Federal Labor Laws

Paul K. Rainsberger, Director
University of Missouri – Labor Education Program
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VII. Unit Determinations

A. Definition of a Bargaining Unit

1. A bargaining unit is simply a group of workers who are logically placed together for purposes of union representation in collective bargaining. Subject to specific statutory and regulatory restrictions, the initial determination of whether a proposed unit is appropriate is primarily an administrative matter for the Regional Director of the NLRB.

2. In seeking to represent a group of workers, it is not necessary for a union to propose the "best" possible unit, as long as the unit proposed is an appropriate unit.[1] The starting point for determining whether a proposed unit is appropriate is the definition of the unit included in a representation petition.

3. The basic test to determine whether a group or workers share enough in common to constitute an appropriate bargaining unit is the concept of a "community of interest."

4. In bargaining unit determinations, an important distinction is between the scope and the composition of the unit. The scope of the unit is the basic definition of what classifications of workers should be included in the unit. Questions of unit composition concern the inclusion or exclusion of specific workers. For example, a clerical worker might be excluded from a unit of all office clerical workers because of the confidential nature of the individual worker's job.

5. There are statutory limits on the definition of bargaining units for the NLRB. For example, a union cannot be certified as the representative of plant guards if that union is affiliated with another union that represents production workers at the same facility under §9(b)(3).[2] Other limits on unit scope and composition are imposed through judicial and administrative rules and policies.

6. In some situations, the employer may recognize a union as the representative of a unit of workers even though the Board could not

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[1] *Lundy Packing Company, Inc.,* 314 NLRB 1042 (1994); *Omni International Hotel*, 283 NLRB 475 (1987); *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950).

[2] *E.g., American Building Maintenance Co.*, 126 NLRB 346 (1960).

certify the same unit. For example, it is common in the construction industry to include foremen in a craft unit even though they might be considered supervisors by the Board. These non-complying units often raise issues if subsequent Board elections become necessary.

B. Unit determination procedures

1. The starting point for any unit determination is the representation petition under which the question of a union's right to represent specified employees is raised. While this is normally a petition initiated by the union seeking representational rights, other representational petitions may also require unit determinations.

    a. If the unit proposed in the representation petition is considered to be an appropriate unit, further inquiry by the Regional Director is unnecessary. The unit proposed does not have to be the most appropriate unit or an optimal unit, as long as it is an appropriate unit.

    b. Certain units are presumptively valid under Board guidelines. If a petition specifies a bargaining unit that corresponds to a presumptively valid unit, that unit will be accepted unless it is shown that it is not appropriate in the specific case. The burden is on the party challenging a presumptively appropriate unit.

2. In some cases, the parties will stipulate to the appropriateness of a bargaining unit. A stipulation is a contractual agreement that a specified unit is appropriate. Even if the parties agree to a stipulated unit, issues may subsequently be raised challenging the inclusion or exclusion of workers in the unit. Different standards apply to Board review of stipulated units.[3]

3. Subject to review by the Board, the Regional Director makes the initial unit determination if such an inquiry is necessary. In determining an appropriate unit, the Regional Director must consider:

    a. Whether the workers involved share a community of interest.

    b. The unit proposed by the petitioner and alternative unit proposals suggested by the parties.

    c. Statutory and other legal and administrative limits on unit determinations.

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[3] *See, Federal Labor Laws: Outline VI* for procedures in consent and stipulated election cases.

d. Under Board policy, the smallest appropriate unit that encompasses the employee classifications specified in the petition should be selected.[4]

4. Initial determinations by the Regional Director are subject to review. Board review occurs through the normal representation case procedures. In directed election cases, such review occurs prior to the direction of an election. In stipulated election cases, the Board may review the terms of the stipulated unit or resolve unit composition issues through the resolution of contested ballot issues.

5. Judicial review of unit determination and other representation case issues is indirect, through the unfair labor practice case procedures.[5] The courts recognize that unit determination issues are largely within the discretion of the Board and its determinations are rarely disturbed. A court should review unit determinations only to assure that they are not unreasonable, made arbitrarily or capriciously, or unsupported by substantial evidence.[6]

C. Stipulated units

1. If the parties have stipulated to a unit definition, the agreed unit will be accepted as appropriate unless it is contrary to express statutory provisions or established Board policies. However, if the intent of the parties is ambiguous, the Board applies traditional community of interest standards to determine whether specific workers are included or excluded from the stipulated unit.[7]

2. If a bargaining unit stipulation is ambiguous, the Board first determines whether the intent of the parties can be discerned from the stipulation agreement itself. If not, the Board applies the community of interest standards. In determining whether the intent of the parties can be discerned from the stipulation agreement, contract interpretation standards are applied, including resort to extrinsic evidence of intent.[8]

3. If the intent of the parties cannot be determined through use of normal contract interpretation standards, the Board will determine

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4 *Boeing Co*., 337 NLRB 152 (2001).

