); *Fieldcrest Cannon, Inc*., 318 NLRB 470 (1995); *Culinary Foods, Inc*., 325 NLRB 664 (1998); *General Metal Products Co.*, 164 NLRB 64 (1967); *Dean Industries*, 162 NLRB 1078, 1093–1094 (1967); *Colson Corp. v. NLRB*, 347 F.2d 128, 137 (8th Cir. 1965).

The test for finding apparent authority is whether, under all the circumstances, "employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001) (quoting *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992)); *Facchina Construction Co.*, 343 NLRB 886, 887 (2004); *Ready Mix, Inc.*, 337 NLRB 1189 (2002); *Mid-South Drywall Co.*, 339 NLRB 480 (2002); *D&F Industries*, 339 NLRB 618, 619 (2002); *Pratt (Corrugated Logistics), LLC*, 360 NLRB 304 (2014).

For an example of an election being set aside based, in part, on misconduct by an individual found to possess apparent authority, see *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1818 & fn. 12 (2011). Cf. *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994) (finding, in unfair labor practice case, that apparent authority was established because individual had, until recently, been a supervisor, continued to perform some supervisory functions during the "transition period" after his transfer to another perception, and employees thus reasonably could perceive that he continued to act on behalf of management). For examples of apparent or ostensible authority in consolidated unfair labor practice and representation cases, see *Thriftway Supermarket*, 276 NLRB 1450 (1985); *G.T.A. Enterprises*, 260 NLRB 197 (1982).

The doctrine of apparent authority also applies to conduct by alleged union representatives. See, e.g., *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122 (2003); see also *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 989–991 (4th Cir. 2012). Thus, a union may be held accountable for statements of its committee members if they are responsible representatives of the union in the plant and play a central role in the election campaign. *Vickers, Inc.*, 152 NLRB 793, 795 (1965). But conduct of union activists is not per se imputed to the union. See *Advance Products Corp.*, 304 NLRB 436, 436 fn. 3 (1991); *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995). For examples of findings that employees were agents of the union, see *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004); *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984). Compare *Midland Processing Services*, 304 NLRB 770 (1991); *United Builders Supply Co.*, 287 NLRB 1364 (1988). For further discussion of agency law as it relates to unit employees as agents of the union, see *Cornell Forge Co.*, 339 NLRB 733 (2003); *Mastec Direct TV*, 356 NLRB 809 (2011).

With respect to the employer's supervisors, however, the Board "has long recognized that 'Section 2(13) of the statute makes it clear that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not.'" *Ace Heating & Air Conditioning Co.*, 364 NLRB No. 22, slip op. at 2 (2016) (quoting *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299

(1986)).

24-230 Two Areas of Objectionable Conduct

As already indicated, section 24-300 considers specific types of objectionable misconduct. Here, it can be briefly stated that, broadly speaking, objectionable conduct can be grouped into (1) conduct that may also violate the unfair labor practice provisions, and (2) conduct that does not necessarily violate unfair labor practice provisions, but is nevertheless objectionable under *General Shoe Corp*., 77 NLRB 124 (1948). There is some overlap in this area (for example, as described in sections 24-301 and 24-302, employer threats or promises of benefits may constitute unfair labor practices that warrant setting the election aside, but threats and promises of benefits have also been found objectionable under *General Shoe*).

As detailed in section 24-240, where misconduct is attributable to a party, whether that conduct also constitutes an unfair labor practice has consequences for the standard to be applied in determining whether an election should be set aside.

24-231 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 be 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, 1419 (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); *Diamond Walnut Growers*, 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, 1786–1787 (1962); see also *Overnite Transportation Co*., 158 NLRB 879, 884 (1966); *Excelsior Underwear, Inc*., 156 NLRB 1236, 1245 (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, with a few notable exceptions (namely threats and promises of benefit) discussed later in this chapter, this edition does not attempt to summarize this area of the law, and the researcher is directed to those research tools that deal specifically with unfair labor practice cases for more information on this area.

As discussed below in section 24-241, however, not all unfair labor practice conduct warrants setting aside an election, and an election will not be set aside where, although unfair labor practices have been found, "it is virtually impossible to conclude that they would have affected the results of the election. *Caron International, Inc.*, 246 NLRB 1120, 1121 (1979).

24-232 Interference Under the *General Shoe* Doctrine

378-1401-5000

1401-6700

In *General Shoe Corp*., 77 NLRB 124, 127 (1948), the Board held 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 held not 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." Id. at 126. The Board reasoned as follows:

> 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.

Id. at 127.

At the same time, the Board noted that Congress only applied Section 8(c)—which states that the expressing of any views, arguments, or opinion shall not constitute evidence of an unfair labor practice if it contains no threat of reprisal or force or promise of benefit—to unfair labor practice cases. Thus, "[m]atters which are not available to prove" an unfair labor practice violation "may still be pertinent, if extreme enough, in determining whether an election satisfies the Board's own administrative standards." Id. at 127 fn. 10. The Board subsequently reaffirmed this view, stating that Section 8(c) "has no application to representation cases." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962) (reversing several decisions which suggested the contrary). The Board added, however, that the "strictures of the first amendment, to be sure, must be considered in all cases." Id.

Under the *General Shoe* doctrine, 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, e.g., *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 3 fn. 12 (2014); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962); see also *Heartland Human Services v. NLRB*, 746 F.3d 802, 804 (7th Cir. 2014).

24-240 Whether Party Misconduct Warrants Setting Aside the Election/De Minimis or Isolated Conduct

378-1401-6750

Where misconduct by a party has been established, the question is whether it warrants setting the election aside. The standard applied in answering that question differs depending on whether the conduct is also the subject of unfair labor practice findings or charges.

24-241 Unfair Labor Practices: "Virtually Impossible"

378-1401-2500

As stated in section 24-231, unfair labor practices are "*a fortiori*" conduct that interferes with the election. See *Playskool Mfg. Co*., 140 NLRB 1417, 1419 (1963). Even so, an election will not be set aside where, although unfair labor practices have been found, "it is virtually impossible to conclude that they would have affected the results of the election. *Caron International, Inc.*, 246 NLRB 1120, 1121 (1979); see also *Jurys Boston Hotel*, 356 NLRB 927, 928 fn. 8 (2011); *Video Tape Co*., 288 NLRB 646, 646 fn. 2 (1989); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986); *Metz Metallurgical Corp*., 270 NLRB 889 (1984); *General Felt Industries*, 269 NLRB 474, 474 fn. 1 (1984). Cf. *Recycle America*, 310 NLRB 629 (1993) (finding, without citing *Caron International*, that unfair labor practices were not sufficient to set aside the election); *Columbus Transit, LLC*, 357 NLRB 1717 (2011) (finding refusal to bargain that took place one week before election was not likely to deprive intervening union "of a possible campaign platform" and also noting petitioning union's considerable margin of victory).

The Board has expressed the "virtually impossible" standard in terms of "de minimis" conduct. See, e.g., *Airstream, Inc.*, 304 NLRB 151 (1991) (stating 8(a)(1) violation interferes with results of election unless "so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election'"); see also *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016); *Enola Super Thrift*, 233 NLRB 409 (1977).

In applying this standard, the Board considers the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election, the proximity of the conduct to the election date, and the number of unit employees affected. See *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001).

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. The standard does not apply in representation proceedings where there are no unfair labor practice allegations or findings. *NYES Corp.*, 343 NLRB 791, 791 fn. 2 (2004). The standard in such representation cases is discussed in the next section.

The "virtually impossible" standard does not apply to violations of Section 8(a)(3) that occur during the critical period, and accordingly such conduct warrants setting an election aside. See *Lucky Cab Co.*, 360 NLRB 271, 277 (2014) (citing *Baton Rouge Hospital*, 283 NLRB 192, 192 fn. 5 (1987).

Conversely, certain types of unfair labor practice conduct do not pose a threat of restraint and coercion of employees and therefore are 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 would not make a free election impossible. See also *Poplar Living Center*, 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.

24-242 Other Conduct: "Tendency to Interfere"

378-1401-6700

Where unfair labor practices are not involved, the test—which is objective—is whether the party's misconduct "has the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); see *Hopkins Nursing Care Center*, 309 NLRB 958 (1992); *Baja's Place*, 268 NLRB 868 (1984); see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (expressing test as whether conduct "could . . . reasonably have affected the results of the election"); *Safeway Inc.*, 338 NLRB 525, 526 fn. 3 (2002) (same); *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (subjective reactions of employees irrelevant to question of whether there was, in fact, objectionable conduct).

In determining whether misconduct has the tendency to interfere with 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. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001) (citing *Avis Rent-a-Car*, 280 NLB 580, 581 (1986)); see *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991).

As the standard is objective, the Board does not consider a particular employee's subjective understanding of remarks as competent evidence to prove a coercive or objectionable effect. *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970); see also *Underwriters Laboratories*, 323

NLRB 300, 300 fn. 2 (1997) (declining to rely on judge's finding there was no evidence any employee felt intimidated or coerced by statement).

The foregoing list of factors, it will be observed, is similar to the factors considered under the "virtually impossible" standard discussed in section 24-241. Further, it is worth noting that under the "tendency to interfere" standard, the Board has also spoken in terms of "de minimis" conduct. See *Rivers Casino*, 356 NLRB 1151, 1153–1154 (2011); *Double J. Services*, 347 NLRB No. 58 (2006) (not reported in Board volumes); see also *Waste Automation & Waste Management*, 314 NLRB 376 (1994); *Mercy General Hospital*, 334 NLRB 100, 107–108 (2001).

24-243 Narrowness of the Election Results

378-0160-5000

378-1401-6750

As indicated, the narrowness of the vote in an election is a relevant consideration under either the "virtually impossible" or "tendency to interfere" test. See *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (2000). It is also relevant in cases involving third-party conduct. See *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Lamar Advertising of Janesville*, 340 NLRB 979 (2003).

Thus, in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (2000), the Board, in setting the election aside, emphasized that the election might have been decided by only one vote, and that accordingly three instances of objectionable conduct "could well have affected the outcome of the election." The Board distinguished certain other cases, noting they did not involve a close election. Id. at 716 fn. 5; see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (emphasizing misconduct could have affected election decided by one vote).

By contrast, in *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001), the Board concluded an unfair labor practice did not warrant setting the election aside due to, among other things, "the sharply lopsided vote." See also *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 (2014) (threats affected "significantly fewer employees than the 18-vote margin").

In *Accubuilt, Inc.*, 340 NLRB 1337 (2003), a third-party case, the Board commented it will assess the "general atmosphere of fear and reprisal" at the location "rather than merely comparing the number of employees subject to any sort of threats against the vote margin."

24-244 Dissemination

378-1401-6750

As also indicated above, the extent of dissemination is an important consideration. See, e.g., *Archer Services*, 298 NLRB 312, 314 (1990) (representation case); *Gold Shield Security*, 306 NLRB 20 (1992) (consolidated unfair labor practice and representation case); see also *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 (2014) (union offered no evidence critical-period threats were disseminated to any other employees); *Trump Plaza Associates v. NLRB*, 679 F.3d 822, 831 (D.C. Cir. 2012) (remanding based on finding Board "ignored the substantial circumstantial evidence of dissemination" of allegedly objectionable mock card-check).

In *Peppermill Hotel Casino*, 325 NLRB 1202, 1202 fn. 2 (1998), the Board stated that did not presume that the conduct at issue—interrogation, the impression of surveillance, threats of discharge, offers of benefit, and a discriminatory evaluation—was disseminated, but noted that because the election ended in a tie, the outcome could have been influenced by a change in the vote of either of the two individuals at whom the conduct was directed, and thus the election should be set aside.

In *Springs Industries*, 332 NLRB 40 (2000), the Board adopted a rebuttable presumption that threats of plant closure are disseminated among employees. In *Crown Bolt, Inc.*, 343 NLRB 776 (2004), the Board reversed *Springs Industries* 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." Id. at 779. See also *M.B. Consultants, Ltd*., 328 NLRB 1089 (1999); *Hollingsworth Management Service*, 342 NLRB 556 (2004).

24-245 The *Showell Poultry* Exception

378-2801

In an election involving two (or presumably more) unions, even if an employer has been shown to engage in misconduct, the Board will not set the election aside if one of the competing unions has won the election decisively and the employer conduct equally affected both unions. *Showell Poultry Co*., 105 NLRB 580 (1953); see also *Flat River Glass Co*., 234 NLRB 1307 (1978); *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 546 fn. 6 (2002); *Randall Rents of Indiana*, 327 NLRB 867, 868 (1999). Compare *President Container, Inc*., 328 NLRB 1277 (1999) (misconduct directed at only one—the losing—union).

24-250 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.

This does not mean that the Board will not consider unfair labor practice findings in deciding objection cases. Rather, as already discussed above (secs. 24-231 and 24-241), 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. Thus, if the General Counsel has dismissed an unfair labor practice allegation with respect to conduct that is also alleged as objectionable conduct, the Board will defer to the General Counsel's dismissal where "the conduct which is alleged to have interfered with the election could only be held to be such interference upon an initial finding that an unfair labor practice was committed." *Texas Meat Packers*, 130 NLRB 279, 280 (1961). Similarly, the Board will not inquire into an objection when "the gravamen of this contention is an unfair labor practice, requiring a finding that the Employer's conduct constituted a violation of Section 8(a)(3) of the Act," as making such a finding in a representation case "would conflict with the statutory scheme which vests the General Counsel with final authority as to the issuance of complaints based upon unfair labor practice charges and the prosecution thereof." Id. at 279; see also *McLean Roofing Co*., 276 NLRB 830, 830 fn. 1 (1985). The Board has applied the same rationale to cases in which the gravamen of the allegation is an 8(a)(5) violation. *Virginia Concrete Corp*., 338 NLRB 1182, 1185 (2003).

That said, the fact that an unfair labor practice charge alleging the same conduct as alleged in objections was dismissed does not require pro forma dismissal of the objections if, for example, the charge alleged 8(a)(1) conduct that could constitute objectionable conduct without determining that such conduct was an unfair labor practice. *ADIA Personnel Services*, 322 NLRB 994, 994 fn. 2 (1997). As discussed above (section 24-231), conduct which amounts to interference and might otherwise constitute 8(a)(1) conduct will generally be considered in an election proceeding.

In *Gaylord Bag Co*., 313 NLRB 306, 307–308 (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.

24-300 Preelection Campaign Interference: Types of Objectionable Conduct

378-2862

Having dealt with general standards and principles applicable to allegedly objectionable

conduct in section 24-200, this section now considers specific areas and types of preelection campaign interference. It should be noted that there is a wide variety of potentially objectionable conduct, particularly under the *General Shoe* doctrine, and this section should not be viewed as an exhaustive list of all possible types of preelection campaign interference. Further, as noted in section 24-231, this edition of this manual does not attempt to summarize the various types of unfair labor practices that could warrant setting aside an election.

This section begins by considering two types of conduct that are often also the basis of unfair labor practice findings: threats of reprisal (24-301) and promises of benefit (24-302). This section then reviews various other types of objectionable preelection conduct the Board has regularly considered, before concluding with a consideration of third-party conduct (24-320) and prounion supervisory conduct (24-330). Note that third-party and prounion supervisory conduct can take a variety of specific forms; these two sections are accordingly less focused on a specific type of misconduct and more focused on the standards and considerations that attach if a third party or supervisor is the source of such conduct.

24-301 Threats

The Board commonly considers whether remarks constitute objectionable threats. Generally speaking, the Board's test in this area 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); *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 fn. 2 (1999).

This section considers certain types of threats, beginning with a considering of the "free speech" issue before turning to cases involving statements alleged to be threats by employers and by unions. See also section 24-320 for third-party threats. The reader should bear in mind that this section does not purport to be an exhaustive study of Board law regarding all alleged threats.

a. Legal Background: The "Free Speech" Issue

378-2835

378-2885

501-2825

501-2862 et seq.

501-2875 et seq.

The Board has regularly confronted situations in which an employer's statements concerning unionization are found coercive and accordingly warrant setting the election aside. The interaction of such objections and the employer's free speech rights warrants some explication here.

In terms of unfair labor practices, the Board once treated every appeal by an employer in opposition to unions as a violation of the Act, and also held that because the choice of a bargaining representative was the exclusive concern of the employees, an employer did not possess an interest sufficient to permit intrusion. See Cox & Bok, *Labor Law Cases and Materials*, 170 et seq. (7th ed., 1969). In *NLRB v. Virginia Electric & Power Co*., 314 U.S. 469, 477 (1941), however, the Supreme Court held that the Act did not prohibit employers from expressing their views about labor organizations and an employer "is as free as ever to take any side it may choose on this controversial issue." See also *Thornhill v. Alabama*, 310 U.S. 88, 102–103 (1940). That said, the Court noted "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act." *Virginia Electric*, 314 U.S. at 477.

Following *Virginia Electric*, for a period of time Board and court findings in unfair labor practice cases 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. Then, in 1947, Congress enacted Section 8(c) of the

Act, perhaps to codify the Supreme Court's holding in *Virginia Electric*, although this is not entirely clear from the legislative history. See 93 Cong. Rec. 3953 (Apr. 4, 1947).

Section 8(c) states that the "expressing of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefits." On its face, this section applies only to unfair labor practice proceedings, and soon after its enactment the Board indicated that it did not apply to representation proceedings. See *General Shoe Corp.*, 77 NLRB 124, 127 fn. 10 (1948). Although subsequent cases arguably suggested that 8(c) nevertheless was applicable to preelection statements, in *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962), the Board definitively stated that Section 8(c) "has no application to representation cases" and overruled cases suggesting otherwise, while still recognizing that "[t]he strictures of the first amendment, to be sure, must be considered in all cases." See also *Hahn Property Management Corp.*, 263 NLRB 586 (1982); *Rosewood Mfg. Co.*, 263 NLRB 420 (1982).

In addition, Section 8(c) plainly states that not all employer expressions are protected, but may still constitute unfair labor practices if the statements contain a threat of reprisal or force or a promise of benefit, i.e., are coercive. Consistent with this, the Board held that statements to the effect that an employer would not bargain if employees selected a union as their representative were not protected under Section 8(c), but constituted interference, restraint, or coercion under Section 8(a)(1). See *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 & fn. 10 (1962). For a period of time, the Board took an inconsistent position in representation cases, holding that such statements were just an expression of "legal position," but in *Dal-Tex* the Board overruled such cases and held that such statements were also grounds for setting aside elections. Id. at 1786–1787.

Thus, under Section 8(c), an employer's views on unionization expressed during an election campaign do not constitute unfair labor practices unless, in expressing such views, the employer conveys a threat of reprisal or force, or a promise of benefit, in which case the expression may also be grounds for setting aside the subsequent election. See sections 24-231 and 24-241. Further, because Section 8(c) does not apply to representation cases, employer statements that would not necessarily constitute unfair labor practices may also warrant setting an election aside if they disrupt "laboratory conditions." See *General Shoe Corp.*, 77 NLRB 124 (1948); see also sections 24-232 and 24-242.

The remainder of this section considers objections based on statements alleged to contain threats, with particular reference to the distinction drawn by the Board and the courts between an employer's permissible predictions of the consequences of unionization and objectionable threats. The section then considers union conduct found to constitute objectionable threats. Promises of benefit are dealt with in section 24-302.

b. Employer Threats: Gissel and Other Situations

378-2835

378-2885 et seq.

The Board and the courts have frequently decided cases involving allegations that employer predictions of the consequences of unionization constituted objectionable threats. This issue has appeared both in cases involving unfair labor practice allegations and in cases confined to representation issues.

The lead case in this area is *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The *Gissel* decision resolved two separate cases, one of which—*NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968)—involved the court's affirmance of the Board's unfair labor practice finding (and consequent invalidation of an election) based on the employer's communication to employees that, the Board found, reasonably tended to convey the belief that selection of the union could lead to plant closure or other job loss.

The Court, with specific reference to the "free speech" issue, reiterated 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. The Court further held that an employer can make a prediction as to the effects of unionization, as long it is phrased on the basis of objective fact and "convey[s] an employer's belief as to demonstrably probable consequences beyond [the employer's] control or to convey a management decision already arrived at to close the plant in case of unionization." Id. at 618. But where "there is any implication that an employer may or may not take action solely on [its] own initiative for reasons unrelated to economic necessities and known only to [the employer], 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." Id. The Court went on to hold that the Board and First Circuit could reasonably find that the employer was not predicting inevitable closure based on unionization, but was instead threatening "to throw employees out of work regardless of economic realities" based on the circumstances of the case. Id. at 619. In so finding, the Court noted that the Board has often found that employees, particularly sensitive to rumors of plant closings, take such hints as "coercive threats rather than honest forecasts. Id. at 620 (citing *Kolmar Laboratories*, 159 NLRB 805 (1966), enfd. 387 F.2d 833 (7th Cir. 1967); *Surprenant Mfg. Co.*, 144 NLRB 507 (1963), enfd. 341 F.2d 756 (6th Cir. 1965)). The Court commented that the Board was competent "to judge the impact of utterances made in the context of the employer-employee relationship. Id.

The *Sinclair* case decided in *Gissel* was a consolidated representation and unfair labor practice case. See *Sinclair Co.*, 164 NLRB 261 (1967). *Gissel* has subsequently been applied in unfair labor practice cases that did not involve objections (see, e.g., *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001)) as well as representation cases without unfair labor practice allegations. See, e.g., *Southern Labor Services*, 336 NLRB 710 (2001). Representation and unfair labor practice cases accordingly draw on each other when analyzing predictions alleged to be threats. See, e.g., *Daikichi Sushi* (citing *AP Automotive Systems*, 333 NLRB 581 (2001)); *Southern Labor Services*, 336 NLRB 710 (2001) (citing *Daikichi Sushi*).

