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NATIONAL LABOR RELATIONS BOARD

OTHER RULES—PART 103

Subpart A—Jurisdictional Standards

Sec. 103.1 *Colleges and universities.*—The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than \$1 million.*

JURISDICTIONAL STANDARDS APPLICABLE TO PRIVATE COLLEGES AND UNIVERSITIES

NOTICE OF ISSUANCE OF RULE

On July 14, 1970, the Board having determined in *Cornell University*, 183 NLRB 329, to assert jurisdiction over private nonprofit colleges and universities as a class published in the Federal Register, Vol. 35, p. 11270, a Notice of Proposed Rule Making which invited interested parties to submit views, data, and recommendations to assist the Board in formulating a standard to be applied in determining whether to assert jurisdiction over specific institutions within the class. Thirty-three responses to the notice were received containing proposals and information. After giving careful consideration to all the responses, the Board has concluded that it will best effectuate the purposes of the Act to apply a \$1 million annual gross revenue standard to private, nonprofit colleges and universities. A rule establishing that standard has been issued concurrently with the publication of this notice.

Although it is well settled that the National Labor Relations Act gives to the Board a jurisdictional authority coextensive with the full reach of the commerce clause,¹ it is equally well established that the Board in its discretion may set boundaries on the exercise of that authority.² In exercising that discretion, the Board has consistently taken the position “that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.”³

In determining where to draw such a dividing line, the Board here, as in the past, must balance its statutory obligations to extend the rights and protections of the Act to those employers and employees whose labor disputes are likely to have a substantial impact on commerce against the

* The following statement was published by the Board concurrently with the issuance of this rule, 35 F.R. 11270.

¹ See *N.L.R.B. v. Fainblatt, et al.*, 306 U.S. 601.

² *Office Employees International Union, Local No. 11 v. N.L.R.B.*, 353 U.S. 313; Sec. 14(c)(1) of the Act.

³ *Hollow Tree Lumber Company*, 91 NLRB 635, 636. See also, e.g., *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261, 264; *Butte Medical Properties, d/b/a Medical Center Properties*, 168 NLRB 266, 268.

need to confine its caseload to manageable proportions. We are satisfied that the standard announced above accommodates these considerations.

In arriving at a \$1 million gross revenue figure,⁴ the Board considered the nature of the impact upon commerce made by private, nonprofit colleges and universities, as well as the number of employers and employees potentially affected. Thus, statistical projections based on data submitted by responding parties disclosed that adoption of such a standard would bring some 80 percent of all private colleges and universities and approximately 95 percent of all full- and part-time nonprofessional personnel within the reach of the Act. It has been argued that because the current annual gross revenue standards set for other types of enterprises are all lower than \$1 million the Board is thereby precluded from adopting, or ought not to adopt, any gross revenue standard higher than the highest current standard which is \$500,000 per annum. However, this argument overlooks the interplay between the various relevant considerations.

For example, available data revealed that the \$250,000 gross revenue standard established for the hospital industry extended the Board's jurisdiction to approximately 76 percent of the institutions in that field.⁵ In adopting a \$500,000 annual gross revenue standard for the hotel industry, the Board observed that only 3.5 percent of the employers, but over 60 percent of the hotel employees, would be covered.⁶ The same gross revenue standard applied to the retail industry encompassed 6.5 percent of the retail store employees.⁷ Thus, although the standard set for private, nonprofit colleges or universities is higher on its face than gross revenue standards currently existing for other enterprises, its practical effect is to extend the protections of the Act to a greater proportion of the employers and employees in the affected class. Further, the industries to which the Board applies gross revenue standards of \$500,000 or less conduct their business through large numbers of relatively small units, a substantial number of which must be embraced by the relevant jurisdictional standard if the Board effectively is to regulate the labor relations of the industry. Here, in contrast, effective regulation of the labor relations of the industry can be achieved, in our opinion, under the higher standard. Finally, the Board has rejected contentions that a standard higher than \$1 million should be adopted because the Board is satisfied that colleges and universities with gross revenues of \$1 million have a substantial impact on commerce; and that the figure selected will not result in an unmanageable increase on the Board's caseload.

We recognize that there remains a small number of colleges and universities and their employees who will be excluded from the coverage of the Act. We are nevertheless satisfied that this standard will bring within the Board's jurisdiction these labor disputes in the industry which exert or tend to exert a pronounced impact on commerce. Moreover, adoption of a particular standard now in light of prevailing conditions does not foreclose future reevaluation and revision of that standard should subsequent circumstances make that appropriate.

