CHAPTER IV

THE APPROPRIATE BARGAINING UNIT

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1. General Principles

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. . . ."

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." 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." 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.

The presumption is that a plantwide unit is appropriate. A petitioner's desires as to unit is always a relevant consideration.

The discretion granted to the Board in Section 9(b) to determine the appropriate bargaining unit is reasonably broad. 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)).

To obtain a better understanding of the factors which go into a unit finding, we shall first consider those which are relatively simply and therefore require little elaboration, and then, in more detail, those which need further explication.

1. Community of Interest

A major determinant in an appropriate unit finding is the community of duties and interests of the employees involved. Where the interests of one group of employees are dissimilar from those of another group, a single unit is inappropriate.

Many considerations enter into a finding of community of interest. The factors affecting the ultimate unit determination may be found in the following sampling:

> "[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination."

2. History of Collective Bargaining

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective bargaining which is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act.

3. 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.

a. Size of unit

It is contrary to Board policy to certify a representative for bargaining purposes in a unit consisting of only one employee.

b. Mode of payment

The mode of payment is not determinative of the scope of an appropriate bargaining unit. Nor does a distinction in the rate of pay affect the unit determination. A mere difference in the method of payment does not warrant exclusion from an appropriate unit. 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.

c. Age

Age is not a valid consideration for exclusion from a unit.

d. Sex

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.

e. Race

The race of employees is not a valid determinant of the appropriateness of the unit.

f. Union membership

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. 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.

g. Territorial jurisdiction

The union's territorial jurisdiction and limitations do not affect the determination of an appropriate unit.

h. Work jurisdiction

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." 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.

i. Employees' desires

"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.'"

j. Single employee unit

NLRB will not certify a unit composed of a single employee.

Multilocation Units

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.

A number of factors bear on the unit determination in a multilocation situation. These include past bargaining history; the extent of interchange of employees; the work contacts existing among the several groups of employees; the extent of functional integration of operations; the differences, if any, in the products or in the skills or types of work required; the centralization or lack of centralization of management and supervision, particularly in regard to labor relations,

the power to hire, discharge, or affect the terms and conditions of employment; and the physical and geographical location in relation to each other. These factors must necessarily be weighed in resolving the unit contentions of the parties.

The general rule is that a single-plant unit is presumptively appropriate, unless the employees at the plant have been merged into a more comprehensive unit by bargaining history, or the plant has been so integrated with the employees in another plant as to cause their single-plant unit to lose its separate identity.

Multiemployer Units

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.

Basically, in addressing itself to the standard to be applied in assessing the existence of a multiemployer bargaining, the Board looks for a sufficient indication from the history of the bargaining relationship between the employers and the union of "intent to be governed by joint action."

Residual Units

Returning to Board policy considerations, as distinguished from the interpretation of a statutory requirement, we take up the subject of residual units. Their treatment is based on a concept developed as a necessary adjunct to the general unit principles here under consideration.

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.

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.

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.

A. Agricultural Employees

> ". . . agriculture 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."

B. Domestics

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).

C. Individuals Employed by Their Parent or Spouse

Individuals employed by a parent or spouse are statutorily excluded from the definition of "employee," and thus may not vote in representation elections. Other relatives may be excluded from the bargaining unit and therefore would be ineligible to vote if they are found to have a greater affinity with the interests of management than with the interests of the bargaining unit.

D. Independent Contractors

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."

E. Supervisors

The supervisory status of an individual under the Act depends on whether he possesses authority to act in the interest of his employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

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

F. Railway Workers

Individuals employed by employers subject to the Railway Labor Act are excluded from the coverage of the National Labor Relations Act, as amended.

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.

G. Employees of "Nonemployers"

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. Section 2(2) provides:

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Statutory Limitations

While the Board generally exercises wide discretion in determining bargaining units, it is limited by some basic rules provided in the Act:

A. Professional Employees

Section 9(b)(1) provides that professional employees may not be included in a bargaining unit with nonprofessionals unless they vote in favor of such inclusion. The term "professional employee" is defined in Section 2(12), as follows:

> "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> "(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional employee as defined in paragraph (a)."

B. Plant Guards

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 interest 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.

To be a "guard" within the meaning of the Act, an employee must enforce against employees and other persons rules to protect the property of the employer's premises.

The Board has also established special rules concerning the exclusion of specific types of employees from bargaining units.

Confidential Employees. An employee may be excluded from a rank-and-file bargaining unit as a confidential employee only if the employee assists "persons who formulate, determine *and* effectuate management policies in the field of labor relations," or regularly has access to confidential informational concerning collective bargaining negotiations.