The First Circuit has observed that, under *Gissel*, there are 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. *NLRB v. C. J. Pearson Co.*, 420 F.2d 695 (1st Cir. 1969). Likewise, the Ninth Circuit has stated that "an employer may not impliedly threaten retaliatory consequences" within its control, nor may an employer, "in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside [its] control which have no basis in objective fact." *NLRB v. Lenkurt Electric Co.*, 438 F.2d 1102, 1106 (1971).

The Ninth Circuit has also held that allegedly objectionable predictions must be considered "in the context of the factual background in which they were made, and in view of the totality of employer conduct." *NLRB v. Lenkurt Electric Co.*, 438 F.2d 1102, 1107 (9th Cir. 1971). On a different note, the Seventh Circuit has stated that in this area, "[a]ny 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." *NLRB v. Roselyn Bakeries*, 471 F.2d 165, 167 (7th Cir. 1972).

There is no shortage of Board and court cases considering whether an employer's predictions are permissible predictions grounded in objective fact or objectionable threats. In

such cases, the Board has emphasized that it is no defense that a prediction is phrased as a possibility rather than a certainty. *Daikichi Sushi*, 335 NLRB 622, 624 (2001). Similarly, the Board has found no merit to a contention that statements that do not directly or explicitly attribute strikes, closings, or job loss to unionization cannot constitute threats, reasoning: "Communications which hover on the edge of the permissible and unpermissible are objectionable as '[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double *entendre* should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or "grammarians."'" *Turner Shoe Co.*, 249 NLRB 144, 146 (1980) (quoting *Georgetown Dress Corp.*, 201 NLRB 102, 116 (1973)).

Applying *Gissel*, the Board has found various types of predictions constituted objectionable threats. For example, the Board has set aside elections based on employer statements, unsupported by objective facts, that unionization will result in exorbitant demands leading to job loss and/or plant closure. *AP Automotive Systems*, 333 NLRB 581 (2001); *Mohawk Bedding Co*., 204 NLRB 277 (1973); *Unitec Industries*, 180 NLRB 51, 52 (1970); see also *Coradian Corp.*, 287 NLRB 1207, 1212–1213 (1988) (setting election aside based on employer statements assuming a contract with local union would render operations unprofitable and rejecting defense that employer had earlier relationship with this local union); *Zim's Foodliner v. NLRB*, 495 F.2d 1131, 1137–1138 (7th Cir. 1974) (employer statement it could not afford wages in union's contract and would go out of business if employees voted for it unaccompanied by any objective evidence). Compare *Churchill's Restaurant*, 276 NLRB 775, 775–776 (1985), in which an employer's prediction of closure had objective support based in part on the employer's emphasis of prior experience with wage demands of same union, as well as an emphasis on the a decline in business.

Similarly, elections have been set aside based on statements unionization would result in the loss of customers, leading to further negative consequences. *Southern Labor Services*, 336 NLRB 710 (2001); *SPX Corp.*, 320 NLRB 219, 221–223 (1995); *Blaser Tool & Mold Co.*, 196 NLRB 374 (1972). Compare *Eagle Transport Corp.*, 327 NLRB 1210 (1999), where the Board found that an employer's posting of four customer letters (stating that if the employees unionized, the customers might need to make other business arrangements) was not objectionable as the employer "accurately conveyed these customer statements to employees by posting the letters verbatim." Id. at 1211. The employer did not discuss or characterize the content of the letters, and there was no showing it had solicited the letters from the customers. Id. at 1211–1212. Cf. *Student Transportation of America, Inc.*, 362 NLRB No. 156 (2015) (setting election aside based on employer statement unionization would cause employer to walk away from contract with only client).

More generally, a statement that not decertifying the incumbent will cause the employer to "go broke," *Madison Industries*, 290 NLRB 1226, 1230 (1988), and that bargaining would consume time and energy that could be devoted to solving other problems and thus result in "devastating" consequences, *Dominion Engineered Textiles*, 314 NLRB 571 (1994), have been found objectionable.

The Board has also set aside elections where employers have stated or suggested that unionization has resulted in closure or job loss at other employers when there is no demonstrable evidence unionization in fact caused these events. See *Shelby Tissue, Inc.*, 316 NLRB 646 (1995); *Turner Shoe Co.*, 249 NLRB 144, 146 (1980); *Mohawk Bedding Co.*, 204 NLRB 277, 278 (1973); *General Electric Wiring Devices, Inc.*, 182 NLRB 876, 877 (1970); see also *BI-LO*, 303 NLRB 749 (1991) (although some newspaper articles in packet employer sent to employees indicated union economic actions constituted factor leading other employers to close stores, majority of articles did not identify union activity as cause of closure, and accordingly finding that suggestion unionization would lead to closure lacked objective basis).

In addition, the Board has emphasized that an employer is free to "discuss rationally the potency of strikes as a weapon and the effectiveness of the union seeking to represent" the employees, but that employees "should not be led to believe, before voting that their choice is simply between no union and striking." *Fred Wilkinson Associates*, 297 NLRB 737 (1990)

(quoting *Amerace Corp.*, 217 NLRB 850, 852 (1975)).

By contrast, the Board has found that statements that connoted only possibilities, as opposed to probabilities, in the event of unionization were not objectionable. See *CPP Pinkerton*, 309 NLRB 723, 724 (1992) (mere caution that employer contracts could be jeopardized if employer did not remain competitive, as opposed to statement consequences would occur if employees unionized, not objectionable); *Manhattan Crowne Plaza*, 341 NLRB 619, 620 (2004) (employer memo describing how sequence of events following unionization at another employer led to job loss, with comment "each set of negotiations is different," only "described what *could* happen; it was not predicting what *would* happen" (citing *Novi American*, 309 NLRB 544 (1992); *Caradco Corp.*, 267 NLRB 1356 (1983))); see also *NLRB v. Lenkurt Electric Co.*, 438 F.2d 1102 (1971) (various predictions of stricter working hours and other changes in working conditions and benefits "were at most predictions of possible disadvantages which might arise from economic necessity or because of union demands or union policies" and had factual basis); *Desert Laundry-A Corp.*, 192 NLRB 1032, 1033 (1971) (letter was merely "a statement of opinion predicting events that might occur should the Union win the election").

For other cases finding that allegedly objectionable predictions were permissible as they were based on objective facts, see *Boaz Spinning Co. v. NLRB*, 439 F.2d 876 (6th Cir. 1971) (employer referred to how unionization disrupted two other plants' traditionally friendly relations with employees but also stated plants did not close or lose business because of union); *Kawasaki Motors Mfg. Corp*., 280 NLRB 491 (1986) (in unfair labor practice case, employer supported discussion of its poor financial condition with facts and figures, stated continued losses would result in closure, but never stated it would close or move if employees unionized); *Levy Co.*, 351 NLRB 1237, 1239–1240 (2007) (statement to current workforce, all of whom were striker replacements, that elsewhere union had demanded that strikers be reinstated at expense of replacements accurate and not objectionable, even if employer did not explain every possibility to employees); see also *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1367–1369 (7th Cir. 1983); *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981); *Carry Cos. Of Illinois*, 310 NLRB 860 (1993).

As noted earlier, *Gissel* also indicates that threats of retaliation are unlawful. For cases setting aside elections based on express or implied threats of retaliation without specific reference to the absence of objective evidence, see *Keystone Automotive Industries, Inc.*, 365 NLRB No. 60, slip op. at 1 fn. 2 (2017) (employer stated it would stop offering incentive program if union "infiltrated" and that all "little perks" would go away); *Labriola Baking Co.*, 361 NLRB No. 41 (2014) (Spanish translation of employer prediction of strike and replacement workers reasonably suggested it would use immigration status to take action against employees in event of strike); *Deaconess Medical Center*, 341 NLRB 859 (2004) (employer indicated it would not revers wage cut if union won election); *Cooper Tire & Rubber Co.*, 340 NLRB 958 (2003) (employer reasonably suggested to employees they would be foreclosed from obtaining certain benefit if union represented them); *Georgia-Pacific Corp.*, 325 NLRB 867 (1998) (employer stated union representation would make employees ineligible for bonus plan); *ADIA Personnel Services*, 322 NLRB 994 (1997) (employer implied it would not institute usual wage increase if union won); *Renton Issaquah Freightlines*, 311 NLRB 178 (1993) (employer linked reopening of plant to whether employees voted to decertify the union); *Hertz Corp.*, 316 NLRB 672, 672 fn. 2 (1995) (employer statements conveyed impression employees would lose 401(k) immediately upon choosing union); *Glasgow Industries*, 204 NLRB 625, 627 (1973) (one foreman told employee selection of union would lead to loss of work and another stated "if you all vote this Union in, this plant could move to Mexico"); *Sprague Ponce Co.*, 180 NLRB 281 (1970) (veiled threat to close plant if union was selected); see also *Petrochem Insulation, Inc.*, 341 NLRB 473 (2004) (stating, in setting aside election based on threat, that employer's clear implication that it would reduce wages and benefits if employees unionized "would not constitute a prediction of adverse consequences that was both beyond the Employer's control and

based on objective fact"); *NLRB v. Taber Instruments*, 421 F.2d 642 (2d Cir. 1970) (enforcing order finding unlawful statement that employees did not realize what they could lose in election, as employer, if it chose, could phase out or move operations). Cf. *Penland Paper Converting Corp.*, 167 NLRB 868 (1967) (pre-*Gissel* case setting election aside based on veiled threat to close plant or take other economic sanctions if employees selected union).

Elections have been set aside where the employer's remarks about the cost of its antiunion campaign reasonably communicate that the union campaign has potentially cost employees bonuses and might continue to do so. See *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 4–5 (2014); *Mesker Door, Inc.*, 357 NLRB 591, 595–596 (2011); *Pilot Freight Carriers, Inc.*, 223 NLRB 286, 286 fn. 1 (1976).

Even in the absence of a specific finding of objectionable conduct, the Board has set aside elections where the overall impact creates a coercive atmosphere due to the employer's emphasis on the likelihood of strikes, plant closure, and loss of jobs if the union wins. See, e.g., *Turner Shoe Co.*, 249 NLRB 144, 147 (1980) (citing *Thomas Products Co.*, 167 NLRB 732 (1967); *Amerace Corp.*, 217 NLRB 850 (1975)).

Without specific reference to *Gissel*, the Board has held that an employer's conveyance of a sense of futility warrants setting an election if the employer's statements expressly, or through clear implication, convey that it will not bargain in good faith if the union is selected. See *Madison Industries*, 290 NLRB 1226, 1230 (1988); see also *American Telecommunications Corp.*, 249 NLRB 1135, 1136 (1980).

Special considerations are present when an employer makes statements concerning the consequences of an economic strike. In *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), the Board articulated certain rights for economic strikers, namely that when economic strikers who have been permanently replaced unconditionally apply for reinstatement, they are entitled to full reinstatement when positions become available (unless they have acquired regular and substantial equivalent employment in the meantime). Given these rights, the Board will find objectionable conduct if an employer, without advising employees of their *Laidlaw* rights, conveys a prospect of total job loss by telling employees they may lose their jobs if they go on strike. See *Warren Manor Nursing Home, Inc.*, 329 NLRB 3 (1999); *Baddour, Inc.*, 303 NLRB 275 (1991); *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989). Compare *Fiber-Lam, Inc.*, 301 NLRB 94 (1991). The employer does not have to fully detail striker protections, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights under *Laidlaw*. *Eagle Comtronics*, 263 NLRB 515 (1982); *Novi American*, 309 NLRB 544, 545 (1992).

c. Union Threats

378-4228

The Board has also considered whether statements attributable to a union constitute objectionable threats. As with employer statements, in assessing union statements the subjective reactions of employees are not relevant. *Van Leer Containers*, 298 NLRB 600, 600 fn. 2 (1990).

In *Rio de Oro Uranium Mines*, 120 NLRB 91, 94 (1958), several statements were made to the effect that employees' jobs would be affected if the union won the election; the Board found that even if these statements were made by union agents, employees could evaluate them for themselves and the statements did not contain "threats within the Union's power to carry out." See also *Accubuilt, Inc.*, 340 NLRB 1337 (2003); *Allied-Chalmers Corp.*, 278 NLRB 561, 563 (1986); *Urban Telephone Corp.*, 196 NLRB 23, 25–26 (1972). Compare *United Broadcasting Co. of New York, Inc.*, 248 NLRB 403, 404 (1980) (union threat to retaliate with blacklist, despite no evidence it had ever engaged in such a practice, was "the kind of economic reprisal which an employee may reasonably believe is within a union's power").

The Board has set aside an election based on a union's statement that a vote to decertify it would result in a loss of health and welfare coverage (provided pursuant to its contract with the

employer) and there would be no benefits for employees under any plan sponsored for the two and a half years the union predicted it would take for the Board's certification to become final. The Board noted that there was no evidence the coverage would be removed by operation of law upon decertification, so employees could reasonably infer this was a threat that the union would terminate the coverage if it did not prevail. *Bell Security*, 308 NLRB 80 (1992). Likewise, the Board set aside an election where, a week before the election, an agent of the union took steps to terminate dental and vision insurance benefits and advised employees they could only retain such benefits by voting for the union. *Willey's Express*, 275 NLRB 631 (1985); see also *A. Rebello Excavating Contractors*, 219 NLRB 329 (1975) (union statement employees had good chance of losing "union books" if they voted against the union required setting election aside).

It is not objectionable, however, for a union to describe the consequences of a termination of a collective-bargaining relationship between the union and the employer, including the effects of such termination on a pension plan. *Trump Taj Mahal Associates*, 329 NLRB 256 (1999). It is also not objectionable for a union to try to explain its legal obligations to employees in the event they vote to decertify. *Van Leer Containers*, 298 NLRB 600, 600 fn. 2 (1990); see also *JTJ Trucking, Inc.*, 313 NLRB 1240, 1240 fn. 1 (1994) (not objectionable for union to truthfully represent to employees that its health coverage would not be available to them if they did not select it as their representative).

See also *Janler Plastic Mold Corp*, 186 NLRB 540 (1970), in which the Board found that a supposed threat that employees would lose their jobs if they did not vote for the union was not objectionable because there was no evidence any employees had reason to believe the union could figure out they how voted, nor was there evidence employees had reason to believe the employer favored the union and on request would discharge employees for voting against the union. Compare *NLRB v. Valley Bakery, Inc.*, 1 F.3d 769 (9th Cir. 1993), with *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048 (1998).

For the effect of a union's alleged threat to stop representing employees in the event of a successful deauthorization election, see *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247 (1999).

24-302 Promises and Grants of Benefit

As indicated above, under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–618 (1969), employer statements that convey a promise of benefits may, like those conveying threats, be unlawful and thus objectionable. Promises of benefit may also objectionable under *General Shoe Corp.*, 77 NLRB 124 (1948). See, e.g., *Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962).

a. Express and Implied Promises of Benefit (Employer)

378-2839

Express promises of benefit are generally obvious enough and require little comment. See, e.g., *Madison Industries*, 290 NLRB 1226, 1230 (1988) (employer provided employees with document proposing various improved terms and provisions and expressly conditioned implementation of them on employees' rejection of the union).

A more nuanced area is whether an employer's statements contain an implied promise of benefit. An employer may lawfully inform employees of wages and benefits its nonunion employees receive, and it may respond to requests for information from employees about such benefits. See *Suburban Journals of Greater St. Louis*, 343 NLRB 157, 159 (2004). But the Board sets aside elections when an implied promise of benefits is made to employees. *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979). The Board infers that such a promise interferes with free choice, but an employer can rebut the inference by showing a legitimate purpose for the timing of the promise. *G & K Services*, 357 NLRB 1314, 1315 (2011).

To determine if a statement is an implied promise of benefit, the Board considers the surrounding circumstances and whether, in light of those circumstances, employees would

reasonably interpret the statement as a promise. See *Viacom Cablevision*, 267 NLRB 1141 (1983); *Crown Electrical Contracting, Inc.*, 338 NLRB 336, 337 (2002).

An employer may compare union and nonunion benefits and make statements of historical fact, but even such comparisons and statements may, "depending on their precise contents and context, nevertheless convey implied promises of benefits." *G & K Services*, 357 NLRB 1314, 1315 (2011); see *Keystone Automotive Industries, Inc.*, 365 NLRB No. 60 (2017) (employer linked expeditious wage increase to vote against union); *Unifirst Corp.*, 361 NLRB No. 1, slip op. at 1 fn. 3 (2014) (employer specifically linked receipt of 401(k) and profit-sharing plans to voting against union); *Grede Plastics*, 219 NLRB 592, 593 (1975) (factually accurate letter contained implied promise); *Westminster Community Hospital, Inc.*, 221 NLRB 185 (1975), enfd. mem. 566 F.2d 1186 (9th Cir. 1977) (comparison contained promise). Compare *Langdale Forest Products Co.*, 335 NLRB 602 (2001) (comparison was lawful). The fact that a comparison is not accompanied by other objectionable conduct or is not tailored to the employees at issue is not dispositive. *Lutheran Retirement Village*, 315 NLRB 103 (1994). Further, if the evidence indicates that an employer offers such information without solicitation, this circumstance supports finding an implied promise. *G & K Services*, 357 NLRB 1314, 1315–1316 (2011); *Coca-Cola Bottling Co. of Dubuque*, 325 NLRB 1275, 1276 fn. 6 (1995). The fact an employer is responding to employee questions does not necessarily excuse an actual implied promise, however. *California Gas Transport*, 347 NLRB 1314, 1318 (2006), enfd. 507 F.3d 847 (5th Cir. 2007). For examples applying these principles to reach different results, compare *TCI Cablevision*, 329 NLRB 700 (1999) (employer statement that its represented employees did not get a 401(k) plan that unrepresented employees were required to receive not objectionable), and *G & K Services, Inc.*, 357 NLRB 1314 (2011) (employer description of benefits obtained by its employees at another facility after decertification objectionable).

If an express or implied promise has been made, an employer's disclaimer it is making any promises is "immaterial." *Michigan Products*, 236 NLRB 1143, 1146 (1978).

b. Grants of Benefits (Employer)

378-2839

The actual grant of a benefit during the critical period may also be objectionable. See, e.g., *SBM Management Services*, 362 NLRB No. 144 (2015) (distribution of bonuses to 11 of 35 unit employees during critical period objectionable). So too the announcement of a benefit or improved working conditions. *Newburg Eggs*, 357 NLRB 2191, 2192 (2011); *Reliant Energy*, 357 NLRB 2098, 2114 (2011). That said, a grant of benefit "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." *United Airlines Services Corp.*, 290 NLRB 954 (1988) (citing *NLRB v. Exchange Parts Co.*, 375 NLRB 405 (1964)). The employer's duty is, in deciding whether to grant benefits, "to decide that question precisely as it would if the union were not on the scene." *R. Dakin & Co.*, 284 NLRB 98 (1987) (quoting *Reds Express*, 268 NLRB 1154, 1155 (1984)); see also *Niblock Excavating, Inc.*, 337 NLRB 53 (2001); *Network Ambulance Services*, 329 NLRB 1, 2 (1999); *Waste Management of Palm Beach*, 329 NLRB 198 (1999).

The standard in grant-of-benefit cases is an objective one. See *Gulf States Canners*, 242 NLRB 1326 (1979). To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, the Board examines 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. *B & D Plastics*, 302 NLRB 245 (1991); see also *Ameraglass Co.*, 323 NLRB 701 (1997). For more on *B &D Plastics*, see section 24-303, which deals with gifts, raffles, contests, and parties.

Similar to its treatment of implied promises of benefits, the Board infers benefits granted

during the critical period are coercive, but allows the employer to rebut that inference by providing an explanation, other than the pending election, for the timing of the grant or announcement of benefits. *United Airlines Services Corp.*, 290 NLRB 954 (1988) (citing *Uarco, Inc.*, 216 NLRB 1, 2 (1974); *Singer Co.*, 199 NLRB 1195 (1972)). It is the employer's burden to make this showing, which can be met by showing the grant is consistent with past practice or company policy. *American Sunroof Corp.*, 248 NLRB 748 (1980); see also *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002); *Onan Corp.*, 338 NLRB 913 (2003). The fact that an employer has a past practice of paying bonuses may not meet the burden if the bonus payment made during the critical period was larger than in the past, paid to proportionately more employees, and paid faster than in the past. *STAR, Inc.*, 337 NLRB 962, 963 (2002). The absence of a past practice is not fatal, however, if the benefit is granted for other legitimate business reasons, such as if a multiunit corporation grants a corporatewide benefit during the critical period before a Board election held at one of its subsidiaries. *Network Ambulance Services*, 329 NLRB 1 and fn. 4 (1999).

Even if it is shown that a *decision* to grant a benefit is not objectionable, the *announcement* of the benefit may still be objectionable if the employer waits to announce it until shortly before the election. *Sun Mart Foods*, 341 NLRB 161, 164–165 (2004); see also *Yale Industries*, 324 NLRB 949 (1997). If an employer, during the critical period, has a legitimate concern that the Board might perceive a projected benefit as objectionable, even though the employer had decided to grant the benefit before the critical period, the employer may announce that, solely for the purpose of avoiding the appearance of influencing the election, the scheduled improvement will be deferred until after the election. *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995). An employer is not obliged to take such a course of action, however. *Network Ambulance Services*, 329 NLRB 1, 2 (1999). Indeed, postponing a benefit and failing to ensure employees the benefit would ultimately be given regardless of the election outcome might itself be objectionable. *United Methodist Home of New Jersey*, 314 NLRB 687, 688 (1994).