5 *See, Federal Labor Laws: Outline VIII*.

6 *Massachusetts Society for the Prevention of Cruelty to Children*, 297 F.3d 41 (1st Cir. 2002).

7 *Kalustyans*, 332 NLRB 843 (2000); *Venture Industries*, 327 NLRB 918 (1999); *Wells Fargo Alarm Services*, 289 NLRB 562 (1988).

8 *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999).

the bargaining unit through the normal community of interest standards.[9]

D. The concept of a community of interest

1. Some of the factors used to determine whether a proposed unit of workers shares a community of interest are listed below. In any case, all factors are considered and none are dispositive.[10]

   a. Degree of functional integration of the work in the business of the employer,[11]

   b. Whether they perform similar types of work, including the nature of the workers' skills and functions,[12]

   c. Whether they have regular work contact and whether they are interchangeable with other workers,[13]

   d. Whether they are subject to similar working conditions,

   e. Whether they have similar wage and benefit packages,[14]

   f. Whether they are subject to common supervision,[15]

   g. Prior bargaining history.[16] Bargaining history that is contrary to Board policy will not be used to determine that a unit is appropriate.[17]

   h. The extent and form of organization, either with that employer or within that industry. However, by statute, the

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[9] *Caesars Tahoe*, 337 NLRB 1096 (2002).

[10] *Ore-Ida Foods, Inc*., 313 NLRB 1016 (1994), provides a comprehensive discussion of the factors considered in determining a community of interest.

[11] E.g., *Seaboard Marine Ltd*., 327 NLRB 556 (1999).

[12] *Phoenix Resort Corp.,* 308 NLRB 826 (1992).

[13] *Novato Disposal Services*, 330 NLRB 632 (2000).

[14] *Allied Gear & Machine Co.,* 250 NLRB 679 (1980).

[15] *Associated Milk Producers,* 251 NLRB 1407 (1980).

[16] *Great Atlantic and Pacific Tea Co*., 153 NLRB 1549 (1965).

[17] *E.g., New Deal Cab Co*., 159 NLRB 1838 (1966) (history of bargaining in segregated units).

extent of organization cannot be the controlling factor in a unit determination.[18]

2. Residual units, consisting of all workers excluded from other established units are appropriate. However, in initial unit determinations, the Board would prefer to include isolated groups in a larger general unit to avoid leaving residual units.[19] A residual units is appropriate only if includes all unrepresented employees of the type covered by the petition.[20]

3. Race, gender, age, and eligibility for union membership are all factors that may not be used to justify a proposed bargaining unit.

4. A single worker cannot constitute an appropriate bargaining unit for purposes of Board certification.[21]

E. Presumptively appropriate and other common bargaining units

1. Over a period of years, the Board has determined that certain units are presumably valid for purposes of collective bargaining. While the presumption may be rebutted, the burden falls on a party challenging a presumptively appropriate unit to demonstrate that it is not appropriate.

2. Both single facility and employer-wide units are presumptively valid.[22] Many of the problems in unit determination cases arise because the petition seeks either a unit smaller than a single facility (craft, departmental, or occupation units) or a multi-facility unit (larger than a single facility but not employer-wide).

3. Other presumptions concerning appropriate bargaining units include:

   a.. In manufacturing industries, single plant production and maintenance units are presumptively appropriate.[23]

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[18] 29 USC § 159(c)(5). *Overnite Transportation Co*., 322 NLRB 723, *enforced*, 294 F.3d 615 (4th Cir. 2002).

[19] *Huckleberry Youth Programs*, 326 NLRB 1272 (1998).

[20] *Fleming Foods*, 313 NLRB 948 (1994).

[21] *Roman Catholic Orphan Asylum*, 229 NLRB 251 (1977).

[22] *Beverly Enterprises*, 341 NLRB 296 (2004), *citing, Trane*, 339 NLRB 866 (2003) and *Greenhorne & O'Mara, Inc*., 326 NLRB 514 (1998).

[23] *Temco Aircraft Corp.*, 121 NLRB 1085 (1958).

b. There is a strong presumption in regulated public utilities that systemwide units are optimal to avoid fragmentation. [24]

1) Less than systemwide units will be considered appropriate only if there is compelling evidence that such a unit is feasible.[25]

2) The Board has not resolved the question of whether the public utility presumption applies to the cellular telephone industry. However, it has determined that the presumption does not apply to the retail outlets operated by a cellular telephone company.[26]

c. Single store units of retail establishments are presumptively appropriate. However, there may also be appropriate departmental or craft units within a retail establishment. [27]

d. The wall-to-wall presumption in retail establishments does not necessarily apply to combined retail/wholesale operations. Whether separate units for the retail and wholesale operations of a combined business are appropriate is determined through application of the community of interest test.[28]

e. Certain craft and occupational units are presumptively appropriate.