Managerial Employees. Managerial employees are those who ". . . formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." These employees are excluded from coverage of the Act as well as from rank-and-file bargaining units in order to avoid any division of loyalty between management and the union.

Supervisory Employees. Supervisory employees are excluded from coverage of the Act, and cannot be included in a rank-and-file bargaining unit. They may, however, without Board sanction, join units composed only of supervisors, and employers may bargain voluntarily with such groups.

Clerical Employees. Clerical employees are categorized as either *office clerical*, considered to be "white collar" office workers, or *plant clerical*, considered to have interests similar to those involved in production. Office clericals typically are excluded from a rank-and-file bargaining unit while plant clericals usually are included.

Voter Eligibility

The eligibility of an employee to vote in a representation election generally turns upon two factors: (1) status as an "employee" during the eligibility period and on the election date and (2) whether the employee is "sufficiently identified with the bargaining unit to have a community of interest with its other members." The eligibility period typically is the payroll period that immediately precedes the direction of election.

The Board has developed eligibility rules for the following classes of employees:

(a) ***Part-Time Dual Function Employees and Trainees.*** Regular part-time employees are eligible. Those part-time employees who work only irregularly are not eligible. "Dual function" employees, who spend only part time on bargaining unit work, are eligible if they have a substantial interest in conditions of employment in the bargaining unit. Trainees may or may not be included in the bargaining unit, depending upon an evaluation of the interests of such employees compared to those of the regular employees. Present duties and interests are determinative, not future assignments.

(b) ***Temporary and Seasonal Employees.*** Temporary employees are eligible to vote only if they are employed during the eligibility period and their tenure of employment is uncertain. An employee's tenure is considered uncertain as long as no definite termination date is known, even though the employee may be aware that the employment will be short-lived. An employee temporarily assigned to work outside of the bargaining unit, or to supervisory duties, is eligible to vote. Seasonal employees may vote only if they have a reasonable expectation of reemployment. Students hired only during a school vacation are excluded from voting.

(c) ***Probationary Employees.*** Probationary employees may vote if their duties and working conditions are similar to those of regular employees and they have a reasonable expectation of permanent employment.

(d) ***Employees on Leave of Absence, Sick Leave, or Temporary Layoff.*** Employees on leave of absence are eligible to vote if they will be restored to their jobs when they are ready to resume work. Employees on sick or maternity leave are presumed to continue in "employee" status, and thus are presumed eligible to vote, unless and until the presumption is rebutted by an affirmative showing that the

employee has been discharged or has resigned. Laid-off employees may vote if they have a reasonable expectation of recall. A determination of this expectation depends upon objective factors, including the past experience of the employer regarding layoffs, the employer's future plans, the circumstances of the layoff, and representations made to employees by the employer. This determination must be made upon information available at the time of the election, not upon any subsequent developments.

(e) ***Employees Whose Employment Has Been Terminated.*** Employees who have voluntarily quit or have been discharged for cause are ineligible to vote. Employees who have been discharged or laid off discriminately are eligible. Employees allegedly discharged in violation of the Act are permitted to vote subject to challenge. If the number of challenged ballots could affect the result of the election, the Board will resolve them after completion of the unfair labor practice proceeding.

(f) ***Strikers.*** Economic strikers who have been permanently replaced are eligible to vote in any initial election held within 12 months of the commencement of the strike, as well as any re-run election held outside the 12-month period where the re-run election is

necessitated by misconduct. While an employee does not necessarily lose the right to vote by taking a job elsewhere, voting eligibility will be lost if the employee abandons any interest in the former job. Unfair labor practice strikers, by contract, are eligible to vote regardless of how much time has elapsed from the beginning of the strike. Strikers will be presumed to be economic strikers, however, until they are found by the Board to be on strike because of their employer's unfair labor practices.

(g) ***Replacements of Strikers.*** Replacements of economic strikers employed on a permanent basis are eligible to vote if they are employed during the eligibility period and on the election date. If a strike occurs after the eligibility period has passed, permanent replacements working on election day may vote. Replacements for unfair labor practice strikers are not permitted to vote.

(h) ***Relatives of Management.*** Individuals employed by a parent or spouse are statutorily excluded from the definition of "employee" and thus may not vote in representation elections. Other relatives may be excluded from the bargaining unit and therefore would be ineligible to vote if they are found to have a greater affinity with the interests of management than with the interests of the bargaining unit.

(i) ***Hospital Interns and Residents.*** Interns, residents and clinical fellows who comprise the "housestaff" of a medical center are not "employees" covered by the Taft-Hartley Act cut but primarily "students," the NLRB has held.

(j) ***Social security annuitants.*** Employees limiting their working time and earnings to avoid decreasing their social security annuities may vote in elections held in units of full-time and regular part-time employees.