See section 24-430 for a discussion of an employer's offer to grant extra pay as inducement for employees not scheduled to work to vote in the election.

c. Union Promises and Grants of Benefit

378-4214

378-4270-6799

378-4284-6500

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*., 338 NLRB 986 (2003). That said, a union promise may be objectionable if the benefit promised is within the union's power to effectuate it. See, e.g., *Alyeska Pipeline Service Co.*, 261 NLRB 125, 126 (1982) (union controlled all access to construction jobs in Alaska for employees participating in election, and thus union's suggesting only way to get union card was by voting for union in upcoming election was objectionable as union was clearly promising to grant members advantage over nonmembers and had power to do that). But see *Station Operators*, 307 NLRB 263, 263 fn. 1 (1992) (stating that the holding in *Alyeska* was tied to its special facts); *Electrical Workers Local 103 (Drew Electric)*, 312 NLRB 591, 593 fn. 6 (1993) (distinguishing *Alyeska*). See also *Go Ahead North America, LLC*, 357 NLRB 77 (2011) (finding objectionable union offer to waive back dues). Compare *Washington National Hilton Hotel*, 323 NLRB 222 (1997) (offer to put employees in contact with a news reporter who was doing a story on

organizing not shown to be "tangible, substantial, and direct benefit" that would interfere with free choice).

For potentially objectionable union offers to waive initiation fees, see section 24-304.

With respect to a union actually granting benefits, the factors set forth in *B & D Plastics*, 302 NLRB 245 (1991), apply. See also section 24-303 with respect to union gifts.

24-303 Gifts, Parties, Raffles and Contests

378-2897

378-4284

a.
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). There is, of course, overlap between the grant of a benefit (such as the types of benefits discussed in section 24-302) and the giving of a gift. The Board applies the same standard for determining whether benefits or gifts amount to objectionable conduct:

> 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.

B & D Plastics, 302 NLRB 245, 245 (1991) (citing *Speco Corp.*, 298 NLRB 439, 439 fn. 2 (1990); *United Airlines Services Corp.*, 290 NLRB 954 (1988); *May Department Stores Co.*, 191 NLRB 928 (1971)). This test is objective. *Gulf States Canners, Inc.*, 242 NLRB 1326, 1327 (1979), enfd. 634 F.2d 215 (5th Cir. 1981), cert. denied 452 U.S. 906 (1981).

"[T]he mere fact that a payment in cash or in kind has been made to an eligible voter during a preelection campaign does not require a *per se* finding that the employee's right to make a free and uncoerced choice . . . has been destroyed." *Gulf States Canners*, 242 NLRB at 1327. If a gift's value is so minimal that it would not reasonably interfere with free choice, the Board will not find the gift objectionable. *Go Ahead North America, LLC*, 357 NLRB 77, 78 fn. 6 (2011). Generally speaking, gifts of minimal value include items such as buttons, stickers, t-shirts, and similar types of campaign propaganda. See *R. L. White Co.*, 262 NLRB 575, 576 (1982); see also *Nu Skin International, Inc.*, 307 NLRB 223 (1992) (t-shirts not objectionable); *Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969) (union giveaway of turkeys not objectionable). But see *NLRB v. Shrader's, Inc.*, 928 F.2d 194 (6th Cir. 1991) (holding union t-shirt giveaway on election day objectionable). But promises of gifts of tangible economic value made as an inducement to win support in an election are objectionable. *Go Ahead North America, LLC*, 357 NLRB 77 (2011).

For union promises or gifts held objectionable, see *Comcast Cablevision-Taylor*, 338 NLRB 1089 (2000) (on remand, promise of trip to Chicago worth $50); *Mailing Services*, 293 NLRB 565 (1989) (free medical screenings); *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235–1236 (1984) (jackets); *General Cable Corp.*, 170 NLRB 1682, 1682–1683 (1968) (gift certificates); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (life insurance).

For employer promises or gifts held objectionable, see *B & D Plastics*, 302 NLRB 245 (1991) (promised grant of day off 2 days after election); *Shore & Ocean Services*, 307 NLRB 1051 (1992) (change in overtime computation and provision of uniforms shortly after petition filed).

Compare *Emery Worldwide*, 309 NLRB 185 (1992) (although outcome of bonus competition was accounted the day before the election, timing alone was insufficient to make otherwise unobjectionable announcement objectionable).

Provision of free food and drink, even on election day, is not necessarily objectionable. See *Lach-Simkins Dental Laboratories*, 186 NLRB 671, 672 (1970) (union-provided sandwiches and soft drinks). Food and drink are often offered in conjunction with parties, which are discussed in more detail immediately below.

b. Parties

Absent special circumstances, campaign parties are legitimate campaign devices. *L. M. Berry & Co.*, 266 NLRB 47, 51 (1983) (Christmas party held 8 days before election at which union was not mentioned found lawful). Thus, a union or employer party providing free food and drink to employees is not, by itself, reason to set aside an election. *Chicagoland Television News, Inc.*, 328 NLRB 367 (1999).

But the Board "will examine whether particular events constitute or involve benefits sufficiently large to interfere with laboratory conditions for a fair election, which can result in setting aside the election." *Bernalillo Academy*, 361 NLRB No. 127, slip op. at 2 (2014). Thus, in determining whether the objecting party has established "special circumstances," the Board will apply the test set forth in *B & D Plastics*, 302 NLRB 245 (1991). See also *Atlantic Limousine*, 331 NLRB 1025, 1029–1030 (2000).

Applying this standard, the Board has set aside elections based on the employer paying for a lavish brunch (costing about $8000) 3 days before the election. *Chicago Tribune*, 326 NLRB 1057 (1998). The Board has also set aside an election based on an offsite crab boil held 2 days before the election (and immediately after a campaign meeting all but 4 employees were required to attend) for which the employer paid employees for their attendance. *River Parish Maintenance, Inc.*, 325 NLRB 815 (1998). The Board has declined to set elections aside based on preelection parties in *Bernalillo Academy*, 361 NLRB No. 127 (2014); *Chicagoland Television News, Inc.*, 328 NLRB 367 (1999); *Lach-Simkins Dental Laboratories*, 186 NLRB 671, 671–672 (1970); *Jacqueline Cochran, Inc.*, 177 NLRB 837, 839 (1969); and *Peachtree City Warehouse, Inc.*, 158 NLRB 1031 (1966). Cf. *Raleigh County Commission on Aging*, 331 NLRB 924 (2000) (announcement of dinner to celebrate employer's anticipated election victory not objectionable).

c. Raffles

A raffle is objectionable if eligibility to participate in it is tied to voting in the election or being at the election site on election day, or if it is conducted any time from 24 hours before the opening of the polls and the closing of the polls. *Atlantic Limousine*, 331 NLRB 1025, 1029 (2000). For more on this standard, see section 24-443. For raffles held outside of this period, the Board considers 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." Id. at 1029 fn. 13. In such circumstances, the test set out in *B & D Plastics*, 302 NLRB 245 (1991), applies. See *BFI Waste Systems*, 334 NLRB 934 (2001) (setting election aside based on this test).

d. 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, 1133 (2000) (questionnaire amounted to polling).

24-304 Offers to Waive Union Initiation Fees

378-4270-6705

378-4284-5000

712-5042-6767

Union offers to waive initiation fees present a situation distinct from the promises or grants of benefits or gifts discussed in sections 24-302 and 24-303.

In 1973, the Supreme Court ruled that a union's offer to waive initiation fees can be grounds for setting aside an election 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 is not objectionable. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *L. D. McFarland Co*., 219 NLRB 575, 576 (1975); *Irwindale Division, 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* prohibits conditions of the waiver on an "outward manifestation of support" such as signing an authorization card or joining the union. Id. at 295. 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, it is the union's duty to clarify such ambiguity "or suffer whatever consequences might attach to employees' possible interpretations of the ambiguity." *Inland Shoe Mfg. Co.*, 211 NLRB 724, 725 (1974); see also *S.T.A.R., Inc.*, 347 NLRB 82 (2006); *Town & Country Cadillac, Inc.*, 267 NLRB 172 (1983). For a finding that the union had clarified any ambiguity, see *Smith Co. of California, Inc.*, 215 NLRB 530 (1974).

Where employees solicit cards in exchange for a waiver, their remarks may be attributable to the union and thus become the basis for election objections. Specifically, 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); *Davlan Engineering*, 283 NLRB 803, 804 (1987). Such disavowal may be achieved "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." *Hollingsworth Management Service*, 342 NLRB 556, 559 (2004) (quoting *Davlan Engineering*, 283 NLRB at 805).

24-305 Filing Lawsuits

378-2500

378-2839

378-4284-6500

At one time, the Board held that a union's provision of free legal services to employees, during the critical period, to assist them in efforts to improve terms and conditions of employment fundamentally differed from other union conduct traditionally analyzed as an objectionable grant of benefit. See, e.g., *Novotel New York*, 321 NLRB 624 (1996) (services to investigate, prepare, file FLSA lawsuit); see also *Nestle Dairy Systems*, 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995) (filing RICO lawsuit not objectionable). Circuit courts, however, deemed this approach incompatible with the general prohibition on the conferral of benefits during the critical period. See *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).

In *Stericycle, Inc*., 357 NLRB 582, 584–585 (2011), which involved the union filing a wage

and hour lawsuit on behalf of unit employees during the critical period, the Board announced that, in light of the court cases noted above, a union's financing of a lawsuit filed during the critical period will ordinarily constitute objectionable conduct. The Board specified, however, that various other types of conduct remain unobjectionable, and unions remain free to "inform employees about their rights, assist them in identifying violations, urge them to seek relief, and even refer them to competent counsel." Id. at 585. Further, after the employees have been referred to counsel, "such counsel may file suit on behalf of employees, even during the critical period, so long as the union does not fund the litigation directly or indirectly, and the lawyers are acting solely in the interest of their employee clients and not as the union's agents, as under such circumstances lawyers would be acting as third parties. Id. at 585-586.

See also *NLRB v. VCNCL, L.L.C.*, 655 Fed. Appx. 196 (5th Cir. 2016) (union's filing of unfair labor practice charge based on comments made by employer at representation case hearing, and Board's investigation and issuance of complaint based on the charge, was not objectionable).

24-306 Assembly of Employees at a Focal Point of Authority and Home Visitations

378-2816

378-4242

The Board has often considered whether the assembly of employees by the employer at a focal point of authority disrupts "laboratory conditions." Indeed, this issue was raised in *General Shoe Corp.*, 77 NLRB 124 (1948), itself.

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 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." Id. at 126–127. The employer also instructed his supervisors "to propagandize employees in their homes." Id. at 127. 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." Id. 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 may still be pertinent, "if extreme enough," in deciding whether an election satisfies the Board's own administrative standards. Id. at 127 fn. 10.

In *Economic Machinery Co*., 111 NLRB 947, 949 (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." For further elaboration on this reasoning, see *H. W. Elson Bottling Co*., 155 NLRB 714, 716 fn. 7 (1965) (noting congressional and judicial recognition of the "unique effectiveness of speeches addressed to employees assembled during working hours at the locus of employment); *Great Atlantic & Pacific Tea Co*., 140 NLRB 133, 134 (1963) (commenting on the "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). See also *Hurley Co*., 130 NLRB 282 (1961).

In *NVF Co*., 210 NLRB 663, 664 (1974), the Board concluded that 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. Such conduct will only be held objectionable "where it can be said on reasonable grounds that, because of the small size of the groups interviewed, the locus of the interview, the position of the interviewer in the employer's hierarchy, and the tenor of the speaker's remarks" the election results did not represent the employees' true wishes. Id. at 1118. See also *Flex Products*, 280 NLRB 1117 (1986); *Three Oaks, Inc.*, 178 NLRB 534 (1969). Cf. *Frito Lay, Inc.*, 341 NLRB

515, 516 fn. 8 (2004) (noting *NVF Co.* and *Flex Products* in finding that employer's use of "ride-alongs"─management representatives who rode with unit drivers to discuss working conditions─was not objectionable under the circumstances); *Keystone Automotive Industries, Inc.*, 365 NLRB No. 60, slip op. at 1 fn. 2 (2017).

Short interviews of several minutes' duration conducted at employees' worksites have been found unobjectionable. See *Mall Tool Co*., 112 NLRB 1313 (1955) (distinguishing *Economic Machinery Co.*, 111 NLRB 947 (1955)).

With respect to home visitations by officials and supervisors of the employer, the Board has made 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 grounds for setting aside an election. See *F. N. Calderwood, Inc*., 124 NLRB 1211, 1212 (1959); see also *Phelps Dodge Corp.*, 177 NLRB 531, 532 fn. 3 (1969); *Hurley Co*., 130 NLRB 282 (1961); *Peoria Plastic Co.*, 117 NLRB 545, 547 (1957). 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).

It should be emphasized 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*, 119 NLRB 131, 133–134 (1957).

24-307 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, 224 (1962); and *Shopping Kart Food Market*, 228 NLRB 1311 (1977); see also *Phoenix Mechanical*, 303 NLRB 888 (1991) (no basis for setting aside elections on the basis of misrepresentations by third parties); *Carry Cos. of Illinois*, 310 NLRB 860 (1993) (even if propaganda was misrepresentation of fact or law, it was not objectionable); *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).

In a series of cases, the Board has rejected assertions that union flyers bearing employees signatures, statements, or photographs conveying impression they supported the union constituted objectionable conduct. *Gormac Custom Mfg*., 324 NLRB 423 (1997) (union flyer with signatures of employees supporting union not objectionable where employees signed document authorizing union to reproduce signatures); *Champaign Residential Services*, 325 NLRB 687 (1998) (union flyer with photocopied signatures of employees supporting the union not objectionable); *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 736 (2011) (flyer purporting to quote employees as saying they were going to vote for the union, when in fact they had not done so, not objectionable); *Enterprise Leasing Co.–Southeast, LLC*, 357 NLRB 1799 (2011), ultimately enforced at 722 F.3d 609, 617–618 (2013) (use of employee photograph on flyer without his permission not objectionable); *Durham School Services, LP*, 360 NLRB 851 (2014), enfd. 821

F.3d 52 (D.C. Cir. 2016) (flyer picturing employees with caption "WE'RE VOTING YES" for petitioner).

A misstatement of the law is not objectionable conduct. Thus, in *John W. Galbreath & Co*., 288 NLRB 876, 877 (1988), the Board overruled objections to an election where an employer stated that an employee who is expelled from the union could be fired if a union-security agreement is in effect. See also *Seven-Up/Royal Crown Bottling Cos*., 323 NLRB 579 (1997); *Virginia Concrete Corp.*, 338 NLRB 1182, 1186 (2003). Misrepresentations of Board actions are also treated no differently than other misrepresentations. *Riveredge Hospital*, 264 NLRB 1094, 1095 (1982). But see *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 9, 38 (2016) (setting election aside where misstatements of Board action were accompanied by altered Board document that constituted "false cloak of Board authority").

Midland National did, however, indicate a continued Board concern over "forged documents which render the voters unable to recognize propaganda for what it is." 263 NLRB at 133. 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, 1060 fn. 2 (1992); see also *United Aircraft Corp*., 103 NLRB 102 (1953). In *AWB Metal*, 306 NLRB 109 (1992), the Board distinguished between a document that allegedly misrepresented wage rates and forgery. Cf. *Care Enterprises*, 306 NLRB 491, 491 fn. 3 (1992) (finding employer had furnished insufficient evidence to warrant hearing on allegation union forged employee signature on campaign document.

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, Inc.*, 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). Applying *Ryder Memorial Hospital*, the Board has set aside an election based on a union organizer's preelection statement that she was visiting employee homes "on behalf of the NLRB" to determine how employees were voting; the Board held 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." *Goffstown Truck Center, Inc*., 356 NLRB 157 (2010). As indicated above, however, mere misrepresentations of Board actions are not objectionable, see *Riveredge Hospital*, 264 NLRB 1094 (1982), including misrepresentations as to the Board's neutrality. *TEG/LVI Environmental Services*, 326 NLRB 1469 (1998). See also sections 24-423 and 24-441.

Midland National does not apply, however, and the Board will set aside an election upon a showing that the employees did not know the identity of the organization that they were voting for or against. See *Humane Society for Seattle/King County*, 356 NLRB 32, 34–35 (2010); *Pacific Southwest Container*, 283 NLRB 79, 80 fn. 2 (1987). Compare *Nevada Security Innovations*, 337 NLRB 1108 (2002).

Midland National also does not excuse a campaign statement that contains a threat of reprisal or force or a promise of benefit. *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 5 fn. 14 (2016).

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, 348 (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); *U-Haul Co. of Nevada, Inc*., 341 NLRB 195 (2004).

24-308 Racial Appeals

378-2885-8000

Campaign propaganda calculated to inflame racial prejudice of employees, deliberately seeking to overemphasize and exacerbate racial feeling by irrelevant, inflammatory appeals, is a

basis for setting aside an election. *Sewell Mfg. Co.*, 138 NLRB 66, 71–72 (1962); *YKK (USA) Inc*., 269 NLRB 82, 84 (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 *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).

In *Sewell Mfg.*, 138 NLRB at 70, the Board elaborated on the standard to be applied, commenting that "[s]ome appeal to prejudice of one kind or another" is inevitable, and that although the Board's standards "must be high," they "cannot be so high that for practical purposes elections could not effectively be conducted." The Board emphasized that appeals to race prejudice "on matters unrelated to the election or to the union's activities . . . have no place in Board electrical campaigns" and that it would not tolerate "appeals or arguments which can have no purpose except to inflame the racial feeling of voters in the election," but added that "a relevant campaign statement" will not be "condemned because it may have racial overtones." Id. at 71. Accordingly, if "a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground." Id. at 71–72. The burden, however, is "on the party making use of a racial message to establish that it was truthful and germane," and any doubt on these grounds is resolved against the party communicating such a message. Id. at 72.

In *Sewell Mfg.* itself, the employer—who operated facilities in two small Georgia towns—(1) two weeks before the election mailed employees (a) a picture of a black man dancing with a white woman with a caption indicating the C.I.O. supported the Fair Employment Practices Committee, and (b) an article from a Mississippi newspaper, headed "Race Mixing Is An Issue as Vickers Workers Ballot," depicting union leader James B. Carey dancing with a black woman; (2) sent a subsequent letter calling attention to the petitioner's support of NAACP and CORE; and (3) in the months before the election, distributed "Militant Truth," a South Carolina publication that contained statements such as "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." Id. at 66–68. The Board held that this conduct warranted setting the election aside as it seemed "obvious from the kind and extent of propaganda . . . that the Employer calculatedly embarked on a campaign so to inflame racial prejudice of its employees that they would reject the Petitioner out of hand on racial grounds alone." Id. at 72. The Board particularly noted that the photographs and "Race Mixing" article "were not germane to any legitimate issue involved in the election." Id.

By contrast, in *Allen-Morrison Sign Co*., 138 NLRB 73, 75 (1962), the Board, applying *Sewell*, declined to set aside an election based on an employer's letter to employees advising them of the petitioner's position on segregation, finding that the letter was "temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation;" further, with respect to a clipping from "Militant Truth" concerning the Petitioner's disciplinary actions against a nearby Local that supported segregation, stated 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 Board has clarified that the burden-shifting "rule in *Sewell* is applicable only in those circumstances where it is determined that the 'appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election.'" *Bancroft Mfg. Co.*, 210 NLRB 1007, 1008 (1974) (quoting *Sewell Mfg.*, 138 NLRB at 71); see also *Englewood Hospital*, 318 NLRB 806, 807 (1995); *Foxwoods Resort Casino*, 356 NLRB 816 (2011). Various courts have agreed that challenged remarks must be inflammatory for *Sewell* to apply. See, e.g., *Honeyville Grain, Inc. v. NLRB*, 444 F.3d 1269, 1275 (10th Cir. 2006), and cases cited therein.

In a similar vein, the Board has explained that the *Sewell Mfg.* rule does not apply to

"noninflammatory appeals designed to encourage solidarity among racial minorities in order to promote their separate social and economic interests." *Bancroft Mfg. Co.*, 210 NLRB 1007 (1974), enfd. 515 F.2d 436 (5th Cir. 1975); see also *Baltimore Luggage Co.*, 162 NLRB 1230, 1233 (1967) (noting *Sewell Mfg.* applies to appeals to animosity that set race against race). Accordingly, the Board declined to set aside an election based on campaign propaganda that sought to encourage racial pride, self-consciousness, and concerted action. *Archer Laundry Co.*, 150 NLRB 1427, 1432–1434 (1965); see also *Aristocrat Linen Supply Co.*, 150 NLRB 1448, 1452–1453 (1965); *Hobco Mfg. Co.*, 164 NLRB 862 (1967); *Coca-Cola Bottling Co. of Memphis*, 273 NLRB 444 (1984). For further discussion of the distinction between "consciousness raising" and racial prejudice see *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 924–929 (5th Cir. 1977) But see *NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675, 678–679 (4th Cir. 1966), in which the court, after approving *Sewell*, held that campaign literature urging employees (most of whom were African-American) to consider and act on race as a factor in the election warranted invalidating the election because the calls "upon racial pride or prejudice in the contest could 'have no purpose except to inflame the racial feelings of voters in the election'" and the literature referenced recent nearby instances of racial violence.

Likewise, statements denouncing racial prejudice are not objectionable under the *Sewell* standard. See *Englewood Hospital*, 318 NLRB 806, 807 (1995); *Beatrice Grocery Products*, 287 NLRB 302 (1987). Cf. *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458, 460–461 (1998) (union supporter's warning to Japanese managers not to show racial favoritism did not violate *Sewell*).