1) Craft units have historically been appropriate in the construction and printing industries.[29] In determining whether a group of workers constitutes a separate craft, the Board looks at whether the workers participate in a formal training or apprenticeship program, whether the work is functionally integrated with work of excluded employees, whether the duties overlap with other workers, whether the employer assigns works on craft or jurisdictional lines, and whether the workers share common interests, terms

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[24] *Colorado Interstate Gas Co.*, 202 NLRB 847 (1973).

[25] *Alyeska Pipeline Service Co.*, 348 NLRB No. 44 (2006).

[26] *Verizon Wireless*, 341 NLRB 483 (2004).

[27] *Sav-On Drugs, Inc.*, 138 NLRB 1032 (1962).

[28] *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999).

[29] *See, E.I. du Pont & Co.*, 166 NLRB 413 (1966), for the standards for determining when a craft unit is appropriate.

and conditions of employment with other employees.[30]

2) Units of office clerical units are presumptively separate from production, maintenance, or warehouse units that include plant clerical workers.[31]

4. In unit determinations, a number of issues are raised when either the employer or union involved argue that the appropriate unit is larger than a single facility but smaller than an employer-wide unit.

a. A single facility unit is not appropriate if it has been so effectively merged into a more comprehensive unit or is so functionally integrated that it loses its separate identity.[32]

b. If a petition proposes a presumptively appropriate single facility unit and the employer argues that such a unit is not appropriate, several factors must be considered, including central control over daily operations and labor relations; the extent of local autonomy of the separate facilities; similarity of employee skills, functions and working conditions; the degree of interchange among employees; the distance between facilities; and bargaining history.[33]

c. In considering the degree of integration between two facilities, both product and operational integration are considered. However, product integration is less significant than other types of functional integration.[34]

d. When a petition proposes a multi-facility unit, the petitioner must show that the selected facilities are not an arbitrary grouping. When the proposed unit does not conform to an administrative or organizational grouping of the employer, the workers involved in the selected facilities must share a community of interest distinct from that shared by all similar employees of the employer.[35]

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[30] *Burns and Roe Services Corp*., 313 NLRB 1307 (1994). *But, see AGI Klearfold, LLC*, 350 NLRB No. 50 (2007), moving away from a traditional lithographic unit in the printing industry to a unit consisting of press and pre-press employees.

[31] *Mitchellace, Inc.*, 314 NLRB 536 (1994).

[32] *Cargill, Inc.,* 336 NLRB 1114 (2001).

[33] *Trane*, note 21, *supra*.

[34] *Lawson Mardon U.S.A., Inc*., 332 NLRB 1282 (2000).

[35] *Bashas', Inc.,* 337 NLRB 710 (2002).

5. Unit determination issues also arise when a petition proposed a unit larger than a specific craft or occupational unit, but smaller than a presumptively appropriate single facility unit.

   a. Such units have been found appropriate when they are directly related to the work of craft workers that cut across multiple departments of the employer's business.[36]

   b. Similarly, such units have been found appropriate when they involve multiple crafts engaged in functional integrated work of the employer.[37]

   c. In some cases, maintenance department units have been established separate from production workers in the same facility. To establish a separate maintenance department unit, there must be a community of interest among maintenance workers that is distinct from the community of interest shared by all production and maintenance workers.[38]

   d. Departmental units have also been approved when workers in a specific department share a clear community of interest distinct from other employees, even if the workers in the specific department do not qualify as a distinct craft.

      1) For example, meat department units in the grocery industry have been approved even if the meat department workers do not exercise the full range of meatcutter skills.[39] However, the Board does not apply the same criteria to other departmental units in the retail grocery industry.[40]

      2) Applying community of interest standards, the Board has also approved units in the hotel industry that distinguish between front office and other employees,[41] and in free standing restaurants distinguishing between kitchen workers and waiters and bussers.[42]

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[36] *Barron Heating & Air Conditioning*, 343 NLRB 450 (2004).

[37] *Johnson Controls*, 332 NLRB 669 (1996).

[38] *Buckhorn, Inc.*, 343 NLRB 201 (2004); *American Cyanamid Co.,* 131 NLRB 909 (1961).

[39] *Scolari's Warehouse Markets, Inc.*, 319 NLRB 153 (1995).

[40] *Ray's Sentry*, 319 NLRB 724 (1995), rejecting a departmental unit of bakery/deli employees.

[41] *Holiday Inn City Center*, 332 NLRB 1246 (2000).

[42] *Washington Palm, Inc.*, 314 NLRB 1122 (1994).