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. Thus, the Board will overrule objections where the remarks in question are isolated. See *Beatrice Grocery Products, Inc.*, 287 NLRB 302 (1987); *Coca-Cola Bottling Co. Consolidated*, 232 NLRB 717 (1977); *Brightview Care Center*, 292 NLRB 352, 353 (1989); *Catherine's, Inc.*, 316 NLRB 186 (1995); see also *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458, 461 fn. 3 (1998) (commenting ethnic appeals must constitute a significant aspect of a party's campaign to require a rerun election). Compare *Zartic, Inc.*, 315 NLRB 495, 497 (1994) (setting aside election based on union's repeated inflammatory appeals "to the ethnic sentiments of the Employer's Hispanic employees"). See also *Singer Co.*, 191 NLRB 179 (1971) (limited remark found not objectionable in campaign otherwise free of racial hostility). In a case involving remarks about the employer's owners' religion, the Tenth Circuit agreed with the Board that these remarks were not a central theme of the campaign. *Honeyville Grain, Inc. v. NLRB*, 444 F.3d 1269, 1278–1279 (10th Cir. 2006); see also *State Bank of India v. NLRB*, 808 F.2d 526, 542 (7th Cir. 1986). Compare *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53, 57–58 (3d Cir. 1981) (remanding case to Board for hearing on whether union agent's remark at meeting of 20 employees that employer was "stingy Jew" warranted setting election aside); *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 259–260 (6th Cir. 1994), denying enf. of 309 NLRB 1063 (1992) (overturning certification where union, shortly before election, distributed letter from Japanese individual expressing anti-American sentiment but letter had no connection to the views of the employer—who was also Japanese—on American employees).

The Board has also explained that in analyzing *Sewell* issues, it will assess the intent of the party accused of the relevant misconduct, as well as its likely effect on the employees in question, in order to determine "whether the conduct so clouded the election atmosphere as to require the election to be set aside." *Zartic, Inc.*, 315 NLRB 495, 497 (1994) (quoting *KI (USA) Corp.*, 309 NLRB 1063, 1064–1065 (1992)).

The Board has stated that *Sewell* applies, by its terms, only to parties. *S. Lichtenberg & Co.*, 296 NLRB 1302 (1989); see *El Fenix Corp.*, 234 NLRB 1212, 1213–1214 (1978); *Benjamin Coal Co.*, 294 NLRB 572, 573 (1989); *GD Copper (USA) Inc.*, 362 NLRB No. 99, slip op. at 1 fn. 2 (2015); see also *Brightview Care Center*, 292 NLRB 352 (1989) (distinguishing cases where remarks did not come from unidentified employee, but going on to find that anti-Semitic remarks were isolated and not sustained). The Board has, however, at least suggested that *Sewell* might

have some application to conduct engaged in by third parties. See *S. Lichtenberg & Co.*, 296 NLRB at 1302–1303 (finding third party remarks not objectionable even assuming *Sewell* applied); see also *Universal Mfg. Corp.of Mississippi*, 156 NLRB 1459 (1966) (setting aside an election based on antiunion handbills and newspaper ads, editorials, and cartoons—not attributable to the employer—that, in addition predicting economic suffering, repeatedly emphasized union support for the civil rights movement). For a discussion of how circuit courts have approached *Sewell* in the context of third-party appeals to racial prejudice, see *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 992–993 (4th Cir. 2012). For more on third party conduct, see sec. 24-320.

Although not a *Sewell* case as such, the Board has held a rumor that an employer would discharge all African-American employees if the union lost an election unobjectionable where the union disassociated itself from the rumor and (like the employer) urged employees to disregard it. The Board held that these disclaimers transformed the rumor into the type of propaganda employees were capable of evaluating for themselves. *Staub Cleaners, Inc.*, 171 NLRB 332 (1968); see also *Kresge-Newark, Inc*., 112 NLRB 869, 871 (1955).

24-309 The Voter List (*Excelsior* Rule)

378-2878

Sections 102.62(d) and 102.67(l) of the Board's Rules and Regulations, as amended in 2014, provide that within 2 business days after issuance of a direction of election, or approval of an election agreement, unless a longer time is specified or granted, the employer shall "provide to the regional director and the parties . . . a list of the full names, work locations, shifts, job classifications, and contact information . . . of all eligible voters." To be timely filed and served, the list must be received by the regional director and the parties within the required 2 business days, unless a longer time is specified in the direction of election or in the approved election agreement. The list must be alphabetized and in an electronic format approved by the General Counsel, unless the employer certifies that it does not possess the capacity to produce the list in that form. When feasible, the list is to be filed electronically with the region and served electronically on the other parties. Failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election "whenever proper and timely objections are filed," save that the employer is estopped from objecting on these grounds if it is responsible for the failure. See GC Memo 15-06, "Guidance Memorandum on Representation Case Procedure Changes," p. 29 (Apr. 6, 2015), for the General Counsel's specifications regarding the electronic format of the list.

The voter list requirement applies to nearly all election cases, including revocation of union-security authorization. See CHM sec. 11508.2. It does not, however, apply to apply to expedited elections held pursuant to Section 8(b)(7)(C) of the Act. CHM sec. 11312.1(k).

As noted in section 23-510, this provision codifies, with modifications, the rule, first set forth in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), which required the employer to file a list of names and addresses with the regional director within 7 days of the direction of election or approval of an election agreement. See also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (upholding substantive validity of the *Excelsior* rule); *Bishop Hansel Ford Sales*, 180 NLRB 987 (1970) (rejecting argument employer is not obligated to provide list when entering an election agreement). As explained in *Excelsior*, the list requirement is designed to maximize the likelihood that all voters will be exposed to arguments for, as well as against, union representation, permitting them to make a more fully informed and reasoned choice; the list also tends to eliminate challenges of voters based on lack of knowledge of their identity and furthers the public interest in obtaining more prompt resolution of questions concerning representation. Id. at 1241; see also *Mod Interiors*, 324 NLRB 164 (1997); 79 Fed. Reg. 74323, 74335 (Dec. 15, 2014).

The Rules also provide that "[t]he parties shall not use the list for purposes other than the

representation proceeding, Board proceedings arising from it, and related matters." Rules secs. 102,62(d), 102.67(l). 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.

Based on the existence of the voter list requirements, the Board has declined to find objectionable an employer's antiunion speech on company time and premises, combined with a denial of the union's request to reply. See *General Electric Co*., 156 NLRB 1247, 1251 (1966).

The remainder of this section deals first with situations involving (a) untimely submission of the list, and (b) failure to provide the list in the proper format.

a. Submission of the list

Prior to the 2014 amendments to the Board's election procedures, after the employer provided the list to the region, the region provided the list to the other parties. See *J. P. Phillips, Inc.*, 336 NLRB 1279 (2001). The region's failure promptly to make the list available to all parties resulted in litigation. See, e.g., *Ridgewood Country Club*, 357 NLRB 2247 (2012); *CEVA Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Teamsters Local 705 (K-Mart)*, 347 NLRB 439, 444–445 (2006); *Special Citizens Futures Unlimited*, 331 NLRB 160, 160–162 (2000); *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 (1998); *Gerland's Food Fair*, 272 NLRB 294 (1984); *Red Carpet Building Maintenance Corp.*, 263 NLRB 1286 (1982); *American Laundry Machinery Division*, 234 NLRB 630 (1978); *Sprayking, Inc*., 226 NLRB 1044 (1976); *Coca-Cola Co. Foods Division*, 202 NLRB 910 (1973). By adopting the requirement that the employer provide the list to the other parties at the same time it provides the list to region, the amendments sought to eliminate this potential for litigation. See 79 Fed. Reg. 74356 (Dec. 15, 2014).

The 2014 amendments further provide that failure to file the list with the region or to serve it on the others parties "shall be grounds for setting aside the election whenever proper and timely objections are filed." Rules secs. 102.62(d), 102.67(l). Thus, where the employer fails to serve the list on the other parties, even though it timely provided the list to the region, an election will be set aside. *URS Federal Services*, 365 NLRB No. 1 (2016).

For cases dealing with an employer's alleged failure to timely submit the list prior to the 2014 amendments, compare *Rockwell Mfg. Co*., 201 NLRB 358 (1973), and *Mod Interiors*, 324 NLRB 164 (1997), in which the election was set aside, with *U.S. Consumer Products*, 164 NLRB 1187 (1967), *Taylor Publishing Co*., 167 NLRB 228 (1967), *Wedgewood Industries*, 243 NLRB 1190 (1979), and *Bon Appetit Management Co*., 334 NLRB 1042 (2001), in which the election was upheld.

b. Erroneous or incomplete lists

The contact information to be provided by the employer includes home addresses (as was required under the *Excelsior* rule), available personal email addresses, and available home and personal cellular telephone numbers. Rules secs. 102.62(d), 102.67(l). The employer is not required to provide workplace email addresses. *Trustees of Columbia University*, 350 NLRB 574, 576 (2007); see also 79 Fed. Reg. 74351 (Dec. 15, 2014).

As under the *Excelsior* rule, the employer must provide the *full* names of the employees. The Board has set aside elections where an employer has failed to do so. *Laidlaw Waste Systems*, 321 NLRB 760 (1996) (list only included last names and first initials); *North Macon Health Care Facility*, 315 NLRB 359 (1994) (same); *Weyerhaeuser Co*., 315 NLRB 963 (1994) (list only provided last names and first and middle initials). But see *Singer Co.*, 175 NLRB 211, 212 (1969) (noting failure to provide full first names might in other circumstances warrant setting election aside, but in this case supplying full first names "would not have been of material benefit in assisting delivery of the Petitioner's communications").

The Board often considers situations in which the employer has submitted a list, but in doing so has submitted an inaccurate or incomplete list. In deciding whether such noncompliance requires setting aside an election, the Board has emphasized that the rule is not to be "mechanically applied." *Telonic Instruments*, 173 NLRB 588, 589 (1969); *General Time Corp*., 195 NLRB 343, 344 (1972); *Program Aids Co*., 163 NLRB 145, 146 (1967); *Thrifty Auto Parts*, 295 NLRB 1118 (1989). Balancing this against the need to encourage conscientious efforts to comply, the Board accordingly considers whether, under the circumstances of a particular case, the employer has "substantially complied" with the requirements. *Gamble Robinson Co.*, 180 NLRB 532 (1970); *Sonfarrel, Inc.*, 188 NLRB 969 (1971).

A finding that the employer has acted in bad faith precludes a finding of substantial compliance. *Woodman's Food Markets*, 332 NLRB 503, 504 fn. 9 (2000) (citing *Bear Truss, Inc.*, 325 NLRB 1162, 1162 fn. 3 (1998)).

Prior to the 2014 amendments to the Board's election procedures, the Board observed that the omission of names from the list is more likely to frustrate the Board's purposes than address inaccuracies, given that a party with an employee's name may still be able to communicate with that employee by means other than mail, and employers may be less able to maintain completely accurate addresses. Thus, although the Board set aside elections based on inaccurate addresses, see, e.g., *Mod Interiors*, 324 NLRB 164 (1997) (40 percent of addresses were incorrect and corrections were supplied less than 10 days before the election), it showed a greater tolerance for address inaccuracies. See *Women in Crisis Counseling*, 312 NLRB 589 (1993) (election upheld despite 30 percent inaccurate addresses); *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1222 (2004) (28 percent inaccurate); *Fontainebleau Hotel Corp.*, 181 NLRB 1134 (1970) (56 out of about 300 inaccurate). Cf. *LeMaster Steel Erectors*, 271 NLRB 1391 (1984) (election upheld where parties stipulated 9 percent of voters were assigned out of state, but list did not specifically identify these voters or their temporary addresses but did provide permanent addresses). As noted, however, if an employer acts in bad faith in supplying inaccurate addresses, or is grossly negligent in doing so, its noncompliance will not be excused. *Merchants Transfer Co.*, 330 NLRB 1165 (2000) (setting election aside based on gross negligence where employer knew many addresses were inaccurate). Compare *Lobster House*, 186 NLRB 148, 149 (1970) (employer was not grossly negligent and did not act in bad faith); see also *British Auto Parts, Inc.*, 160 NLRB 239 (1966) (setting election aside where employer provided names but no addresses). For a discussion of the effect of voter list inaccuracies following the 2014 amendments, see *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 4–7 (2017).

Absent a finding of bad faith, the Board at one time occasionally declined to set aside an election when the number of omissions was only a small percentage of the total number of eligible voters, even if the number of omissions was potentially determinative. See, e.g., *Kentfield Medical Hospital*, 219 NLRB 174, 175 (1975). In *Woodman's Food Markets*, however, the Board concluded that this approach was inadequate and that in addition to the percentage of omissions, it would henceforth also consider factors such as whether the number of omissions was determinative and the employer's explanation for the omissions. 332 NLRB 503, 504 (2000); see also *Automatic Fire Systems*, 357 NLRB 2340 (2012). Prior to *Woodman's Food Markets*, the Board had rejected an argument that a 9.5 omission rate was a minimum prerequisite for finding a lack of compliance. *Meadow Valley Contractors*, 314 NLRB 217, 217 fn. 3 (1994).

For earlier cases excusing voter list omissions, see, e.g., *Telonic Instruments*, 173 NLRB 588, 589 (1969) (finding substantial compliance where 4 of 111 voters were omitted and employer swiftly informed region and union list was incomplete); *West Coast Meat Packing Co*., 195 NLRB 37 (1972) (excusing omission of 2 of 44 voters based on mistaken belief as to unit placement and eligibility in absence of bad faith).

For earlier cases setting elections aside based on omissions, see, e.g., *Fountainview Care Center*, 323 NLRB 990 (1997) (concluding employer's omission of slightly more than 5 percent of eligible voters was not a good-faith mistake); *Thrifty Auto Parts*, 295 NLRB 1118 (1989) (9.5

percent of voters omitted); *Ponce Television Corp*., 192 NLRB 115, 116 (1971) (22 percent of voters omitted); *Sonfarrel, Inc*., 188 NLRB 969 (1971) (omission of 5 of 52 voters); *Gamble Robinson Co.*, 180 NLRB 532 (1970) (11 percent omitted); *Blue Onion*, 175 NLRB 9 (1969) (employer omitted nearly half of eligible voters and supplied updated list that still omitted certain voters and could only be used for 6 days before election).

In adopting the 2014 amendments, the Board indicated that its prior precedent in this area remains undisturbed. See 79 Fed. Reg. 74357 fn. 249 (Dec. 15, 2014) (citing *Woodman's Food Markets*, 332 NLRB 503 (2000); *Automatic Fire Systems*, 357 NLRB 2340 (2012)); see also *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 4–5 (2017). With respect to the added requirement of providing available phone numbers, the Board has set aside an election where the employer did not provide phone numbers of any of its employees on the list, and in doing so rejected an argument that an employer is not obligated to include available phone numbers that are not maintained in the employer's computer database. *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 5–7 (2017).

The inclusion of ineligible voters on the list may also warrant setting aside an election. See *Idaho Supreme Potatoes*, 218 NLRB 38 (1975) (list contained names of 81 ineligible voters in unit of 146 employees).

As noted above, an employer is estopped from relying on its own failure to comply with voter list requirements, including omissions of eligible voters. *George Washington University*, 346 NLRB 155 (2005); *Thiele Industries*, 325 NLRB 1122 (1998). In a more unusual situation, the Board declined to set aside an election where the employer engaged in flagrant unfair labor practices in an effort to defeat the winning union and also withheld the voter list, and there was no evidence that any union was prejudiced more than another by the failure to provide the list. *Nathan's Famous of Yonkers*, 186 NLRB 131, 133–134 (1970).

An election will, of course, be set aside where the employer provides no list at all, and the fact that the union only received very few votes in the election is no defense, as this would subvert one of the very purposes of the voter list requirement. See *Fuchs Baking Co.*, 174 NLRB 720 (1969).

On a related note, the issues of a union's actual access to employees, or the extent to which employees omitted from the list are nevertheless aware of the election issues and arguments, are not litigable in such cases because looking beyond the list itself "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." *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971). Likewise, 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, 42 (1970), and has declined to permit inquiry into such matters. *Murphy Bonded Warehouse*, 180 NLRB 463 (1970).

See also section 23-510.

24-310 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." Id. The Board noted that prescribing this type of time limitation paralleled its prescription on space limitations under its electioneering rules. Id. at 430; see also section 24-440.

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, Inc.*, 195 NLRB 133 (1972); see also *Dixie Drive-It-Yourself System Nashville Co*., 120 NLRB 1608 (1958).

The *Peerless Plywood* rule does not, however, "prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour before an election." *Business Aviation, Inc.*, 202 NLRB 1025 (1973). Thus, the Board did not set an election aside based on a casual solicitation of three employees, only one of whom was eligible to vote, the night before the election by a union agent, observing that this conduct could not be characterized as a "speech" to a "massed assembly of employees." Id. See also *Electro Wire Products, Inc.*, 242 NLRB 960 (1979) (employer president speaking individually to each employee on the morning of the election asking them to vote "no" did not violate *Peerless Plywood*); *Associated Milk Producers*, 237 NLRB 879 (1978) (same, with respect to plant manager initiating conversations); *Comcast Cablevision of New Haven*, 325 NLRB 833, 838 (1998) (brief remarks by union to employees as they entered and left facility did not violate rule).

This rule forbids mandatory speeches, whether coercive or not, on company time and property during the 24-hour period. See, e.g., *Excelsior Laundry Co.*, 186 NLRB 914, 915 fn. 4 (1970). 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)." *Peerless Plywood Co.*, 107 NLRB 427, 430 (1954). It also 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." Id.; see also *Nebraska Consolidated Mills, Inc.*, 165 NLRB 639 (1967) (union speech not objectionable where started on employees' time, was voluntary, extemporaneous, and ran over into company time for no more than about 5 minutes). The 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); *Andel Jewelry Corp.*, 326 NLRB 507 (1998); see also *Virginia Concrete Corp.*, 338 NLRB 1182, 1187 (2003) (analogizing text message sent to drivers in their trucks within 24 hours of election to campaign literature). Nor does it prohibit the use of any other legitimate campaign propaganda or media. See, e.g., *Conroe Creosoting Co.*, 149 NLRB 1174, 1182 (1964) (rule does not prohibit distribution of propaganda with paychecks immediately before the election); *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003) (affixing prounion poster on election day to tree on employer property not visible from polling room did not violate rule).

The rule can, however, 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, 735 (1956); see also *Purolite*, 330 NLRB 37, 39–40 (1999), overruling *Bro-Tech Corp*., 315 NLRB 1014 (1994).

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, 325 (1967) (fact only one section of the employees was

involved, or that relatively small percentage of employees constituted the "captive audience," did not warrant exception to rule). Compare *Business Aviation Inc.*, 202 NLRB 1025 (1973) (casual solicitation of 3 employees, only 1 of them an eligible voter, was not "speech" to "massed employees").

A meeting ostensibly called for another reason, but in which the party nevertheless engages in campaign speeches, violates the *Peerless Plywood* rule. See *Mallory Capacitator Co.*, 167 NLRB 647 (1967) (speech opposing union delivered at meeting called to advise employees election would not be postponed as communicated in earlier letter).

As noted earlier (see section 24-245), in *Showell Poultry Co.*, 105 NLRB 580 (1953), the Board declined to set an election aside based on an allegedly coercive speech in which the employer urged employees to vote against both unions, but one union won decisively (with the other filing an objection based on the speech). The Board has applied this rationale to find that employer meetings held within 24 hours of the election that were anti-petitioner in tone did not warrant setting the election aside where the petitioner nevertheless won the election (and the intervenor, which filed the objection, was not the target of the employer's speech), commenting that invalidating the election in such circumstances would invite "collusion in future cases" by suggesting that an employer that favors one competing union whose chances "do not appear to be bright" could secure that union "a second opportunity to woo voters" by deliberately violating the *Peerless Plywood* rule. *Packerland Packing Co.*, 185 NLRB 653 (1970).

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. The Board's prior practice in this area was that the parties were 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, 341 (1959); see also *Interstate Hosts, Inc.*, 130 NLRB 1614, 1622 (1961).

In *Guardsmark, LLC*, 363 NLRB No. 103 (2016), however, the Board overruled *Oregon Washington Telephone* and held that such speeches are prohibited within 24 hours of the mailing of the ballots, reasoning that this rule was more closely aligned with the application of *Peerless Plywood* to manual elections

The presence of the time and date of the mailing of ballots in a stipulated election agreement will defeat a claim that speeches given after the mailing should nevertheless be excused because the parties were not informed of the time and date of mailing. See *American Red Cross Blood Services*, 322 NLRB 401 (1996).

24-311 Paycheck Changes and the *Kalin* Rule

378-2872

In *Kalin Construction Co*., 321 NLRB 649, 651–653 (1996), the Board, drawing in large part on the *Peerless Plywood* rule, held that four enumerated changes in the paycheck process are also prohibited within 24 hours of the election. In doing so, the Board distinguished a paycheck from the distribution of campaign literature which, as noted above, is permissible under the *Peerless Plywood* rule. See id. at 652. See also *United Cerebral Palsy Assn. of Niagara County*, 327 NLRB 40 (1998).

The Board found *Kalin* inapposite where the complained-of conduct was an election day party free of any electioneering. See *Chicagoland Television News, Inc.*, 328 NLRB 367, 368 (1999).

Legitimate business considerations may be a defense to a *Kalin* objection. See, e.g., *Tinius Olsen Testing Machine Co.*, 329 NLRB 351 (1999) (including retroactive pay increase as required by collective-bargaining agreement had legitimate business reason). Compare *Fred Meyer Stores*, 355 NLRB 541, 543 (2010), in which the Board declined to find a *Kalin* violation based on paycheck deductions made on election day, but nevertheless found that because the deductions

were unusual, substantial, unexplained at the time, and may well have affected employee sentiment, "'requisite laboratory conditions' were so disturbed" that the election had to be set aside.

24-312 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, 784–785 (2001). It also constitutes objectionable conduct. *Mercy General Hospital*, 334 NLRB 100, 104–105 (2001). These rules apply not only where footage 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*, 334 NLRB 100 (2001); *U.S. Ecology Corp*., 331 NLRB 223, 233–235 (2000). At the same time, 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*, 334 NLRB 100, 105 (2001) (finding no justification 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*, 333 NLRB 784 (2001), an unfair labor practice case, 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 Motor Freight* and found no such justification.