F. Unit determinations in the health care industry

1. While many of the general rules concerning bargaining units also apply in the health care industry, special rules apply to the determination of bargaining units in hospitals and other health care settings.[43]

2. In the health care industry, a continuing debate has existed over the appropriateness of bargaining units. There is general agreement among the Board, Congress and the courts that unit determinations in this industry present novel questions because of the mix of professional and other workers.

    a. A major goal of unit determinations in health care institutions is to limit the total number of units, to avoid "proliferation of units." How this is to be accomplished has been less clear.

    b. Beginning in 1984, the Board applied a "disparity of interest" test to limit the total number of units.[44] This is a more restrictive approach than the traditional "community of interest" definition of units in other industries. This approach was criticized by the courts.[45]

    c. The D.C. Circuit Court of Appeals remanded a case to the Board in 1987 for further clarification of the disparity of interest test. On remand, the Board announced that it would exercise its rule-making authority instead of further interpreting the test.[46] The Board then promulgated uniform rules for unit determinations in acute care hospitals which establish eight presumptively appropriate units.[47]

        1) Under the NLRB rules hospitals would be presumed to have separate units for physicians, registered nurses, other professional employees, technicians, guards, business office clericals, other non-professional and service workers, and skilled maintenance workers.

        2) The status of the NLRB hospital unit rules remained uncertain for some time. The American Hospital

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[43] *See, e.g., Clarion Health Partners*, 344 NLRB 332 (2005), concerning a petition seeking to represent workers in two of three hospitals operated by the same employer.

[44] *St. Francis Hospital (St. Francis II),* 271 NLRB 948 (1984).

[45] *See, e.g., IBEW Local 474 v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987), denying enforcement of *St. Francis II*, note 43, *supra*.

[46] *St. Vincent Hospital*, 285 NLRB 365 (1987).

[47] 29 CFR Part 103.

Association obtained an injunction preventing the Board from using the new rules pending judicial review.[48] During the appeal, the Board continued to rely on its "disparity of interest" test.

3) The controversy over the Board's authority to promulgate a substantive, industry-wide rule was settled by the Supreme Court in 1991. The Court unanimously affirmed the Board's rule-making power as valid and legitimate.[49]

3. In health care facilities other than acute care hospitals, many of the same problems have existed.

a. From 1991 until 2011, the Board did not apply the traditional community of interest standard, the “disparity of interests” test, or the rules promulgated for acute care hospitals. During that period, the Board adopted an “empirical community of interest test,” under which the Board considered community of interest factors, factors considered relevant in the rule making process for acute care hospitals, evidence presented during the rule making process, and prior cases involving the type of unit sough or the type of health care facility involved.[50]

b. In 2011, the Board abandoned the “empirical community of interest test” for non-acute health care facilities and returned to the general application of community of interests standards for these facilities.[51]

b.. The community of interest test applies to nursing homes, psychiatric and other non-acute care hospitals, and other health care employers. While the “empirical community of interest test” had applied to a hybrid facility that operated as a functionally integrated, single entity, it is likely that these types of facilities will, in the future, be subject to the general community of interests standards.[52]

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[48] *American Hospital Association v. NLRB*, 718 F.Supp. 704 (N.D. Ill, 1989).

[49] *American Hospital Association v. NLRB*, 499 U.S. 106, 111 S.Ct. 1539 (1991).

[50] *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995). The test was first announced in *Park Manor Care Center*, 305 NLRB 872 (1991). The Board in *Park Manor* indicated that it did not want yet another short hand phrase to describe the standards to be applied, but suggested that it might be referred to as the “pragmatic or empirical community of interests” approach, thus leading to the short hand phrase, “empirical community of interest test,” in *Hillhaven*.

[51] *Specialty Health Care & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

[52] *Child’s Hospital*, 307 NLRB 90 (1992). The facility in this case included an acute care hospital, nursing home, and support services corporation.

b. In the future, the Board may develop rules for other industries. The increase of these rules may result in the saving of money, time and effort for unions. Rules should help avoid administrative and court delays over unit determination issues.

4. Specific issues concerning health care units arise under both the acute hospital rules and under the empirical community of interests test. Some of the important issues are:

a. Medical technologists are presumed to be professional employees. The presumption of professional status may be rebutted on a case-by-case basis.[53]

b. Paramedics are not entitled to a separate unit. They are generally included in a broader unit of technical employees.[54]

c. Residual units in health care facilities are permitted in health care facilities. In acute care hospitals may arise in situations in which some workers fall outside the scope of non-conforming units under the Health Care Rule.[55] In other health care units, residual employees that would not otherwise qualify as a separate bargaining unit may constitute an appropriate residual unit.[56]

G. Statutory and policy limits on unit scope and composition

1. Even if they would otherwise share a community of interest, special statutory rules apply to the inclusion or exclusion of specific categories of workers in bargaining units. The Board has also developed policies concerning inclusion or exclusion of other workers in bargaining units.

2. Individuals who are excluded from the definition of "employee" under the National Labor Relations Act[57] are not included in bargaining units.

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[53] *Group Health Assn*., 317 NLRB 238 (1995).

[54] *Virtua Health, Inc.,* 344 NLRB 604 (2005).

[55] *St. Mary's Duluth Clinic*, 332 NLRB 1419 (2000).

[56] *Kaiser Foundation Health Plan of Colorado*, 333 NLRB 557 (2001).

[57] 29 USC § 152(3). *See, also*, "Outline II: Structure and Jurisdiction of the Labor Management Relations Act and the National Labor Relations Board," for a more extensive discussion of the definition of "employee" under the Act.

a. Agricultural laborers are exempt from the jurisdiction of the NLRB. However, the Board will assert jurisdiction over individuals performing activities incidental to or in conjunction with farming operations. A party attempting to exclude an individual under the agricultural exemption has the burden of proving that the individuals in question are exempt.[58]

b. Individuals employed by a parent or spouse are also excluded from the definition of employee. Beyond the narrow exemption, the Board will exclude relatives of management from bargaining units if the employee's familial ties are sufficiently aligned with management.[59]

c. Independent contractors are not employees and are therefore not included in bargaining units by the Board.[60]

d. Supervisors are not employees and are not included in bargaining unit determinations by the NLRB. However, voluntary recognition of a unit that includes supervisors is legal, and resulting contractual obligations apply to the supervisors as well as non-supervisory employees.[61]

3. While both plant security personnel and professionals are included in the definition of "employee" under the National Labor Relations Act, special rules apply to the Board's ability to determine bargaining units that include these classifications of workers.

a Professional employees may be included in a unit that includes non-professional employees, but only if the professional employees are given a separate right to vote on inclusion in the broader unit.[62] Procedures for conducting elections are discussed in Section I, *infra*.

b. The Board is prevented by statute from designating a bargaining unit that includes guards and other employees and certifying a representative of guards if the union admits

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58 *AgriGeneral L.P.*, 325 NLRB 972 (1998).

59 *T.K. Harvin & Sons, Inc*., 316 NLRB 510 (1995).

60 *See, AmeriHealth Inc./AmeriHealth HMO*, 329 NLRB 870 (1999), applying independent contract standards to evaluate the relationship between physicians and health maintenance organizations.

61 *See, e.g., F.G. Lieb Construction Co*., 318 NLRB 914 (1995); *Gratiot Community Hospital*, 312 NLRB 1075 (1993).

62 29 USC § 159(b)(1).

to membership, or is affiliated with an organization that admits to membership, employees other than guards.[63]

c. For mixed, guard and non-guard units, there is a lingering question concerning the effect of voluntarily recognized mixed units. The Board interprets the limitation on guard units to mean that such units are non-complying and that the employer may withdraw recognition from a non-complying union. While it is lawful for the employer to voluntarily recognize a mixed-guard union, the Board will neither compel such recognition nor compel maintenance of the bargaining relationship.[64] However, this position has been rejected by the Seventh Circuit Court of Appeals.[65]

4. A number of other categories of workers present unique problems, particularly in the context of unit composition. For some, the Board has relatively clear policies concerning the inclusion and exclusion of workers, but for other classifications, determinations are based on a case-by-case analysis.

a. Clerical workers are generally divided between plant clericals and office clericals. Plant clericals who have regular and substantial contact with other production, maintenance or comparable workers are generally included in a broader appropriate unit. Office clericals, primarily engaged in the business operations of the employer are generally excluded from a broader unit. Comparable treatment of clerical workers exists in manufacturing, service, construction, and health care industries.[66]

b. Regular part-time workers are generally included in a unit of comparable full-time workers if they share a community of interest. Whether a person is a regular part-time worker is generally based on the recent work history of the employee.[67]

c. Temporary workers, whether full- or part-time, are generally excluded from the composition of a bargaining unit, as they

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[63] 29 USC § 159(b)(3).

[64] *Temple Security, Inc*., 328 NLRB 663 (1999); *Wells Fargo Corp*., 270 NLRB 787 (1984).

[65] *General Service Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909 (7th Cir. 2000), denying enforcement of *Temple Security*, note 62, supra.

[66] *See, e.g., Caesars Tahoe*, 337 NLRB 1096 (2002); *Weldun International, Inc.*, 321 NLRB 733 (1996); *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995); *Brown & Root, Inc*., 314 NLRB 19 (1994).