For a discussion of employer videotaping as unlawful polling, see *Allegheny Ludlum Corp.*, 333 NLRB 734, 739–745 (2001), discussed in section 24-313.

b. Union taping

In *Pepsi-Cola Bottling Co.*, 289 NLRB 736, 736–767 (1988), the Board set aside an election based on the union's apparent videotaping of at least two employees as they exited the employer's premises and were handed union leaflets, given that the union offered "[n]o legitimate explanation" for the videotaping. Subsequently, in *Mike Yurosek & Son*, 292 NLRB 1074 (1989), the Board similarly set an election aside where a union agent photographed employees, provided no explanation when doing so "to assuage [employee] fears that the pictures would be the basis for future reprisals," during the course of photographing made an arguably threatening remark, and did not offer a valid explanation of the photographing at the hearing. Compares *Nu Skin International*, 307 NLRB 223 (1992) (finding photographing of employees attending union's voluntary picnic not objectionable as it did not reasonably suggest a retaliatory purpose and union provided explanation for the photographing).

In *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999) (*Randell I*), the Board overruled *Pepsi-Cola Bottling* while reaffirming *Mike Yurosek & Son*, but after a court remand of the subsequent refusal-to-bargain case, the Board overruled *Randell I* and "restore[d] the appropriate standard, i.e., that in the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer." *Randell Warehouse of Arizona*, 347 NLRB 591 (2006) (*Randell II*); see also *Sprain Brook Manor Nursing Home*, 348 NLRB 851 (2006) (distinguishing *Randell II* as identity of photographer was unclear and union

obtained signed consent forms prior to using the photographs in campaign materials); *Enterprise Leasing Co.–Southeast LLC*, 357 NLRB 1799 (2011) (distinguishing *Randell II* as photography was not of protected activity, there was no evidence photographer failed to explain purpose of photographing, and employer's objection was not to the taking of the photograph, but to its allegedly unauthorized use).

24-313 Miscellaneous Party Conduct

The foregoing sections have discussed some of the alleged misconduct the Board most frequently encounters; the list to this point is by no means exhaustive. As noted earlier, this text does not attempt to summarize the myriad types of unfair labor practice conduct that warrant setting aside an election. Nor, for that matter, does it endeavor to enumerate each and every type of conduct considered under the *General Shoe* doctrine.

That said, this section seeks to convey a flavor of other types of conduct found objectionable or unobjectionable in representation cases.

Union agents' repeated and belligerent refusals—made in front of nearly all unit employees 75 minutes before the election—to leave the employer's premises (when they had no demonstrated legal right to be there) was found objectionable. *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). Compare *Champaign Residential Services*, 325 NLRB 687 (1998); *Edward J. DeBartolo Corp.*, 313 NLRB 382 (1993); *Station Operators*, 307 NLRB 263 (1992).

An employer's increased security following the filing of the petition and on the day of the election did not, under the circumstances, warrant setting an election aside. *Quest International*, 338 NLRB 856 (2003). Compare *Mental Health Assn.*, 356 NLRB 1220, 1220 fn. 4 (2011) (setting aside election based on totality of employer's election-day conduct, including hiring security, erecting fence around part of parking lot, and posting private property signs, apparently without security justification).

In the absence of a previous practice of doing so, an employer's solicitation of grievances during an organizational campaign is objectionable if the employer expressly or impliedly promises to remedy those grievances. *Sweetwater Paperboard*, 357 NLRB 1687 (2011). This is so even if the employer does not commit itself to specific correct action, because "employees would tend to anticipate improved conditions of employment which might make union representation unnecessary." *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001) (quoting *Uarco, Inc.*, 216 NLRB 1, 1–2 (1974)); see also *American Freightways*, 327 NLRB 832 (1999) (single past instance of soliciting grievances does not establish past practice). Compare *MacDonald Machinery Co.*, 335 NLRB 319, 320 (2001) (election upheld where solicitation of grievances predated filing of petition).

In *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335 (1998), the Board concluded that the employer did not engage in objectionable conduct when its supervisors distributed flyers in apparent violation of its (valid) no-distribution rule against employees. Compare *Curtin Matheson Scientific*, 310 NLRB 1090, 1091 (1993) (finding employer's conduct requiring prounion employee to collect handbills she had distributed in meeting room, parking lot, and motel lobby amounted to an "unlawfully broad no-distribution rule").

Promulgation of rules during the critical period that would have a reasonable tendency to coerce or interfere with the exercise of employee rights under the Act constitutes objectionable conduct. *Steeltech Mfg.*, 315 NLRB 213 (1994) (employer's code of ethics and business conduct manual); see also *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2, 9–10, 12 (2014) (handbook rule prohibiting disruptions on employer property); *Durham School Services, L.P.*, 360 NLRB 694, 694 fn. 5 (2014) (provisions of social networking policy requiring employee contacts with certain individuals to be "appropriate" and subjecting employees to investigation and possible discipline for sharing "unfavorable . . . information related to the company or any of its employees"); *Jurys Boston Hotel*, 356 NLRB 927 (2011) (rules against solicitation, loitering, wearing emblems and buttons); *Freund Baking Co.*, 336 NLRB 847 (2001) (employee handbook

policy on confidential information); *Waste Management, Inc.*, 330 NLRB 634, 634 fn. 2 (2000) (bulletin board policy). Compare *Safeway, Inc.*, 338 NLRB 525, 526 (2003) (confidentiality rule not objectionable).

The Board has also found that elimination of access to a bulletin board during the election campaign was an objectionable elimination of benefit. *Bon Marche*, 308 NLRB 184, 185 fn. 7 (1992). Cf. *Intertape Polymer Corp.*, 360 NLRB 957, 958 (2014), enfd. in relevant part 801 F.3d 224, 233–234 (4th Cir. 2015) (change in enforcement of literature distribution policy in reaction to union campaign unlawful).

It is objectionable for an employer to facilitate worktime electioneering by one union while denying the same access to a rival union. *Seton Medical Center/Seton Coastside*, 360 NLRB 302, 302 fn. 2 (2014); *Duane Reade, Inc.*, 338 NLRB 943, 943–944 (2003), enfd. 99 Fed. Appx. 240 (D.C. Cir. 2004); *Raley's, Inc.*, 256 NLRB 946, 947 (1981), affd. on remand 272 NLRB 1136, 1136 fn. 2 (1984).

Requiring employees to attend a captive audience speech without fully compensating them for the time spent at the meeting and without distributing paychecks until after the meeting was found objectionable. *Comet Electric*. 314 NLRB 1215 (1994).

Employer polling of employee sentiment is generally assumed to be coercive and elections will be set aside on this basis. See, e.g., *Offner Electronics, Inc.*, 127 NLRB 991 (1960). Unions, however, may legitimately measure support among employees. See *Longwood Security Services*, 364 NLRB No. 50, slip op. at 2 (2016), and cases cited therein. An employer's videotaping or photographing of employees in order to use images in an election campaign may, without certain protections, amount to unlawful polling. See *Enterprise Leasing Co.-Southeast, LLC*, 357 NLRB 1799, 1800 (2011) (discussing *Allegheny Ludlum Corp.*, 333 NLRB 734, 739–745 (2001). The Board has also likened certain types of contests to unlawful polling. See *Sea Breeze Health Care Center*, 331 NLRB 1131, 1133 (2000).

24-320 Third-Party Conduct

378-1401

378-5625-6700

378-7000

712-5014-0190

To this point, the cases discussed have generally focused on the conduct of the parties and/or their agents. Elections may, however, also be set aside based on third-party conduct. The test in such cases is whether the misconduct involved "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Mastec Direct TV*, 356 NLRB 809, 810 (2011); *U.S. Electrical Motors*, 261 NLRB 1343, 1344 fn. 5 (1982); *Phoenix Mechanical*, 303 NLRB 888 (1991); *O'Brien Memorial*, 310 NLRB 943, 943 fn. 1 (1993); *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Duralam, Inc*., 284 NLRB 1419 (1987).

The Board has set aside elections due to third-party conduct based on objections filed by a union or by an employer. Compare *James Lees & Sons Co.*, 130 NLRB 290 (1961) (objections filed by petitioner), with *Al Long, Inc*., 173 NLRB 447 (1969) (objections filed by employer).

This section considers allegedly objectionable third party conduct in a variety of circumstances. For an analysis of third party electioneering conduct at or around the polls, see sec. 24-442. For a discussion of racially or ethnically derogatory remarks by third parties, see sec. 24-308

a. Nature of conduct

As stated above, the standard for third-party conduct is whether the alleged misconduct "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free

election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Cal-West Periodicals*, 330 NLRB 599, 600 (2000); *Robert Orr–Sysco Food Services*, 338 NLRB 614, 615 (2002); *Associated Rubber Co*., 332 NLRB 1588 (2000).

This standard is objective, and accordingly "does not hinge on the subjective reactions of the prospective voters in a particular election." *Stannah Stairlifts, Inc.*, 325 NLRB 572, 572 fn. 2 (1998); *Picoma Industries*, 296 NLRB 498, 499 (1989). But see *Monroe Auto Equipment Co.*, 186 NLRB 90, 92 (1970), on remand from 406 F.2d 177 (5th Cir. 1969), in which the Board interpreted the court's remand as requiring inquiry into subjective evidence of fear and coercion. See also *Home Town Foods, Inc. v. NLRB*, 379 F.2d 241, 244 (1967).

The reasoning behind the Board's willingness to inquire into third party conduct is that a representation proceeding is, in effect, an investigation to ascertain employee wishes concerning their choice of a bargaining representative, which warrants inquiry into whether the election was held in an atmosphere conducive to the kind of free and untrammeled choice contemplated by the Act, not just into whether one of the parties was responsible for conducted impeding such a choice. See *P. D. Gwaltney, Jr. & Co.*, 74 NLRB 371, 379–380 (1947). As the Second Circuit has stated, certain elements, regardless of their course, may make an impartial choice impossible, thus invalidating an election. *NLRB v. Staub Cleaners, Inc.*, 357 F.2d 1, 3 (2d Cir. 1966). Put differently, if the standard for objectionable third party conduct is met, "[i]t 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 *Al Long, Inc.*, 173 NLRB 447, 448 (1969); see also *Foremost Dairies of the South*, 172 NLRB 1242, 1247 (1968). "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).

The standard for third-party conduct is more difficult to meet than the standards ordinarily applied to party conduct. In this regard, the Board has held that it "accords less weight to such [third-party] conduct than to conduct of the parties." *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); *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. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); see also *Owens-Corning Fiberglas Corp.*, 179 NLRB 219, 223 (1969); *Mastec Direct TV*, 356 NLRB 809, 811 (2011). Further, the Board recognizes that because unions and employers cannot control nonagents, "the equities militate against setting aside elections on the basis of conduct by third parties." *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003).

The fact that conduct creates confusion is not sufficient to meet the third-party standard. See *Phoenix Mechanical*, 303 NLRB 888 (1991) (misleading comment by employee not basis for setting election aside). Nor does mere name calling meet the standard. *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 fn. 1 (1999). But conduct that is boisterous, sustained, and intrusive into the election process has been found sufficient to set an election aside. *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988) (prounion employees formed "gauntlet" and forced voters to pass between two lines of chanting and cheering union supports in order to enter polling place). Compare *Cargill, Inc. v. NLRB*, 851 F.3d 841, 850–851 (8th Cir. 2017).

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 has been found sufficient to meet the standard. *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765 (1958). Compare *Vita Food Products, Inc.*,

116 NLRB 1215, 1219 (1957) (mere presence of police at plant during election did not warrant setting election aside).

Although third-party threats are governed by the usual third-party standard, the Board applies a particular test to assess the seriousness of such threats, considering "(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." *PPG Industries*, 350 NLRB 225, 226 (2007); see also *Bell Security*, 308 NLRB 80, 81 (1992).

Under these factors, the Board has set elections aside based on multiple threats of harm, physical injury, and property damage against proemployer employees or employees who crossed a picket line. See id. at 226; *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615–616 (2002), enfd. mem. 184 Fed. Appx. 476 (2006); *Picoma Industries*, 296 NLRB 498, 500 (1989). Cf. *Al Long, Inc.*, 173 NLRB 447, 448 (1969) (election set aside based on repeated anonymous threats against 2 employees who crossed picket line, as well as several instances of property destruction and other threatening and unruly conduct on the picket line). Compare *Manorcare of Kingston PA, LLC*, 360 NLRB 719 (2014), enf. denied 823 F.3d 81 (D.C. Cir. 2016) (employee comments she would punch people in the face or cause property damage or bodily harm if union lost unobjectionable as made in joking manner); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000) (single conversation containing 2 allegedly threatening statements overheard by one individual did not meet standard); *Bell Trans*, 297 NLRB 280 (1989) (isolated statement directed at only one individual and overheard by small number of voters did not meet standard); *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1348–1349 (1st Cir. 1971), enfg. 191 NLRB 27 (1971) (assault by prounion employee on two employees who refused to support union not objectionable where assault took place 2 months before election, assailant was discharged shortly thereafter and did not return, and there were no further incidents); *Foremost Dairies of the South*, 172 NLRB 1242, 1246–1247 (1968) (several threats made to one employee 6 weeks before election, only one of which was known to only two other employees, did not warrant setting election aside).

The Board has also set an election aside based on a third-party threat to call the INS to report any employee who voted against the union. *Q. B. Rebuilders, Inc.*, 312 NLRB 1141 (1993); see also *Crown Coach Corp.*, 284 NLRB 1010 (1987) (threats of deportation if union lost). Compare *Mike Yurosek & Sons*, 225 NLRB 148 (1976), enfd. 597 F.2d 661 (9th Cir. 1979) (declining to set election aside based on threat to call INS if union lost that was mitigated and not rejuvenated); *Culinary Foods, Inc.*, 325 NLRB 664 (1998) (election upheld where at most 45 out of 1158 eligible voters heard statements petitioner would contact INS if it lost); *NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207, 213 (1st Cir. 2015) (threats undocumented employees would be turned in when union won election not objectionable as made to employees who had already voted, there was no evidence of dissemination, and threat was more likely to make employee vote against union, not for it).

b. Who is a third party

A "third party" can be virtually any individual or group who is not one of the parties to the election, an agent of one of the parties, or an agent of the Board. As discussed in section 24-220, the Board applies common law principles of agency, including principles of apparent and actual authority, in determining whether alleged misconduct is attributable to a party. If the conduct is not attributable to a party, the standard for third-party conduct applies.

The Board has treated conduct by the following types of persons, among many others, under the standard for third party conduct: members of the community (*James Lees & Sons Co.*, 130 NLRB 290 (1961); *Dean Industries*, 162 NLRB 1078, 1093–1094 (1967); *Louisburg*

Sportswear Co., 173 NLRB 678, 693 (1969)); the mayor of the city (*Utica-Herbrand Tool Div. of Kelsey-Hayes Co*., 145 NLRB 1717, 1719–1720 (1964)); members of the police force (*Great Atlantic & Pacific Tea Co*., 120 NLRB 765 (1958)); employees or nonemployees, (*Cal-West Periodicals*, 330 NLRB 599 (2000); *Associated Rubber Co.*, 332 NLRB 1588 (2000); *Al Long, Inc.*, 173 NLRB 447 (1969); *Culinary Foods, Inc.*, 325 NLRB 664 (1998); employee committees (*Emerson Electric Co.* 177 NLRB 75, 100 (1969); *Windsor House C & D*, 309 NLRB 693 (1992); *Q. B. Rebuilders, Inc.*, 312 NLRB 1141 (1993)); employees from neighboring plants (*Diamond State Poultry Co*., 107 NLRB 3 (1954)); a committee headed by bank presidents (*Utica Herbrand Tool Div. of Kelsey-Hayes Co.*, 145 NLRB 1717, 1723 fn. 10 (1964)); community leaders (*Dean Industries*, 162 NLRB 1078, 1085–1087 (1967)); businessmen (*Benson Veneer Co*., 156 NLRB 781 (1966); newspaper editors (*Universal Mfg. Corp. of Mississippi*, 156 NLRB 1459 (1966)); chief of police (*Lifetime Door Co*., 158 NLRB 13, 24–25 (1966)); an industrial advisory committee (*Proctor-Silex Corp*., 159 NLRB 598, 610–611 (1966)); and former employees who have been discharged (*Apcoa Div.—ITT Consumer Services Corp*., 202 NLRB 65, 65 fn. 1 (1973)).

The Board has also applied the third-party standard to statements by government officials. *Affiliated Computer Services*, 355 NLRB 899, 900 (2010) (statements by U.S. Congressman and state senator not objectionable). On a related note, the Board has addressed (and typically rejected) contentions that elected officials' statements would mislead reasonable employees into believing the government or Board supported the petitioning union. Id.; see also *Saint-Gobain Abrasives, Inc.*, 337 NLRB 82 (2001) (U.S. Congressman); *Chipman Union, Inc.*, 316 NLRB 107 (1995) (U.S. Congresswoman); *Ursery Cos.*, 311 NLRB 399 (1993) (state representative); *Trump Plaza Associates v. NLRB*, 679 F.3d 822, 827–829 (D.C. Cir. 2012) (various government officials). Compare *Columbia Tanning Corp.*, 238 NLRB 899 (1978), where the Board concluded a letter written in Greek by the state commissioner of labor on his official stationery endorsing the petitioner could, under the circumstances, confuse employees into thinking the Board was endorsing the petitioner.

The Board has also applied the third-party standard in assessing whether a state labor law restricting the use of state funds to encourage or discourage union activity interfered with an election. *Independence Residences, Inc.*, 355 NLRB 724, 729–732 (2010).

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 *Emerson Electric Co.*, 177 NLRB 75, 100 (1969); *Northrop Aircraft, Inc.*, 106 NLRB 23, 25 (1953). In like vein, the conduct of rank-and-file employees is not generally imputed to their labor organization unless there is ratification. *Dixie Gas, Inc.*, 135 NLRB 1051, 1062 fn. 18 (1962). But see section 24-220 for a discussion of principles of agency and apparent authority as applied to prounion employees.

Although disavowal of third-party conduct is generally not required, there are instances in which an employer's specific public disavowal may neutralize otherwise-actionable third-party conduct. Thus, for example, although news stories and a statement by a development group suggested that the employer might move if the union won the election,, "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 conduct. *Electra Mfg. Co*., 148 NLRB 494, 497 (1964). Compare *Bristol Textile Co*., 277 NLRB 1637 (1986) (employee threat made during conversation with union agent who did not disavow it warranted setting election aside).

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, Inc.*, 146 NLRB 1400, 1402 (1964).

d. Rumors

On the subject of rumors, the Board, in *General Housing Industries*, 197 NLRB 24, 25 (1972), found that the rumors (of possible consequences of victory for either union) 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, Inc.*, 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. See also *Con-Way Freight, Inc. v. NLRB*, 838 F.3d 534 (5th Cir. 2016) (unsourced, unconfirmed, isolated rumors of termination for those who voted against the union did not undermine election result).

e. Unidentified wrongdoers

On occasion the Board will not be able to identify the persons engaging in misconduct. The third party standard applies in such situations. Cf. *Universal Mfg. Corp. of Mississippi*, 156 NLRB 1459, 1466–1467 (1966) (finding actions of newspaper editors and unidentified third parties rendered a free choice impossible).

Additionally, where those responsible for the conduct cannot be identified, 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).

24-330 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 articulated the 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.

In setting forth this standard, the Board disavowed language in certain decisions that suggested that prounion supervisory conduct is not objectionable unless it involves a threat or a promise, commenting this "represent[ed] a departure from established precedent." Id.

In addition, as part as the second prong of test, the Board stated that an employer's antiunion stance is relevant. Id. at 914; see also *Terry Machine Co.*, 356 NLRB No. 120 (2011) (not reported in Board volumes) (finding employer's "aggressive antiunion campaign" mitigated prounion activity of individuals Board assumed to be supervisors).

In *Harborside Healthcare* itself, the Board set an election aside based on the supervisor's

threats of job loss, advising employees that they had to attend union meetings, and soliciting employees to sign union authorization cards. 343 NLRB at 910–911. With respect to solicitation of authorization cards, the Board overruled prior precedent holding supervisory solicitation unobjectionable where nothing in the words, deeds, or atmosphere of the request suggested potential reprisal, punishment, or intimidation. See *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999). Instead, the Board held that supervisory solicitation has an inherent tendency to interfere with an employee's freedom to choose to sign a card or not, given that solicitation places employees in a situation where they could be reasonably concerned about giving the "right" or "wrong" response to their supervisors. *Harborside Healthcare*, 343 NLRB at 911.

In applying the *Harborside Healthcare* test, the Board has indicated that prounion supervisory conduct is not objectionable where the supervisor has no authority over the employees to whom the conduct was directed. *Glen's Market*, 344 NLRB 294, 295 (2005).

For subsequent cases setting elections aside based on prounion supervisory conduct, see *Madison Square Garden CT, LLC*, 350 NLRB 117 (2007), and *SNE Enterprises*, 348 NLRB 1041 (2006). For cases finding that prounion supervisory conduct was not objectionable under *Harborside Healthcare*, see *Laguna College of Art & Design*, 362 NLRB No. 112, slip op. at 1 fn. 3 (2015); *Fidelity Healthcare & Rehab Center*, 349 NLRB 1372 (2007); *Northeast Iowa Telephone Co.*, 346 NLRB 465, 466–468 (2006); see also *Veritas Health Services v. NLRB*, 671 F.3d 1267, 1272–1273 (D.C. Cir. 2012).