[67] *Arlington Masonry Supply, Inc*., 339 NLRB 817 (2003).

are unlikely to share a community of interest with regular employees.[68]

e. Casual or other on-call employees are treated in much the same manner as part-time employees. The regularity of their past work and their expectations of continuing work will determine inclusion or exclusion in a bargaining unit.[69]

d. Seasonal workers are included in a bargaining unit if they share a community of interest with the permanent workers. A major factor in the inclusion of seasonal workers is the realistic expectation of reemployment in the foreseeable future.[70]

f. Dual function employees are employees whose work involves tasks that are both within and outside the scope of a bargaining unit. The connection between a dual function worker and the bargaining unit must be determined on a case-by-case basis. To be eligible to vote, the dual function employee must have a substantial and continuing interest in the unit's working conditions.[71]

H. Historical and non-complying units

1. Multi-employer bargaining units

a. Although single employer units are the norm, there are a variety of circumstances in which the employees of more than one employer may be considered part of the same bargaining unit. Multi-employer unit issues may arise either in representation cases or in bargaining cases.[72]

b.. Because single employer units are presumptively appropriate, multi-employer bargaining units are established through a controlling bargaining history. Where employers have demonstrated their intent to be bound by a joint

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68 *Marian Medical Center*, 339 NLRB 127 (2003).

69 *Trump Taj Mahal Casino*, 306 NLRB 294 (1992).

70 *Winkie Mfg. Co., Inc. v. NLRB*, 348 F.3d 254 (7th Cir. 2003).

71 *Air Liquide America Corp.,* 324 NLRB 661 (1997); *Berea Publishing Co*., 140 NLRB 516 (1963).

72 Issues concerning employer withdrawal from multi-employer bargaining relationships are addressed more extensively in *Federal Labor Law, Part IV: The Duty to Bargain*.

bargaining arrangement, a multi-employer bargaining unit may be appropriate.[73]

c. It is not necessary for the bargaining arrangement to be formalized through an employers' association. It is the intent of the employers to be bound by joint bargaining that is controlling.[74]

d. Where existing multi-employer units exist, petitions for representation initiated on an employer-by-employer basis must establish that the single employer units are appropriate. Factors that will be considered include the extent to which a community of interest exists among employees of the various members of the multi-employer association, the diversity of business among the employer members, geographical diversity, and bargaining history.[75]

e. Even if multi-employer bargaining is established, it is possible for an individual employer to withdraw from the bargaining arrangement.[76] The employer must demonstrate that its intent is to withdraw on a permanent basis. Written notice must be provided in advance of bargaining. Once bargaining has begun, withdrawal is permitted only by mutual consent unless unusual circumstances justify the withdrawal. A bargaining impasse is not a sufficient basis for withdrawal.

2. A different bargaining unit problem arises when two distinct entities are sufficiently interrelated to function as a single employer. This issue can arise in double breasting cases and in situations where a parent company operates subsidiaries as distinct business entities. The single employer theory has significant implications for secondary boycotts and picketing as well as unit determination issues.

a. Four factors must be present to establish that separate entities function as a single employer. These factors are the extent of interrelatedness of operations, centralized control of labor relations, common management, and common

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[73] *Kroger Co*., 148 NLRB 569 (1964).

[74] *Weyerhaeuser Co*., 166 NLRB 299 (1967); *Milwaukee Meat Packers Assn*., 223 NLRB 922 (1976).

[75] *Maramount Corp*., 310 NLRB 508 (1993).

[76] *Retail Associates*, 120 NLRB 388 (1958).

ownership or financial control. Of these, ownership or financial control is the most important.[77]

b. Establishing that two entities function as a single employer is not sufficient to establish a bargaining unit consisting of employees of both entities. It is also necessary to show that the two groups of workers share a community of interest.[78]

c. The single employer theory is closely related to but different than an alter ego situation. One business is the alter ego of another if they have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. If an alter ego relationship exists, there is only one employer.[79]

3. In an important decision concerning the use of temporary workers, for a brief period of time the Board clarified the rules concerning bargaining units in joint employer situations in which regular workers of one employer work in close contact with temporary employees furnished to that primary employer by another firm. In an important 2000 case, the Board ruled that where one employer controls the labor relations of another, a bargaining unit consisting of both employers may be appropriate under the joint employer theory.[80] That principle was short-lived, rejected by the Board in 2004.[81]

a. Joint employer units have existed from the earliest days of the Board. In traditional joint employer situations, two employers share or codetermine all essential matters relating to the employees involved. Essentially, under the classic joint employer situation, the workers are employed by the joint employer entity rather than by the individual employers.

b. In the modern, controversial form of joint employer relationship, some workers are employed by one employer while others are employed by a second, but one of the employers has wide ranging control over the terms and conditions of the work of all employees.

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77 *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982).

78 *Peter Kiewit Sons' Co*., 231 NLRB 76 (1977).

79 *Denzil S. Alkire*, 259 NLRB 1323 (1982).

80 *M.B. Sturgis, Inc*., 331 NLRB 1298, 165 LRRM 1017 (2000).

81 *Oakwood Care Center*, 343 NLRB 659 (2004).

c. Under current Board policy, a joint employer bargaining unit will be considered appropriate only through consent. To this extent, joint employer units are treated in a manner similar to multi-employer units.[82]

I. Unit severance and bifurcated election procedures

1. Craft severance issues and procedures

a. In some cases, workers seek to carve out a craft or departmental unit from a larger production and maintenance unit. The Board has developed six guidelines to determine whether it is appropriate to allow a craft or departmental severance election.[83] A craft severance will be considered if the following factors suggest that it is appropriate:

1). Whether the proposed craft or departmental unit has a distinct and autonomous identity apart from the broader unit.

2) Whether the proposed severance would promote or undermine stability in collective bargaining.

3) The extent to which the proposed unit has maintained its separate identity while included in the broader unit.

4) The history and pattern of bargaining in the industry.

5) The degree of integration of the production process.

6) The qualifications of the union seeking to carve out the unit.

b. Even though a skilled maintenance unit in acute care hospitals is one of the units approved by the Health Care Rules, the Board refused to permit a severance election in a situation where the maintenance workers were previously included in a broader, non-complying unit. The Health Care Rules apply to initial unit determinations but not severance issues.[84]

c. In general, it is much easier to justify a craft unit from the onset than it is to sever the same unit from a preexistent production and maintenance unit.

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[82] The consent requirement for joint employer units was articulated in both decisions overruled by the Board in *Sturgis, supra* note 78, and restored by *Oakwood Care Center*, supra note 79. *Greenhoot, Inc.*, 205 NLRB 250 (1973); *Lee Hospital*, 300 NLRB 947 (1990).

[83] *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

[84] *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993).

2. Bifurcated and *Globe* Election case procedures and conditions

a. Bifurcated elections are required when a proposed unit would include both professional and non-professional employees.[85]

b. Bifurcated elections may also be conducted when two units are proposed, both of which are appropriate. Known as *Globe*[86] elections, the procedures are similar to elections for professional workers. The typical situation is a case in which one union petitions for a Production & Maintenance unit and another petitions for a craft unit. The craft workers might be given a choice of units.

c.. Procedures: In either of the above cases, a separate ballot will be prepared for the workers entitled to the choice of units.

1) For the specialized unit, there would be three choices on the ballot: (1) separate representation, 2) representation in the broader unit, and 3) no representation.

2) For workers in the broader unit, there would only be choices (2) and (3).

3) Procedurally, the question of separate representation will be resolved first. If a majority of the craft or professional workers seek separate representation, they will be given it, and the broader unit will be reduced by that number.

4) If a majority of workers in the specialized unit seek inclusion in the broader unit, the votes of both units will be counted together.

5) If the specialized unit is professionals, and the vote is for no representation, the professionals are excluded from the unit and the remaining votes are counted to determine whether the union wins.

6) If the specialized unit is a craft unit, and the majority votes for no representation, all of the craft votes are counted in with the broader unit.

7) If the outcome cannot be determined, a run-off between the top two possible choices of units can be held.

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85 *Sonotone Corp,* 90 NLRB 1236 (1950).

86 *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937).

J. Accretions, other expansions and contractions to bargaining units

1. In some cases, a petition is challenged because the composition of a bargaining unit is expected to change dramatically in the future. This would apply to new plant construction and the addition of new work to an existing plant.

    a. Whether a petition is timely in light of future expansion of the unit is a function of the current workforce's composition and the degree of certainty of the expansion.[87]

    b. If dramatic change in the composition of a workforce is expected in the near future, the union may be forced to wait for the expansion/contraction before an election can be held.

    c. If the current workforce is both substantial and representative of the types of jobs that will exist in the expanded workforce, the election will probably proceed. There is a balancing of the potentially conflicting policies of maximum employee participation in the selection of a representative and the desire to obtain representation in a timely manner.

    d. The union cannot be forced to wait indefinitely for the employer to actually add the expected workers. If a union has waited a year to organize a new plant, the composition of the workforce will be regarded as substantial and representative.[88]

2. An accretion is a situation where an employer adds new jobs to an existing bargaining unit. If the new employees have little or no separate group identity and they share an overwhelming community of interest with the existing unit, they will be accreted to the existing bargaining unit.[89]

    a. Accretion issues often arise as unit clarification cases. If an accretion is found to exist, a unit may be clarified without a new representation election. If the additions are not considered an accretion, a unit clarification petition would be denied and the union seeking to represent the new workers would have to organize them separately.

    b. Accretions are considered an appropriate method for expanding an existing bargaining unit because they preserve industrial stability by allowing units to conform to new

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87 *Douglas Motors Corp.,* 128 NLRB 307 (1960).

88 *Clement-Blythe Companies*, 182 NLRB 502 (1970).