24-400 Interference with the Conduct of Elections

393-6081

393-7022

Having dealt with various types of preelection campaign activities, this chapter now turns to issues which arise as a result of conduct at the actual time of the election. As with preelection conduct, with respect to 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 Co*., 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. As shown below, elections may be set aside on procedural grounds or because of the conduct, deliberate or inadvertent, of individuals (whether the parties themselves, including their election observers, or third parties, such as employees) at the polls, or of Board agents if they fail to live up to the Agency's high standards of impartiality and fairness.

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, e.g., *Milham Products Co*., 114 NLRB 1544, 1546 (1955); *Independent Rice Mill, Inc.*, 111 NLRB 536, 537 (1955); see also *Comfort Slipper Corp.*, 112 NLRB 183 (1955) (discretion to determine date of election); *New York Shipping Assn.*, 109 NLRB 310 (1954) (use of IBM voting cards as an additional means of identification of voters). For more on the regional director's discretion in this area, see Chapter 22.

The section begins by considering Board agent conduct before turning to issues of election mechanics. While in a real sense the mechanics of a Board election are inextricably tied in with

Board agent conduct, the two areas are discussed separately, to the extent possible, for the sake of clarity.

24-410 Board Agent Conduct

370-9100

378-9067

The conduct of Board agents must be beyond reproach. Where conduct is attributable to a Board agent, the question is whether "the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970); see also *Durham School Services, LP*, 360 NLRB 851, 853 (2014), enfd. 821 F.3d 52 (D.C. Cir. 2016). The Board has also stated that an election must be set aside "when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain." *Sonoma Health Care Center*, 342 NLRB 933 (2004); see also *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967).

There are no absolute guidelines, however, as clearly stated in *Polymers, Inc*., 174 NLRB at 282:

> 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, 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, Inc*., 202 NLRB 1145 (1973) (in which the Board examined the theoretical possibility as against the improbabilities of the factual circumstances).

The Board also pointed out in *Polymers, Inc.*, 174 NLRB at 282–283, 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."

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, 916 (1958).

a. Ballot and ballot box security

In resolving issues based on allegations of a breach of ballot or ballot box security, the Board looks at all the facts and the inferences drawn from such facts. Thus, in *Polymers, Inc.*, 174 NLRB at 283, 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 636, 637–638 & fn. 2 (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 *Dunham's Athleisure Corp*., 315 NLRB 689 (1994); *Kirsch Drapery Hardware*, 299 NLRB 363 (1990); *Trico Products Corp*., 238 NLRB 380 (1978); *Niagara Wires, Inc.*, 237 NLRB 1347,

1347 fn. 2 (1978).

That said, the Board found that leaving the ballot box wholly unattended (during an altercation that drew attending officials away from the polling place) warrants setting an election aside, and commented that it will not "speculate on whether something did or did not occur while the ballot box was left wholly unattended" because it seeks to "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). Compare *Anchor Coupling Co*., 171 NLRB 1196 (1968) (distinguishing *Austill* as the ballot "box was not left wholly unattended" and both the employer's observers—the employer having filed the objections—certified that the ballot box was protected in the interest of a fair and secret election); *General Electric Co*., 119 NLRB 944, 945 (1957) (no possibility of impropriety where it was 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 observers).

Similarly, 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, Inc.*, 117 NLRB 846, 848 (1957). Likewise, the failure to seal the ballot box between voting sessions, even though it remained in the possession of the Board agent, warranted setting an election aside. *Tidelands Marine Services*, 116 NLRB 1222, 1224 (1956). And the temporary mislaying of a potentially dispositive number of ballots, though they were subsequently found, warranted setting aside an election where the parties would not stipulate to waiving objections and counting the "found" ballots. *New York Telephone Co.*, 109 NLRB 788 (1954).

The mere fact that a Board agent opened the ballot box for the start of a second voting session without waiting for the employer's observer was not objectionable, as there was no contention that the ballot box, blank ballots, or polling place was left unattended, and no facts suggested "a reasonable possibility of a violation of the integrity of the ballot box. *Ashland Chemical Co*., 295 NLRB 1039, 1039 fn. 2 (1989); see also *Queen Kapiolani Hotel*, 316 NLRB 655 (1995). But in *Madera Enterprises, Inc.*, 309 NLRB 774 (1992), the Board set an election aside based on the agent's unsealing a challenged ballot envelope and opening it out of the presence of the parties was objectionable.

A Board agent's leaving the polling place to notify the employees that it was time to vote, if the agent carries the ballot box and blank ballots with him or her and does not let them out of his or her possession and is accompanied by observers, is no ground for invalidating the election. *S. S. Kresge Co*., 121 NLRB 374, 376–377 (1958). Cf. *Durham School Services, LP*, 360 NLRB 851, 853 (2014), enfd. 821 F.3d 52 (D.C. Cir. 2016) (not objectionable for Board agent to carry election booth and ballot box to employer parking lot in order to permit disabled employee to vote).

With respect to retrieval of a ballot from the box, the Board does not follow a per se rule but considers each case on its facts. See *K. Van Bourgondien & Sons*, 294 NLRB 268, 269 (1989). Thus, 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, 797 (1958). But the Board has found that the retrieval of a ballot from the box in order to complete a challenge affected the integrity of the election. *Jakel, Inc*., 293 NLRB 615, 616 (1989), finding that retrieval of a ballot from the box in order to complete a challenge affected the integrity of the election. See also *Rheem Mfg. Co*., 309 NLRB 459, 460–461 (1992) (ballots whose handling was not in conformance with usual Board procedures were neither counted nor determinative). Note that a Board agent may permit an employee to cast a second, challenged ballot where the voter reports having incorrectly marked the first ballot. *Magnum Transportation, Inc.*, 360 NLRB 1093 (2014) (but sustaining

challenge to second ballot).

b. Other conduct

The Board has considered a range of other Board agent conduct in objections cases.

Fraternization: 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 and neutrality of its processes, as this act "could reasonably be interpreted as impugning" the Board's election standards. *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967), principle affd. 423 F.2d 571, 573 (1st Cir. 1970). Compare *Newport News Shipbuilding Co.*, 239 NLRB 82, 87 (1978), enf. denied on other grounds 594 F.2d 8 (4th Cir. 1979), 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.*, 309 NLRB 459, 462 (1992) (election upheld where the Board agent conversed and laughed with union observer while walking through the plant); *Indeck Energy Services*, 316 NLRB 300 (1995) (election upheld where Board agent and petitioner observer's fraternization was innocuous conversation not witnessed by any eligible voters).

Altercations: In *Hudson Aviation Services*, 288 NLRB 870 (1988), an election was set aside where the Board agent's conduct "communicated the impression that the Board was displeased with and was criticizing the Employer's assistant manager and, thereby, undermined the indispensable perception of Board neutrality in the election." Compare *Pacific Grain Products*, 309 NLRB 690, 690 fn. 4 (1992) (election not set aside because, even assuming Board agent spoke to management personnel in a loud and perhaps angry voice, agent was "trying to maintain the integrity of the election process by getting them to leave the polling place as soon as possible so as to preclude their presence from being used as a ground for an objection" and thus did not show bias).

Alleged Conflict of Interest: The Board prefers that, where practicable, regional offices should keep the conduct of elections completely separate from the investigation or trial of contemporaneous unfair labor practice charges involving the same parties; thus, where feasible, the better course is to the election agent to be someone other than a trial attorney representing the Board in a related unfair labor practice case. *Kimco Auto Products of Mississippi, Inc.*, 184 NLRB 599, 599 fn. 1 (1970). Even so, the Board has rejected objections made on this or similar bases. Id. (Board agent was co-counsel for the General Counsel at an unfair labor practice proceeding held more than 2 weeks prior to the election 30 miles from plant and only 2 eligible voters were present as witnesses); *Amax Aluminum Extrusion Products*, 172 NLRB 1401, 1401 fn. 1 (1968) (Board agent investigated unfair labor practice charges against employer in between voting sessions by interviewing 3 employees away from employer's premises); *McCarty-Holman Co.*, 114 NLRB 1554 (1955) (Board agent previously investigated unfair labor practice charges); *Sparta Health Care Center*, 323 NLRB 526 (1997) (hearing officer in representation case subsequently served as counsel for the General Counsel in an 8(a)(5) "test of certification" proceeding); see also *S. Lichtenberg & Co.*, 296 NLRB 1302 (1989) (Board agent quote to newspaper concerning a pending unfair labor practice complaint was not a basis for setting the election aside).

Giving Employees Notice to Vote: 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, 329 (1949); *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 (after the union specifically asked if they had been informed of the election) 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, 691 (1992).

Erroneous Instructions: In *Harry Lunstead Designs*, 270 NLRB 1163, 1169–1170 (1984), an election was set aside where the Board agent gave erroneous instructions as to the challenged ballot procedure and overly broad instructions concerning the propriety of keeping a challenge list. Cf. *Vanity Fair Mills*, 256 NLRB 1104, 1105–1106 (1981).

Delegation of Election Process: Where the Board agent instructed the union's observer to translate the voting procedure for employees arriving to vote, without any additional guidance, and did not participate in the conduct of the election (aside from handing ballots to employees) until the employer complained, the Board set aside the election, stating that the "delegation of an important part of the election process to the Petitioner's observer conveyed the impression that the Petitioner, and not the Board, was responsible for running the election." *Alco Iron & Metal Co.*, 269 NLRB 590, 591–592 (1984); see also *Monroe Mfg. Co.*, 200 NLRB 62, 74 (1972) (employer telling three employees waiting in line they were not eligible and could go home "might well convey to other the impression that the Employer had some effective connection with, if not control over, the election itself"). Compare *San Francisco Sausage Co.*, 291 NLRB 384 (1988) (Board agent allowing petitioner to use intercom to announce employees could vote unobjectionable delegation of minor task); *Regency Hyatt House*, 180 NLRB 489, 490 (1969) (election upheld where Board agent permitted union observer, without objection from employer observer, to give the only Spanish-speaking employee direction on how to vote, there was no evidence of electioneering, and the incident involved one employee and could not have affected the outcome of the election).

Board Agent Statements: With respect to Board agent statements, "[c]onfidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board elections." *Sonoma Health Care Center*, 342 NLRB 933 (2004). The board found an unacceptable breach of neutrality where the Board interpreter asked an employee "Do you know where to put your yes vote?" *Renco Electronics*, 330 NLRB 368 (1999). Compare *Sonoma Health Care Center*, 342 NLRB 933 (2004) (election upheld despite Board agent comment, in response to question from union observer, that "[c]ompanies don't like unions because they cannot fire or hire anyone and they cannot take benefits from the staff"); *Wabash Transformer Corp.*, 205 NLRB 148 (1973), enfd. 509 F.2d 647 (8th Cir. 1975) (election upheld where Board agent stated polls were open and employees could, if they desired, "now vote for your union representative"); *Wald Sound, Inc.*, 203 NLRB 366 (1973) (agent statement "[y]ou've got yourself a winner" after ballot count "unfortunate" but not objectionable).

Making Challenges: The Board agent normally will not make challenges on behalf of the parties, even if no observer is present. CHM sec. 11338; *Solvent Services*, 313 NLRB 645, 646 (1994); *Balfre Gear & Mfg. Co.*, 115 NLRB 19, 22 (1956). Compare *Laubenstein & Portz, Inc*., 226 NLRB 804 (1976), where the Board agent was held responsible to make a challenge in order to implement an unfair labor practice settlement. See also *H & L Distributing Co*., 206 NLRB 169, 169 fn. 1 (1973), suggesting that if a party faced with an inability to obtain an observer presented facts to the Board agent sufficient to give the agent reason to believe prospective voters were ineligible, the Board agent would be able to challenge such individuals and may be under a duty to do so. See *Lakewood Engineering & Mfg. Co.*, 341 NLRB 699, 700 (2004), for a summary of Board agent's challenge duties.

Other Conduct: 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). 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). Nor does the fact that a union's campaign literature represents to employees that the Board endorses the union warrant setting the election aside. Id. The Third Circuit denied enforcement, see 604 F.2d 820, 828–830 (3d Cir. 1979), but the Board has since cited *Monmouth* with approval. *Dave Transportation Services*, 323 NLRB 562 (1997). A Board agent's decision not to give observers a badge (upon discovering only one was available) is not objectionable. *Hard Rock Holdings v. NLRB*, 672 F.3d 1117, 1123–1124 (D.C. Cir. 2012). Nor is the fact that a Board agent happens to wear clothing that is the same color as the union's alleged official color. *Avenue Care & Rehabilitation Center*, 361 NLRB No. 151 (2014). And a simple mistake in the tally of ballots, later corrected, is similarly not grounds for setting an election aside. *Allied Acoustics*, 300 NLRB 1183 (1990).

See also Opening and Closing of the Polls, section 24-422.

24-420 Mechanics of the Election

Given the many aspects of election mechanics, there are a variety of circumstances in which the Board has considered whether conduct related to these mechanics warrants setting an election aside, ranging from the selection of the polling place to the ballot count.

24-421 The Polling Place

370-1425

370-1450

370-1475

As discussed in more detail in section 22-105, elections are generally held on the employer's premises. The final choice of a place for holding an election is within the regional director's discretion and is not litigable, although the parties' positions on the location(s) of the election are solicited at the preelection hearing. Rules sec. 102.66(g)(1). The Board has also long held that failure to consult with the parties in this regard is not per se prejudicial. *Korber Hats, Inc*., 122 NLRB 1000 (1959). 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, 126 (1961); *Cupples-Hesse Corp*., 119 NLRB 1288 (1958). In the event of picketing, "[m]ere 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*, 122 NLRB at 1001. See section 22-105 for a discussion of selecting the site for a rerun election.

In *Growers Warehouse Co.*, 114 NLRB 1568, 1572–1573 (1955), the Board adopted an administrative law judge's conclusion that it was not objectionable for to allow an employee who was too ill to attend the polling place to vote at home, commenting that such arrangements are "entirely proper if attended by appropriate safeguards" and the vote is taken without challenge.

It is not objectionable for a Board agent to fail to post signs designating the polling area. See *Sawyer Lumber Co.*, 326 NLRB 1331, 1331 fn. 5 (1998); *Pacific Grain Products*, 309 NLRB 690, 690–691 (1992).

For cases on access to the polling place affecting employees' opportunity to vote, see section 24-425.

24-422 Opening and Closing of the Polls

370-9167-4800

370-9167-8800

370-9167-9500

When polls are not opened at their scheduled times, the Board will set the election aside if "the number of employees possibly disenfranchised thereby is sufficient to affect the election," 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). As the test is objective, the Board does not rely on after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election. *Pea Ridge Iron Ore Co.*, 335 NLRB at 161. 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 Div.*, 123 NLRB 1707, 1709 fn. 2 (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, 5 (1954).

For cases in which the Board has set an election aside on such grounds, see *Garda CL Atlantic, Inc.*, 356 NLRB 594 (2011) (agent closed polls early at first voting session and told three voters arriving thereafter they could vote under challenge or return to vote at second balloting session later in day); *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996) (agent closed polls and left polling area unattended for several minutes and four individuals who did not vote could have affected result); *B & B Better Baked Foods, Inc.*, 208 NLRB 493 (1974) (agent arrived 40 minutes late and votes of those possibly excluded by late opening could have been determinative); *Nyack Hospital*, 238 NLRB 257 (1978) (due to late agent, polls opened 55 minutes late and votes of eligible employees who did not vote may have affected outcome); *Bonita Blue Ribbon Mills*, 87 NLRB 1115, 1118 (1949) (polls closed 45 minutes early despite party contending laid-off employees were eligible and number of laid-off employees who had not voted at close was sufficient to affect results of election); see also *Midwest Canvas Corp.*, 326 NLRB 58 (1998) (remanding to determine whether eligible voters who did not vote were determinative in light of a late opening of the polls).

For cases in which the Board declined to set the election aside, see *Arbors at New Castle*, 347 NLRB 544, 545 (2006) (although polls opened late, parties stipulated that the five eligible employees who did not vote had not appeared at the polls "at any time during the scheduled polling hours"); *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980) (polls opened 2 hours late, but vote of only employee possibly excluded could not have been determinative); *Smith Co.*, 192 NLRB 1098, 1102 (1971) (polls opened 2–3 minutes late, all eligible voters voted except one on leave of absence and another home sick).

Note that the Board has also set aside elections even when the votes of possibly excluded employees could not have been determinative, but where the record also showed accompanying circumstances suggesting the vote may have been affected by late opening or early closing of the polls. See *Jobbers Meat Packing Co.*, 252 NLRB 41, 41 fn. 5 (1980). Cf. *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972) (setting election aside where it was "impossible to determine" whether inadvertent early closing of voting session affected outcome of the election).

With respect to late-arriving voters, in *Monte Vista Disposal Co.*, 307 NLRB 531, 533–534 (1992), the Board clarified an area of law it described as "at best confusing" and held that "an employee who arrives at the polling place after the designated polling period ends shall not be

entitled to have his or her vote counted, in the absence of extraordinary circumstances, unless the parties agree not to challenge the ballot." See also *Consumers Energy Co.*, 337 NLRB 752 (2002); *Taylor Cadillac, Inc.*, 310 NLRB 639 (1993). The Board has indicated that a late voter arriving at the facility in a timely manner but being locked out could constitute "extraordinary circumstances" under this standard. See *Pruner Health Services*, 307 NLRB 529, 529–530 (1992). Compare *Visiting Nurses Assn.*, 314 NLRB 404, 404–405 (1994) (employee's voluntary choice not to proceed directly to polling area not extraordinary circumstances).

In *Rosewood Care Center*, 315 NLRB 746, 746–747 (1994), the Board—citing *Monte Vista Disposal*—upheld an election where the Board agent sought and secured the parties' permission to let an employee vote early, but did not do so for three other employees who did not return to the facility until after the polls had closed, emphasizing that none of the three late employees ever appeared at the polls in an attempt to vote. See also *Patient Care*, 360 NLRB 637, 637–638 (2014) (Board agent has no affirmative obligation to initiate inquiry as to whether parties would agree to let late arriving voter cast ballot).

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, and an election may be set aside if the Board agent fails to do so and the vote may have been determinative. See *Laidlaw Transit, Inc*., 327 NLRB 315 (1998). Compare *Argus-Press Co.*, 311 NLRB 24 (1993) (declining to set aside election where Board agent allowed three employees to vote after close but their votes could not have affected outcome of election).

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, 796–797 (1958). Cf. *Sawyer Lumber Co*., 326 NLRB 1331 (1998) (preliminary preparations in anticipation of end of voting period does not constitute early closing of polls).

For related discussion, see section 24-425.

24-423 Notice of Election

370-2800

A standard notice of election (form NLRB-707 for manual election, form NLRB-4910 for mail ballot elections) 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. Of note, if the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election. Rules sec. 102.67(b).

Section 102.67(k) of the Board's Rules and Regulations sets forth the procedures for posting notices of election. The notice must (1) be posted in conspicuous places, including all places where notices to employees in the unit are customarily posted; (2) be posted at least 3 full working days prior to 12:01 a.m. on the day of the election; (3) be distributed electronically, if the employer customarily communicates with employees in the unit electronically; and (4) remain posted until the end of the election.

Section 102.67(k) further provides that failure to comply with these requirements is grounds for setting aside the election whenever proper and timely objections are filed. Further, a party is estopped from objecting to nonposting (or nondistribution) of notices if it is responsible for the nonposting (or nondistribution).

Prior to the 2014 amendments to the Board's election procedures, the Board conclusively

presumed the employer had received the notice if the employer did not inform the region to the contrary within 5 working days; this provision was eliminated in the 2014 amendments. See 79 Fed. Reg. 74406 fn. 446 (Dec. 15, 2014).

The term "working day" means an entire 24-hour period excluding Saturdays, Sundays, and holidays. Rules sec. 102.67(k); see also *Club Demonstration Services*, 317 NLRB 349 (1995); *Ruan Transport Corp*., 315 NLRB 592 (1994). The Board does not define "working day" depending on the individual circumstances of a particular employer or industry or on the working schedules of individual employees. *Cleveland Indians Baseball Co.*, 333 NLRB 579 (2001) (declining to set election aside based on fact no employees were scheduled to work during most of the posting period and objecting party had stipulated to date of election).

The notice-posting rule is strictly enforced. *Smith's Food & Drug*, 295 NLRB 983, 983 fn. 1 (1989). Thus, the Board set an election aside where the employer was unable to post the notice 3 days in advance of the mailing of mail ballots, even though employees were mailed copies of the notice with their mail ballots. *Terrace Gardens Plaza*, 313 NLRB 571 (1993). But see *Maple View Manor, Inc*., 319 NLRB 85 (1995) (declining to set aside election involving two unions because doing so could "invite[] collusion" if employer who favored one of the unions); *Madison Industries*, 311 NLRB 865 (1993) (election upheld where an amended notice was posted for a portion of the time as posting still met purpose of the requirement given .the amendment at issue (eligibility)).

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.

.See section 24-441 for discussion of policy as to defaced notices and section 22-106 for notice requirements in cases where the election is rescheduled for administrative reasons.

24-424 Observers

370-4900

a. Number and Identity of Observers

Section 102.69(a) states that for manual elections, "any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe." CHM section 11310.1 elaborates that each party may be represented at the polling place by an equal, predesignated number of observers, although one party may be permitted to have an observer if the other waives the opportunity to have them. Observers usually should be employees of the employer. CHM sec. 11310.2.

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. *Jat Transportation Corp.*, 131 NLRB 122, 126 (1961); *Simplot Fertilizer Co*., 107 NLRB 1211, 1221 (1954); see also *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 393 (8th Cir. 1947), cert. denied 332 U.S. 758 (1947) (antiunion employees not entitled as of right to have own observer).

In an election conducted pursuant to an election agreement, however, the use of observers, if incorporated in the agreement, is a matter of right since it is a material term of the agreement, and, if this right is not waived, the election is subject to invalidation if the terms of the agreement are not complied with. *Breman Steel Co.*, 115 NLRB 247, 249–250 (1956) (employer was not permitted observer); *Asplundh Tree Expert Co*., 283 NLRB 1 (1987) (agent allowed employer to use one more observer than union; see also *Summa Corp. v. NLRB*, 625 F.2d 293 (9th Cir. 1980) (Board improperly allowed union to use more observers than employer). One party cannot successfully object to an election based on the fact that another party did not have (and had never requested) an observer. *Northern Telecom Systems*, 297 NLRB 256 (1989).

The right to an equal number of observers may be waived if a party was offered, and it

refused, a reasonable opportunity to obtain additional observers. *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1426 (2010); *Best Products Co.*, 269 NLRB 578, 578 fn. 2 (1984); see also *Inland Waters Pollution Control*, 306 NLRB 342 (1992) (no breach where party knew observer was running late at preelection conference but did not designate substitute; Board agent also acted reasonably by refusing late observer to assume duties); *Manhattan Adhesives Corp*., 123 NLRB 1096 (1959) (no breach where election began without party's observer where absence was due to party's own inadvertence). Cf. *San Francisco Bakery Employers Assn*., 121 NLRB 1204, 1206 (1958) (not objectionable that employer refused to release union employee-observer from work based on employee-observer's failure to make arrangements for release).

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*., 131 NLRB 122, 125–126 (1961); *Reflector-Hardware Corp.*, 121 NLRB 1544, 1547 (1958).

The Board has long held, however, that the use of a nonemployee as an observer is not objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer. See *Equinox Holdings, Inc.*, 364 NLRB No. 103, slip op. at 1 fn. 1 (2016); *Embassy Suites Hotel*, 313 NLRB 302 (1993); *San Francisco Bakery Employers Assn*., 121 NLRB 1204 (1958). This policy applies even when the nonemployee is an ex-employee, whether or not the discharge is being litigated. See *Embassy Suites Hotel*, 313 NLRB at 302 (1993) (discharge not being litigated); *Correctional Health Care Solutions*, 303 NLRB 835, 835 fn. 1 (1991) (discharge being litigated); *Soerens Motor Co*., 106 NLRB 1388 (1953) (discharge being litigated); see also *Thomas Electronics, Inc.*, 109 NLRB 1141, 1143 (1954) (individual whose eligibility to vote as laid-off employee had not been determined at time of election entitled to be considered employee for purposes of acting as observer).

With respect to an election agreement requiring that observers be employees of the employer, the breach of this requirement is not material and thus not per se objectionable. *Kelley & Hueber*, 309 NLRB 578, 579 (1992). In such a situation, the Board considers whether the party's use of the nonemployee observer was "reasonable under the circumstances." Id. at 579 fn. 7; see also *Browning-Ferris Industries of California*, 327 NLRB 704 (1999).

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); *Union Switch & Signal Co*., 76 NLRB 205 (1948). Nor may statutory supervisors serve as observers for the union. *Family Services Agency, San Francisco*, 331 NLRB 850 (2000). The employer must, however, raise the alleged supervisory status of a union's election observer at the preelection conference, or such an objection will be precluded. *Liquid Transporters, Inc*., 336 NLRB 420 (2001); *Monarch Building Supply*, 276 NLRB 116 (1985); see also *St. Joseph Riverside Hospital*, 224 NLRB 721 (1976) (rejecting petitioner's objection to employer's use of individual closely identified with the employer). Compare *Bosart Co*., 314 NLRB 245 (1994) (permitting objection and setting election aside where the union was unaware of supervisory status of employer's observer until after election).

The Board will not allow union officials to serve as observers in *decertification* proceedings. See *First Student, Inc.*, 355 NLRB 410 (2010); *Butera Finer Foods*, 334 NLRB 43 (2001) (reversing prior precedent in this area). A *petitioning* union's use of a union official as an observer, however, is not grounds for setting aside an election, absent evidence of misconduct. See *Longwood Security, Inc.*, 364 NLRB No. 50, slip op. at 2 (2016), and cases cited therein. Cf. *FleetBoston Pavilion*, 333 NLRB 655 (2001) (overruling objection because, inter alia, union president used as observer had previously worked for employer and there was possibility he would return to work).

In the event a Board agent becomes aware that a party intends to use a potentially objectionable observer, the proper procedure is for the Board agent to advise the parties of the potential adverse consequences of using that observer, but then allow the election to proceed with the parties' chosen observers, leaving the resolution of any issues raised by the use of the potentially objectionable observer to the objections process; refusal to permit the potentially objectionable observer to serve may result in the election being set aside if such action results in a material breach of an election agreement. *Longwood Security Systems, Inc.*, 364 NLRB No. 50 (2016); *Browning-Ferris Industries of California*, 327 NLRB 704 (1999); see also *Detroit East, Inc.*, 349 NLRB 935 (2007).

b. Conduct and Treatment of Observers

The conduct of observers at the election may be grounds for objections. For conversations and electioneering engaged in by observers, see sections 24-440 and 24-442. For observer listkeeping and checking off voter names, see section 24-445. For observers wearing campaign insignia, see section 24-444.

There is no "implication of impropriety" from the mere fact a party compensates employees to act as observers. *Easco Tools, Inc.*, 248 NLRB 700 (1980). Even so, the Board set aside an election where a petitioner's payments to its observers allowed one to take the day off without loss of pay and the other more than doubled his wages for the day, finding that the observers were sufficient in number to affect the results of the election and it was questionable whether, given the payments, the observers could have voted "without a sense of obligation to vote for the Petitioner." Id. at 700–701; see also *S & C Security*, 271 NLRB 1300 (1984). Compare *Quick Shop Markets*, 200 NLRB 830, 831 (1972) (declining to set election aside where union payments to observers "were no so grossly disproportionate to their usual pay rate or to what the Union could reasonably consider was the value of their 4-1/2 hours work as observers").

An employer is not required to treat its own observers the same as union observers with respect to pay and leave during the election. Thus, in *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 353–354 (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 was it objectionable that the employer held a meeting for its own observers to explain their role but did not invite union observers. For payments designed to encourage off-duty employees to vote, see section 24-430.

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 sec. 11338; *Solvent Services*, 313 NLRB 645, 646 (1994); *Balfre Gear & Mfg. Co.*, 115 NLRB 19, 22 (1956). For more on a Board agent's challenge duties, see section 24-410.

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).

For discussion of challenges and postelection challenges, see sections 22-112 and 22-116.

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 Inc.*, 162 NLRB 1259, 1260 (1967); *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956).

The possible effect of a Board agent opening the polls late or closing the polls early is discussed in section 24-422. This section, by contrast, addresses other situations in which eligible employees are prevented from voting.

When a party's conduct causes an employee to miss the opportunity to vote, the Board will set the election aside if the employee's vote is determinative and the employee was disenfranchised through no fault of his or her own. *Sahuaro Petroleum & Asphalt Co.*, 306 NLRB 586, 586–587 (1992); *Versail Mfg.*, 212 NLRB 592, 593 (1974). But if an employee cannot vote due to sickness or some other situation beyond the control of the Board or the parties, the inability to vote is not a basis for setting aside the election. *Versail Mfg.*, 121 NLRB at 593. As always, the burden is on the objecting party to furnish evidence in support of its objections. *Sahuaro Petroleum*, 306 NLRB at 587; see also *Acme Bus Corp.*, 316 NLRB 274 (1995) (refusing to set aside election where employer did not establish petitioner leaflet erroneously stating election had been postponed led to dispositive number of voters not voting).

The Board has accordingly set aside elections where employees were prevented from voting because they were performing assignments in the normal course of their duties and their votes might have proved dispositive. See *Y-Tech Services*, 362 NLRB No. 7, slip op. at 1 fn. 1 (2015); *Glenn McClendon Trucking Co.*, 255 NLRB 1304 (1981); *Cal Gas Redding, Inc*., 241 NLRB 290 (1979); *Yerges Van Liners, Inc.*, 162 NLRB 1259, 1260–1261 (1967); see also *Wagner Electric Corp.*, 125 NLRB 834, 836 (1959) (employer-created confusion resulted in potentially dispositive number of eligible voters not voting). Compare *Daniel Construction Co*., 145 NLRB 1397, 1412 (1964) (individuals whose status was in doubt were omitted from voter list and had no opportunity to vote, but even had all of them voted it would not have affected results of election).

The Board has upheld elections where employees were unable to vote through no party's fault. See *Coast North America (Trucking) Ltd.*, 325 NLRB 980 (1998), enfd. 207 F.3d 994 (7th Cir. 2000) (employee on vacation and employees who could have voted in morning session); *Waste Management of Northwest Louisiana*, 326 NLRB 1389 (1998) (directive to report to work at certain hour did not prevent employee from arriving earlier to vote).

The Board has also set aside an election where a third party inadvertently locked the doors to the polling area, thus potentially contributing to a potentially dispositive number of employees not voting. *Whatcom Security Agency, Inc.*, 258 NLRB 985 (1981). Compare *Robert F. Kennedy Medical Center*, 336 NLRB 765 (2001) (although main entrance was locked for short period during polling, polling place remained accessible through another door regularly used by employees); see also *Rett Electronics*, 169 NLRB 1111, 1113–1114 (1968) (weather conditions did not disenfranchise determinative group of eligible voters).

If an election agreement provides for a manual election at a designated location, an untimely request for other arrangements (for example, to allow a hospitalized employee to vote) may properly be rejected, and a contention that an employee was wrongly disenfranchised on this basis will be rejected. See *Franklin's Stores Corp*., 117 NLRB 793, 795–796 (1957); *Red Owl Stores, Inc.*, 114 NLRB 176 (1955); see also *Community Care Systems*, 284 NLRB 1147 (1987) (overruling objection to date on which election was held based on low turnout where employer had stipulated to that date).

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, 1080 (1956) (citing *Active Sportswear Co*., 104 NLRB 1057 (1953)).

At one time, the Board would, in some circumstances, set an election aside based on low voter participation, but in *Lemco Construction*, 283 NLRB 459, 460 (1987), the Board abandoned 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*, 284 NLRB 1147 (1987).

Likewise, where severe weather on the day of the election reasonably denies eligible voters and adequate opportunity to vote and a determinative number did not vote, an election will be set aside. *Baker Victory Services*, 331 NLRB 1068 (2000); *V.I.P. Limousine*, 274 NLRB 641 (1985); see also *Goffstown Truck Center, Inc.*, 354 NLRB 359 (2009), incorporated by reference at 356 NLRB 157, 157 fn. 1 (2010). There must, however, be evidence that weather conditions affected the ability of eligible employees to vote. See *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 618–619 (4th Cir. 2013). Note that *Baker Victory Services* declined to follow a case upholding an election where a "representative complement" of eligible voters was able to vote despite severe weather conditions. See *Glass Depot, Inc.*, 318 NLRB 766 (1995).

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) (recognition unlawful where votes cast for labor organization were not a majority of the unit); *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. See also section 24-421.

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. But where an objection alleges that a Board agent failed to ensure the secrecy of balloting, the election will not be set aside "absent evidence that someone witnessed how a voter marked his or her ballot." *American Medical Response*, 356 NLRB 199 (2010), enfd. 477 Fed. Appx. 743 (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, 1142 (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 & Rattan Furniture Co*., 118 NLRB 911, 913 (1957); *Columbine Cable Co.*, 351 NLRB 1087 (2007). Compare *G. F. Lasater*, 118 NLRB 802, 804 (1957) (although some employees marked ballots in small windowless area outside official voting place, secrecy was not violated); *Con-Way Freight, Inc. v. NLRB*, 838 F.3d 534, 537–538 (5th Cir. 2016) (rejecting contention that observers' ability to see voters' upper torso and arms while voting may have intimidated voters into changing their vote). Where, however, the voting booths were located at one end of a warehouse, and after voting some of the eligible employees 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 *Sewell Plastics*, 241 NLRB 887 (1979), overruling objections because, under the facts of the case, "[a]ny possible impairment of the secrecy of the ballot could not have affected the outcome of the election or intimidated the voters in making their choice."

Where several voters enter an election booth at the same time, an election is susceptible to invalidation. See *Case Egg & Poultry Co*., 293 NLRB 941, 941 fn. 3 (1989) (remanding for hearing to determine if several voters were in voting room at same time and saw how each other voted). 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, 991–992 (1956); see also *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005) (even if two employees were in the booth at the same time, there was no evidence they communicated or observed how the other was marking the ballot). 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).

But a ballot will be invalidated if one voter shows it to another. See *Sorenson Lighted Controls*, 286 NLRB 969 (1987). In *General Photo Products*, 242 NLRB 1371 (1979), the voter who revealed his ballot could not vote again.

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. Id. at 984. 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. Ibid.; see also *Eagle Iron Works*, 117 NLRB 1053, 1054 (1957); *Standard-Coosa-Thatcher Co*., 115 NLRB 1790 (1956). But "[i]n 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, 583 fn. 2 (1972).

A voter is not permitted to withdraw his or her ballot, once cast. *Great Eastern Color Lithographic Corp*., 131 NLRB 1139, 1140–1141 (1961). Cf. *City Stationery, Inc*., 340 NLRB 523, 525 (2003). 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." Id.

For a discussion of cases in which a ballot is returned from the ballot box, see section 24-410.

Circumstances may be such that a voter's identity may unavoidably become known. Thus, where a single professional employee constitutes one voting group in a *Sonotone* election (see sections 18-110 and 21-400) while all the other employees constitute a second voting group 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). For similar reasons, 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 *DeVilbiss 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. *International Ladies' Garment Workers' Union*, 137 NLRB 1681, 1682–1683 (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., *United Insurance Co. of America*, 325 NLRB 341 (1998); *Garrity Oil Co*., 272 NLRB 158 (1984); *Premium Fine Coal*, 262 NLRB 428 (1982). Compare *J.C.L. Zigor Corp*., 274 NLRB 1477 (1985) (declining to open ballots because tie was theoretically possible). See also section 22-115.

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. The Regional Director has discretion to authorize balloting by mail when appropriate. *Pacific Gas & Electric Co*., 89 NLRB 938, 940 (1950); *Southwestern Michigan Broadcasting Co*., 94 NLRB 30, 31 (1951).

Three situations normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" because their work schedules vary significantly so that they are not present at a common location at common times; and (3) a strike, a lockout, or picketing in in progress. *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). If any of these situations exists, the regional director should also consider "the desires of the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources"; the Board expects, in the absence of extraordinary circumstances, that a regional director will exercise discretion within these guidelines. Ibid.

The Board reviews the direction of a mail ballot (or mixed manual and mail ballot) election under an abuse of discretion standard. See *California Pacific Medical Center*, 357 NLRB 197, 198 (2011); *GPS Terminal Services*, 326 NLRB 839 (1998); *North American Plastics Corp*., 326 NLRB 835 (1998); *Masiongale Electrical-Mechanical*, 326 NLRB 493 (1998); *London's Farm Dairy*, 323 NLRB 1057, 1058 (1997); *Reynolds Wheels International*, 323 NLRB 1062 (1997); see also *Nouveau Elevator Industries*, 326 NLRB 470 (1998) (not an abuse of discretion to direct manual election even though circumstances would have supported mail or mixed election); *Diamond Walnut Growers, Inc*., 326 NLRB 28 (1998) (no abuse of discretion to direct manual election despite existence of strike); *Willamette Industries, Inc.*, 322 NLRB 856 (1997) (finding abuse of discretion in directing mail ballot based solely on employer distance from Board office); *Shepard Convention Services*, 314 NLRB 689 (1994), (finding an abuse of discretion in the failure to direct a mail ballot election), enf. denied 85 F.3d 671 (D.C. Cir. 1996).

As an example, a mail ballot election was appropriate directed 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, 1344 (1958).

Mail balloting is also used at times in the maritime industry. See, e.g., *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850 (5th Cir. 1978). In *Pacific Maritime Assn*., 112 NLRB 1280, 1281 (1955), the Board explained that there are "unusual problems attendant upon balloting seagoing employees," and thus the Board has generally left the method of voting to the regional director in this industry. See also *Shipowners' Assn. of the Pacific Coast*, 110 NLRB 479 (1954) (holding that fact manual election was conducted previously does not preclude regional director from conducting election by mail); *Continental Bus System*, 104 NLRB 599, 601 (1953) (same).

The Board does not approve of one individual picking up the mail ballot of another potential voter. *Brink's Armored Car*, 278 NLRB 141 (1986); see also *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004) (unanimous Board agreed it is objectionable for a party to collect mail ballots for submission to the Board, evenly divided on whether mere solicitation for collection is objectionable, and majority declined to set election aside as only 2 nondispositive ballots were affected by this conduct). Cf. *Human Development Assn.*, 314 NLRB 821 (1994), in which the Board ordered the employer to pay the costs of a second election where it had interfered with the voting process in a mail-ballot election by various means.

As mail ballot elections are "more vulnerable to the destruction of laboratory conditions than are manual elections," as the Board does not directly supervise voting, the Board requires the use of envelope identification stubs, and the absence of a stub "raises a reasonable doubt concerning whether only eligible voters participated in the election and whether each of those eligible voters cast only one ballot." *Mission Industries*, 283 NLRB 1027 (1987). But where mail ballots become "too closely identified with the names of the voters concerned," the Board will not count the ballots. *Northwest Packing Co*., 65 NLRB 890, 891 (1946) (partial opening of outside envelope revealed names of four voters).

For a discussion of notice posting in a mail ballot election, see *Club Demonstration Services*, 317 NLRB 349, 350–351 (1995). For a discussion of the region's obligation to send duplicate election kits to employees who do not sign identification stub when returning mail ballots, see *Davis & Newcomer Elevator Co*., 315 NLRB 715 (1994).

With respect to the late arrival of mail ballots, ballots received after the tally of ballots is complete are not counted. *Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015) (citing *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981). Ballots received after the due date, but before the count, however, should be accepted and counted. See, e.g., *Watkins Construction Co*., 332 NLRB 828 (2000). 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.

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).

See also section 22-110. For a discussion of mail ballot elections and *Peerless Plywood*, see section 24-310.

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, Ltd.*, 260 NLRB 255 (1982). Compare *Bally's Atlantic City*, 352 NLRB 316, 316 fn. 3 (2008), incorporated by reference at 356 NLRB 179 (2010) (employer did no show that regional director's

denial of request to translate notice into 9 languages was inconsistent with agency-wide practice); see also *Fibre Leather Mfg. Corp*., 167 NLRB 393 (1967) (setting election aside where petitioner called attention to need for Portuguese notice and ballots, but none were provided and although bilingual observers were provided, Portuguese-speaking employees were not advised of purpose of these observers, no employee approached them for assistance, and observers only volunteered assistance to 4–6 out of 15–20 Portuguese-speaking employees).

Policies and procedures concerning foreign language notices of elections and/or ballots (including the factors a regional director should consider in deciding whether to provide such materials) are set forth in CHM section 11315. The CHM notes that foreign language interpreters may be provided at the polling cite as an alternative or supplement to such arrangements. Parties should advise the regional director as early as possible of the need for foreign language translations and/or interpreters. See also *Unibilt Industries*, 278 NLRB 825 (1986) ("It is the parties' responsibility to notify the Board that bilingual election materials are needed"), and cases cited therein.

Translated ballots with three or more languages are usually avoided, as they can present readability problems. CHM sec. 11315.2(b). For example, in *Kraft, Inc*., 273 NLRB 1484 (1985), the Board found that a ballot that attempted to indicate four languages was not 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 handwritten Vietnamese and Laotian translations. In the Board's view, this created "high potential for voter confusion" not cured by the notices of election or campaign materials. Id. at 1484. Compare *Bridgeport Fittings*, 288 NLRB 124 (1988), where a ballot in three languages was laid out in such a way as to avoid confusion.

With respect to the actual translation on the ballot, the "relevant inquiry is whether the translation provided those who do not read English with the information necessary to cast an informed vote." *Bridgeport Fittings*, 288 NLRB 124, 125 (1988) (citing *Tanforan Pack Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1363 (9th Cir. 1981)). In *Bridgeport Fittings*, the Board declined to set an election aside where 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 also rejected the argument that the ballot was objectionable because it did not translate certain proper names. See also *Avante at Boca Raton, Inc.*, 323 NLRB 555, 558–559 (1997) (declining to set election aside because words "affiliated with" were not translated on notice or ballot).

The Board set aside an election where the parties agreed that bilingual notices would be posted, but the Spanish-language notice omitted the official notice's statement of rights of employees. *Flo-Tronic Metal Mfg.*, 251 NLRB 1546 (1980).

Board policy permits the use of foreign language notices of election and English ballots. See CHM section 11315.2(c). This policy was approved by the Seventh Circuit in *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990), enfg. 294 NLRB 1164 (1989), cert. denied 499 U.S. 959 (1991). The court did so, however, noting that there was no "evidence of actual confusion." See also *Superior Truss & Panel, Inc*., 334 NLRB 916, 918–919 (2001) (RD's refusal to provide ballots in Spanish not objectionable; Spanish translation of notice understandable).

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). See also section 24-410(b) for a discussion of similar cases involving the appearance that a party is in control of the election process.

24-429 Ballot Count and Ballot Interpretation/Void Ballots

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. *Paprikas Fono*, 273 NLRB 1326, 1328 (1984); see also *Madera Enterprises*, 309 NLRB 774 (1992) (parties have opportunity to monitor handling of determinative challenges). Ballot count procedures at set forth in CHM sec. 11340.

As ballots are counted, the Board agent interprets "other-than-normal ballots," and the parties may challenge the Board agent's interpretation; if the the challenge is based on good cause, the ballot is segregated in a challenge envelope and listed as a challenged ballot. CHM sec. 11340.7(a).