89 *Frontier Telephone of Rochester, Inc.,* 307 NLRB 1270 (2005); *Baltimore Sun Co. v. NLRB*, 257 F.3d 419 (2001); *American Medical Response, Inc.,* 335 NLRB 1176 (2001).

conditions without an adversarial election every time new jobs are created.[90]

c. However, the Board follows a very restrictive policy in applying the accretion doctrine because accreted employees are absorbed into an existing unit without an election or other showing of majority status. The policy of promoting industrial stability is balanced against the policy of encouraging employee choice of bargaining representatives.[91]

d. As a result, the policy of the Board is to permit accretion only when the employees to be accreted have little or no separate identity and share an overwhelming community of interest with the existing bargaining unit.[92]

e. The factors considered in determining a shared community of interest are the same as in other unit determinations. However, the extent of employee interchange and the level of common supervision are the most important factors in accretion cases.[93]

f. Accretions are never appropriate if the workers involved could have been included in the bargaining unit when it was initially established, but were omitted.[94]

g. Accretions are also not appropriate when the number of workers to be added to a bargaining unit is larger than the existing unit.[95]

3. The opposite of an accretion is a spinoff, where part of an existing bargaining unit is relocated to a different facility. In a spinoff situation, the union may attempt to continue its representation of the relocated workers at the new location.[96]

a. In a spinoff, the Board presumes that the new facility is a separate appropriate bargaining unit. The presumption can

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90 *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985).

91 *Safeway Stores,* 256 NLRB 918 (1981).

92 *E.I. DuPont de Nemours, Inc.*, 341 NLRB 607 (2004).

93 *Towne Ford Sales,* 270 NLRB 311 (1984).

94 *Kaiser Foundation Hospitals,* 343 NLRB 57 (2004).

95 *Carr-Gottstein Foods Co.*, 307 NLRB 1318 (1992).

96 *Gitano Distribution Center*, 308 NLRB 1172 (1992).

be rebutted by a showing that the two locations are sufficiently interrelated to constitute a single unit.

b. If, after the relocation, the transferred employees constitute a majority of the new workforce, the union will continue as the representative of the new unit. If the transferred employees do not constitute a majority, no bargaining obligation exists.

K. Practical issues in the inclusion or exclusion of particular categories of workers in bargaining units

1. As a very practical matter, a union will probably want the largest unit in which it has a good chance of winning an election. Where the favorable votes work may well be a factor in how a proposed unit is described.

2. Case VII-A: Unit Determinations: Some of the categories of workers and issues which may present difficulties in this case are:

a. In this case, the question is whether this is a single plant or two separate plants making up the appropriate unit? Because of the close proximity, the shared management, docks, labs, and trades, it is probably one plant located in separate buildings. Although the two products are different, they are closely related operations.

b. At what level are workers to be excluded as supervisors. Given the number of people, the titles (and presumably the tasks associated with the titles), and the corporate structure, foremen are probably out of the unit and lead operators are probably in.

c. Warehouse clerks would be included in a broader unit of dock workers or production and maintenance workers. Office clericals would be separated into a different unit.

d. Whether the technicians are professionals may be an issue. If so, they would have to vote to be included in a unit that also includes non-professional workers.[97]

e. The technicians, warehouse workers, and skilled trades may all raise questions of departmental or craft units.[98]

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[97] *E.g., Folger Coffee Co.,* 250 NLRB 1 (1980).

[98] *E.g., Burns & Roe Services Corp.,* 313 NLRB 1307 (1994).

f. Guards cannot be included in a broader unit, and if they seek representation, the union they choose may not be affiliated with the successful unions involved in the other drives.[99]

g. Part-time workers may be included in a unit with full-time workers as long as the part-timers are regular.[100]

h. Seasonal workers may be included if they have a reasonable likelihood of returning to the job in the future.[101]

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[99] See note 62, *supra*.

[100] E*.g., Fleming Foods Inc.*, 313 NLRB 948 (1994).

[101] *E.g., L & B Cooling, Inc*., 267 NLRB 1 (1983).

Case VII-A: Unit Determinations

Given the following organizational chart and staffing table, determine what units would be appropriate for collective bargaining with Megalomania Industries:

Megalomania Industries

President:	J.L. Megalomania
V.P. Production:	R.P. Megalomania
V.P. Marketing:	B.R. Megalomania
V.P. Personnel:	J.Q. Megalomania
Plant Mgr. - Plastics:	Jason Smith
Plant Mgr. - Rubber:	Mary Havens

Rubber Plant:	Plastics Plant:
3 Superintendents	3 Superintendents
9 Department Heads	17 Department Heads
12 Secretaries	20 Secretaries
30 Supervisors	18 Lab Technicians
15 Lead Operators	51 Supervisors
135 Operators	20 Lead Operators
27 Skilled Trades	250 Operators
7 Part-time Operators	9 Warehouse Clerks
5 Summer Part-time Operators	27 Dock Workers
	9 Plant Guards