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, 467–468 (11th Cir. 1982), and cases cited therein. Thus, for example, in *Horton Automatics*, 286 NLRB 1413 (1987), the Board found 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) (Board disregarded irregular markings made over the original "X"); *Columbia Textile Services*, 293 NLRB 1034, 1034 fn. 4 (1989); (voter punching a hole through the "yes" box treated as "yes" vote); *Brooks Bros., Inc*., 316 NLRB 176 (1995) (ballot treated as "no" where voter clearly obliterated "X" in "yes" box and left unmistakable "X" in "no" box); *Daimler-Chrysler Corp.*, 338 NLRB 982 (2003) (treating ballot as "yes" vote where there was "X" in the "yes" box, handwritten "?" adjacent to "yes" square, and no markings in "no" box); *Osram Sylvania, Inc*, 325 NLRB 758 (1998) (smudged diagonal line in "yes" box and 7 "X"s in "no" area clearly expressed intent to vote no); *Thiele Industries*, 325 NLRB 1122, 1222 fn. 1 (1998) ("X" in "yes" box, diagonal line in "No" box, and work "YES" above "yes" box counted as "yes" vote). Cf. *Aesthetic Designs, LLC*, 339 NLRB 395 (2003) (counting as valid sample ballot that had been included in mail-ballot election kit); *Ruan Transport v. NLRB*, 674 F.3d 672 (7th Cir. 2012) (heavy mark in box for one union and signs in erasure for box of other union shows overall intent to vote for first union).

By contrast, in *Bishop Mugavero Center*, 322 NLRB 209 (1996), the Board found that a ballot marked with a single diagonal line in the "yes" box and an "X" in the "no" box was a void ballot. See also *TCI West, Inc*., 322 NLRB 928 (1997), enf. denied 145 F.3d 1113 (9th Cir. 1998) (well-established "that where a voter marks both boxes on a ballot and the voter's intent cannot be ascertained from other markings on the ballot . . . the ballot is void because it fails to disclose the clear intent of the voter.

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); *Sorenson Lighted Controls*, 286 NLRB 969 (1987).

24-430 Payments to Off-Duty Employees to Encourage Voting

378-2897-8700

In *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), the 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, 805 fn. 1 (1996); *Rite Aid Corp.*, 326 NLRB 924, 924 fn. 1 (1998). Compare *Good Shepard Home*, 321 NLRB 426 1996) (finding payments amounted to actual expenses); *Allen's Electric Co.*, 340 NLRB 1012 (2003) (payments limited to

unavoidable costs clearly related to casting ballots).

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); *J.R.T.S. Limited, Inc*., 325 NLRB 970 (1998).

The foregoing cases treat such payments as a grant or offer of benefit. For cases involving other types of benefits, see section 24-302. 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.

24-440 Electioneering

370-9167-5400

378-8400

"It is the Board's province and duty to safeguard its electoral processes from conduct which inhibits the free exercise of employee choice." *Boston Insulated Wire Co.*, 259 NLRB 1118 (1982). As "the Board is especially zealous in preventing intrusions upon the actual conduct of its elections," it accordingly prohibits electioneering "at or near the polls." *Claussen Baking Co.*, 134 NLRB 111, 112 (1964).

The Board does not, however, set aside elections based on electioneering "at or near the polls" regardless of the circumstances, as "it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls." *Boston Insulated Wire*, 259 NLRB at 1118. In determining whether electioneering warrants an inference that it interfered with employee's free choice, the Board considers (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened instructions of a Board agent. See id. at 1119; see also *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005). In the event there is no designated no electioneering area, the Board will treat the area "at or near the polls" as equivalent for the purposes of this standard. See *Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001) (citing *Bally's Park Place, Inc.*, 265 NLRB 703 (1982)).

Note that a different standard applies to "prolonged conversations" between party representatives and voters waiting to vote. These types of conversations as subject to the *Milchem* rule, discussed in section 24-442.

Applying the general electioneering standard, the Board has found objectionable a union observer who, in the polling place and acting contrary to the Board agent's instructions, told four employees how to vote and gave others a "thumbs up." *Brinks Inc.*, 331 NLRB 46 (2000). The Board has also found objectionable an antiunion poster hung in an area curtained off for the election area (and which every employee had to pass in order to vote) and which the union told the employer it considered objectionable before the polls opened. *Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001); see also *Star Expansion Industries Corp.*, 170 NLRB 364 (1968) (union agent, on three separate occasions, disregarded Board agent instructions not to electioneer within 50 feet of the polls).

By contrast, the Board has found various other types of electioneering conduct unobjectionable. See, e.g., *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005) (conversations that took place outside the front entrance, away from any no-electioneering zone, that did not violate any Board agent instructions); *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003) (prounion poster affixed to tree 100 feet from polling area and distributing prounion flyers 50 to 80 feet from polling area); *Del Ray Tortilleria*, 272 NLRB 1106, 1107–1108 (1984) (union organizer shaking hands and speaking briefly with voters outside the polling place); *Boston Insulated Wire*, 259 NLRB at 1118–1119 (passing out leaflets and speaking to employees as they entered building where glass-paneled doors effectively insulated voters from the electioneering); see also *Marvil International Security Service*, 173 NLRB 1260

(1968) (union representatives conversed with voters at foot of 10-foot staircase leading to second floor where polling area was 20 to 25 feet down a hallway, beyond no-electioneering area established by Board agent); *Harold W. Moore & Son*, 173 NLRB 1258 (1968) (conversations taking place 30 feet from building entrance, which was itself 30 feet from polling area); *Sewanee Coal Operators' Assn.*, 146 NLRB 1145, 1147 (1964) (persons wearing prounion placards circulated about voting line outside of polling area and Board agent had not designated no-electioneering area); *NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207, 213–214 (1st Cir. 2015) (electioneering and name-calling engaged in by employees outside of any no-electioneering area which could not be heard in polling place not objectionable). Compare *Newark Portfolio JV, LLC v. NLRB*, 658 Fed. Appx. 649 (3d Cir. 2016) (denying enforcement where no evidence supported Board finding agent did not designate no-electioneering area, thus undermining Board's *Boston Insulated Wire* analysis).

Note that picketing at the site of the election is not, by itself, objectionable. See *Chrill Care, Inc*., 340 NLRB 1016 (2003) (picketing at site of election, not objectionable).

Although the factors set forth in *Boston Insulated Wire* clearly contemplate that conduct may be engaged in by a nonparty, the Board has also stated that in evaluating electioneering by nonparties, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976); see also *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004).

As described below, the Board takes approaches distinct from those described above with respect to certain types of conduct that could also be described as "electioneering." The following sections consider ballot reproduction, raffles/gifts/parties/contests, the use of union or employer insignia, and—perhaps most importantly—the *Milchem* rule, which applies to "prolonged conversations" between party representatives and voters waiting to cast their ballots.

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, Inc.*, 109 NLRB 1270, 1272 (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, 557 (1985), the Board determined that this rule failed to account for employees' ability to recognize altered sample ballots as campaign propaganda and to evaluate them as such (see *Midland National Life Insurance Co*., 263 NLRB 127 (1982)), and therefore modified its approach, stating that the "crucial question" in ballot alteration cases 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. To resolve that question, the Board articulated a two-part test that turned on whether an altered ballot clearly identified the party responsible for it, and if not, whether the document tended to mislead employees into believing the Board favored one of the parties. Ibid.

In 1993, the Board added a disclaimer to its notice of election disavowing the Board's participation in the alteration of any sample ballot and pronouncing the Board's neutrality. As

a result, the Board essentially held that the *SDC Investment* analysis was not required where the notice's disclaimer language was available (see *Brookville Healthcare Center*, 312 NLRB 594 (1993), but continued to apply that analysis where the notice's disclaimer was not readily available to employees (see *Sofitel San Francisco Bay*, 343 NLRB 769 (2004)).

Then, in *Ryder Memorial Hospital*, 351 NLRB 214, 216 (2007), the Board added explicit disclaimer language to the actual ballot cast by employees in the election and to the sample ballot contained on the notice of election. Both the sample and actual ballot accordingly now state that the Board does not endorse any choice in the election, and any marking voters may have seen on a sample ballot was not put there by the Board. As a result of this change, the *SDC Investment* analysis is no longer necessary. Instead, altered ballot reproductions that include the disclaimer are not objectionable; by contrast, an altered ballot reproduction that does *not* contain the disclaimer is per se objectionable, because it is highly unlikely that the omission of the disclaimer would be inadvertent (as the disclaimer now appears on all sample ballots). See also *Goffstown Truck Center, Inc.*, 356 NLRB 157, 158 (2010).

See also section 24-423 for a discussion of the requirements for posting the Notice of Election.

24-442 The *Milchem* Rule

370-4975

370-9167-5450

378-4242

378-8420

In *Milchem, Inc.*, 170 NLRB 362 (1968), the Board set forth a rule that prohibits "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." A "chance, isolated, innocuous comment or inquiry" does not "necessarily void the election" under this standard, however. Id. at 363. The Board does not inquire into the nature of the conversation under this rule. Id. at 362.

To find objectionable conduct under *Milchem*, there must accordingly be (1) conduct by a party (2) that involves prolonged conversations with employees waiting in line to vote. *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004). The Board has repeatedly stated that *Milchem* does not apply to third-party conduct. See *Lamar Advertising of Janesville*, 340 NLRB 979, 979 fn. 4 (2003); *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995); *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992).

In *Milchem* itself, 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." 170 NLRB at 362; see also *Volt Technical Corp.*, 176 NLRB 832, 836–837 (1970) (election set aside where supervisor went from person to person in line—which varied from 15 to 50 employees—and engaged in conversational and handshaking activity).

As the foregoing quote illustrates, the *Milchem* rule is applied "without inquiry into the nature of the conversations." 170 NLRB at 362. Thus, although his remarks were not shown to be electioneering, the Board set aside an election where the petitioner's observer engaged in conversations "beyond a mere hello" (and culminated in a gratuitous loan offer to a prospective voter). *Modern Hard Chrome Service Co.*, 187 NLRB 82, 83 (1970).

Social pleasantries or chance remarks are not considered objectionable under the *Milchem* rule absent more. See *Sawyer Lumber Co.*, 326 NLRB 1331, 1333 (1998); *Dubovsky & Sons*, 324 NLRB 1068 (1997); see also *NLRB v. Oesterlein Services for Youth*, 649 F.2d 399, 400–401 (6th Cir. 1981), enfg. 243 NLRB 563 (1979) (pleasantries and innocuous conversations not

objectionable). Rather, once again, the conversation must be "prolonged." *Lowe's HIW, Inc.*, 349 NLRB 478, 479 (2007); see also *Clothing & Textile Workers v. NLRB*, 815 F.2d 225, 228–229 (2d Cir. 1987), enfg. 280 NLRB 864 (1986) (two-minute conversation not necessarily "prolonged"). Cf. *Sir Francis Drake Hotel*, 330 NLRB 638 (2000) (brief and innocuous comments by observer to 5 or 6 employees not objectionable); *Con-Way Freight, Inc. v. NLRB*, 838 F.3d 534 (5th Cir. 2016) (union observer's brief, isolated, ambiguous remarks to voters did not constitute objectionable conduct).

The Board has indicated that *Milchem* does not apply if the conversation in question does not involve voters waiting in line to vote. See *C&G Heating & Air Conditioning*, 356 NLRB 1054, 1055 (2011) (no violation where there was no allegation union representative engaged in any conversation with employees waiting in line to vote, much less prolonged conversations); *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004) (union representative's conversations with voters did not take place in polling area, waiting area, or near line of voters); *Golden Years Rest Home*, 289 NLRB 1106 (1988) (conversation did not take place within polling place or corridor leading to it and employee was not waiting in line to vote); *Stevenson Equipment Co.*, 174 NLRB 865, 867 (1969) (remarks not addressed to employees waiting in line to vote and were not by union agent).

As previously stated, the Board has stated that "isolated" remarks need not violate *Milchem*. In *Mead Corp.*, 189 NLRB 190 (1971), the Board declined to set the election aside based on an apparent isolated violation of the *Milchem* rule where the vote of the employee addressed was not dispositive of the election. Compare *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984) (speaking to four voters in no-electioneering area and agent's extended presence in waiting room amounted to more than "chance, isolated, innocuous comment or inquiry"). See also *Pacific Grain Products*, 309 NLRB 690, 691 (1992) (declining to set election aside based on observer remark that only affected one employee whose ballot would not affect the election's outcome).

For an example of a court decision distinguishing between types of remarks alleged to be objectionable under *Milchem*, see *NLRB v. Vista Hill Foundation*, 639 F.2d 479 (9th Cir. 1980), enfg. 239 NLRB 667 (1978). In that case, the court held that four conversations consisting of greetings and comments on the weather did not violate *Milchem*, nor did the union agent's brief reply to an employee's question (as to whether the observer would be the union representative if employees selected the union). Id. at 484. The court commented that the sixth conversation—in which the observer commented that if the employees voted for the union he (the observer) would not be in so much trouble with the employer—"begins to approach the kind of electioneering condemned" under *Milchem*, but deferred to the Board's finding that this comment was also innocuous. Ibid.

Milchem may apply in the absence of a "conversation" so long as there is a party message directed at employees waiting to vote. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 566–567 (1995) (displaying poster listing union's history of strikes to voters waiting to vote objectionable). But a conversation not directed at voters that voters may be able to overhear does not violate the *Milchem* rule. See *Longs Drug Stores California*, 347 NLRB 500, 501–502 (2006) (although employees may have overheard statements made by alleged agents, such statements were not conversations with employees waiting to vote); *Midway Hospital Medical Center*, 330 NLRB 1420, 1420 fn. 1 (2000) (union observer's outbursts against employer were directed union representative, management officials, and Board agent, and could not reasonably be viewed as attempting to communicate with employees waiting to vote).

An election will not be set aside where the *Milchem* rule was violated by the observer for the losing party in the election. *General Dynamics Corp.*, 181 NLRB 874, 875 (1970).

The Board has declined to extend *Milchem* to find that a party-sponsored luncheon held outside the polling area when the polls are open interferes with an election. *Lach-Simkins Dental Laboratories*, 186 NLRB 671, 672 (1970).

For discussion of other types of electioneering see section 24-440; for third party conduct, see section 24-320.

24-443 Raffles, Gifts, Parties, and Contests

378-2897

378-4284

A party's use of raffles, gifts, parties, and contests could fairly be described as forms of electioneering, but the standards involved here differ from the *Boston Insulated Wire* standard discussed in section 24-440 and the *Milchem* standard discussed in section 24-442. Indeed, this conduct could also be described as possible preelection campaign interference, and in many instances the standard applied to such conduct is the same standard applied to the grant of benefits. Accordingly, for a much more detailed discussion of this area, see section 24-303.

That said, particular considerations apply to raffles. In *Atlantic Limousine*, 331 NLRB 1025, 1029 (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." Conducting a raffle includes announcing one, distributing raffle tickets, identifying raffle winners, and awarding prizes. Id. Accord: *Ryder Student Transportation Services*, 332 NLRB 1590 (2000) (conditioning a raffle on a certain number of employees voting); *Allen-Brooke Healthcare Center*, 331 NLRB 1065 (2000) (raffle conducted during balloting). For a summary of prior precedent in this area, see *Atlantic Limousine*, 331 NLRB at 1026–1028.

If, however, election raffles are held outside of the 24-hour period, the Board scrutinizes them 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." *Atlantic Limousine*, 331 NLRB at 1029 fn. 13. In such circumstances, the test set out in *B & D Plastics*, 302 NLRB 245 (1991), applies. See *BFI Waste Systems*, 334 NLRB 934 (2001) (setting election aside based on this test).

The *B & D Plastics* standard also applies to grants of benefit (section 24-302) and gifts (section 24-303). The Board also applies *B & D Plastics* to determine whether special circumstances warrant setting the election aside based on a campaign party. See section 24-303. As for contests, it is objectionable to hold a contest involving the answering of question about the eletion campaign if the employees are required to sign their names. See *Melampy Mfg. Co.*, 303 NLRB 845 (1991), and section 24-303.

24-444 Campaign Insignia

378-2847-8400 et seq.

378-8440

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. *R. H Osbrink Mfg. Co*., 114 NLRB 940, 942 (1955); see also *Furniture City Upholstery Co*., 115 NLRB 1433, 1434–1435 (1956). The Board discourages observers from wearing insignia, but does not prohibit such conduct. *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004); see also CHM sec. 11310.4. Thus, precedent is clear that 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." *Larkwood Farms*, 178 NLRB 226 (1969) (observer wearing "Vote No" hat not objectionable).; see also *Fiber*

Industries, 267 NLRB 840, 850 (1983) (appearance of words "yes" or "no" in polling area, without more, not grounds to set aside election); *Delaware Mills, Inc.*, 123 NLRB 943, 946 (1959) (overruling objection based on employee—who, because her vote was challenged, was required to sit at polling place—wearing union T-shirt and "Vote Yes" button and allegedly waving and smiling at other voters).

The display of insignia outside the polling area just before or during the polling period similarly has been found unobjectionable. Thus, in *Mar-Jac Poultry Co*., 123 NLRB 1571, 1572–1573 (1959), the Board overruled an objection where, during the half-hour before voting (during which the employer's operations were shut down), some employees walked around the plant at such time wearing handmade paper hats lettered with words "Vote No." Similarly, in *Chrill Care, Inc.*, 340 NLRB 1016 (2003), the presence of picketers displaying union signs and insignia outside the voting area was not objectionable.

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. In such cases, the Board has found objectionable conduct where the offer of such materials pressures employees to make an open or observable choice, thus demonstrating support for, or rejection of, the union. See, e.g., *2 Sisters Food Group, Inc*., 357 NLRB 1816, 1818–1819 (2011); *Circuit City Stores*, 324 NLRB 147 (1997); *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994); *Gonzales Packing Co*., 304 NLRB 805 (1991) (citing *Pillowtex Corp.*, 234 NLRB 560 (1978)); *Macklanburg-Duncan Co*., 179 NLRB 848 (1969); *Garland Knitting Mills*, 170 NLRB 821 (1968), enfd. in material part 414 F.2d 1214 (D.C. Cir. 1969); *Chas. V. Weise Co*., 133 NLRB 765 (1961).

It is not objectionable, however, for an employer to merely make antiunion paraphernalia available. See, e.g., *Columbia Alaska Regional Hospital*, 327 NLRB 876 (1999); *Black Dot, Inc*., 239 NLRB 929 (1978).

24-445 Checking Off Names of Voters/Listkeeping

370-3533-4050-2500

378-2857

378-4260

378-5625-7000

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 735,736–737 (1992); *Hallandale Rehabilitation Center*, 313 NLRB 835, 836–837 (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 *Southland Containers*, 312 NLRB 1087 (1993) (and cases cited therein); *Textile Service Industries*, 284 NLRB 1108 (1987) (finding unobjectionable observer's writing, in addition to hash marks, 'unknown words' not recognized as names while attempting to conceal the paper); *Cross-Pointe Corp*., 315 NLRB 714 (1994) (observer writing something unknown on piece of paper not objectionable). Compare *Cross Pointe Paper Corp.*, 330 NLRB 658, 662 (2000).

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 *Avante at Boca Raton, Inc.*, 323 NLRB 555, 557 (1997); *Cerock Wire & Cable Group*, 273 NLRB 1041 (1984), and CHM section 11338.2. The Board prefers that the observer not use a duplicate *Excelsior* list, *Mead Southern Wood Products*, 337 NLRB 497 (2002).

The Board has permitted the employer to maintain lists where they were unrelated to the actual polling itself. *American Nuclear Resources*, 300 NLRB 567 (1990) (list maintained as part of normal security procedure); *Red Lion*, 301 NLRB 33 (1991) (list maintained for payroll reasons).

See also the discussion of observers at section 24-424.

24-446 Agents Stationed Near Polling Place

378-8430-5050

In *Performance Measurements Co.*, 148 NLRB 1657 (1964), the Board set aside an election due to "the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place." Similarly, in *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982), the Board set aside an election based, in part, on the fact that a supervisor was stationed within 10 to 15 feet of the entrance of the voting area. In *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001), the court stated that these two cases "seem to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." As the Board had denied review of the regional director's finding that the presence of union agents outside the entrance to the polling place was not objectionable, the court remanded the case, stating that the Board had not acted consistent with prior adjudications and had failed to offer a reasoned explanation for this departure. Ibid. The Board has since stated that there "is no indication, however, that the court was presented with, or considered, an argument that *Electric Hose* and *Performance Measurements* were distinguishable on the basis that those cases involved *employer* agents rather than union agents." *Longwood Security Services*, 364 NLRB No. 50, slip op. at 3 (2016).

24-500 The *Lufkin* Rule

370-2817-3366

Before 1964, the 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).

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, 110 fn. 3 (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." 147 NLRB at 342 fn. 2.

The notice, set forth in CHM sec. 11452.3, reads as follows:

NOTICE TO ALL VOTERS

> The election conducted on [insert date] was set aside because the National Labor Relations Board found that certain conduct of the (Employer) (Union) interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election 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, e.g., *Snap-On Tools, Inc.*, 342 NLRB 5, 5 fn. 3 (2004); *Bush Hog, Inc*., 161 NLRB 1575, 1595 (1966). See also *Monfort of Colorado*, 298 NLRB 73, 86 fn. 46 (1990); *SDC Investment*, 274 NLRB 556, 558 fn. 6 (1985). In *Miller Industries, Towing Equipment, Inc.*, 342 NLRB 1074, 1074 fn. 4 (2004), the Board denied a request for a special notice but did direct a notice of election in accordance with *Lufkin* rule.

Inclusion of *Lufkin* language is standard when requested. See *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 1 fn. 2 (2014).

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 [date of original election]." CHM sec. 11452.3.

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. See *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir. 1984). See also section 3-880.

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