There are, of course, criteria other than gross revenue by which to assess the impact of an institution on commerce. For example, responding parties suggested tests based on numbers of employees, numbers of students, or annual expenditures for commercial purposes. However, after

⁴ As reflected in the rule, this figure includes revenues from all sources, excepting only contributions which, because of limitations placed thereon by the grantor, are not available for operating expenses. These contributions encompassing, for example, contributions to an endowment fund or building fund, are excluded because of their generally nonrecurring nature (cf. *Magic Mountain, Inc.*, 123 NLRB 1170). Income derived from investment of such funds will, however, be counted in determining whether the standard has been satisfied.

⁵ *Butte Medical Properties*, 168 NLRB 266.

⁶ *Floridan Hotel of Tampa Inc.*, 124 NLRB 261, 265.

⁷ *Id.* at 265 09266, fn. 19.

considering all the various alternatives, the Board concludes that a gross revenue test is preferable, for it has the advantages of simplicity and ease of application. Board experience has demonstrated that such figures are readily available and relatively easy to produce, thereby reducing the amount of time, energy, and funds expended by the Board and staff as well as imposing less of a burden on the parties involved.

In light of the foregoing considerations, the Board is satisfied that the \$1 million annual gross revenue standard announced today will bring uniform and effective regulation of labor relations to labor disputants at private, nonprofit colleges and universities, and at the same time enable the Board to function as a responsive forum for the resolution of those disputes.

Sec. 103.2 *Symphony orchestras.*—The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any symphony orchestra which has 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.*

JURISDICTIONAL STANDARDS APPLICABLE TO SYMPHONY ORCHESTRAS

NOTICE OF ISSUANCE OF RULE

On August 19, 1972, the Board published in the Federal Register, a Notice of Proposed Rule Making which invited interested parties to submit to it (1) data relevant to defining the extent to which symphony orchestras are in commerce, as defined in section 2(6) of the National Labor Relations Act, and to assessing the effect upon commerce of a labor dispute in those enterprises, (2) statements of views or arguments as to the desirability of the Board exercising jurisdiction, and (3) data and views concerning the appropriate jurisdictional standards which should be established in the event the Board decides to promulgate a rule exercising jurisdiction over those enterprises. The Board received 26 responses to the notice. After careful consideration of all the responses, the Board has concluded that it will best effectuate the purposes of the Act to assert jurisdiction over symphony orchestras and apply a \$1 million gross revenue standard, in addition to statutory jurisdiction. A rule establishing that standard has been issued concurrently with the publication of this notice.

It is well settled that the National Labor Relations Act gives to the Board a jurisdiction authority coextensive with the full reach of the commerce clause.¹ It is equally well settled that the Board in its discretion may set boundaries on the exercise of that authority.² In exercising that discretion, the Board has consistently taken the position that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.³ The standard announced above, in our opinion, accommodates this position.

* The following statement was published by the Board in the Federal Register on March 19, 1973, 38 F.R. 7289.

¹ See *N.L.R.B. v. Fainblatt*, 306 U.S. 601.

² *Office Employees International Union Local No. 11 (Oregon Teamsters) v. N.L.R.B.*, 353 U.S. 313; Sec. 14(c)(1) of the Act.

³ *Siemons Mailing Service*, 122 NLRB 81; *Hollow Tree Lumber Company*, 91 NLRB 635, 635. See also, e.g., *Floridan Hotel of Tampa Inc.*, 124 NLRB 261, 264; *Butte Medical Properties, d/b/a Medical Center Hospital*, 168 NLRB 266, 268.

The Board, in arriving at a \$1 million gross figure,⁴ has considered, *inter alia*, the impact of symphony orchestras on commerce and the aspects of orchestra operations as criteria for the exercise of jurisdiction. Symphony orchestras in the United States are classified in four categories: college, community, metropolitan, and major.⁵ Community orchestras constitute the largest group with over 1,000 in number and, for the most part, are composed of amateur players. The metropolitan orchestras are almost exclusively professional and it is estimated that there are between 75 and 80 orchestras classified as metropolitan. The annual budget for this category ranges approximately from \$250,000 to \$1,000,000. The major orchestras are the largest and usually the oldest established musical organizations. All of them are completely professional, and a substantial number operates on a year-round basis. For this category the minimum annual budget is approximately \$1 million. Presently, there are approximately 28 major symphony orchestras in the United States. Thus, statistical projections based on data submitted by responding parties, as well as data compiled by the Board, disclose that adoption of such a standard would bring approximately 2 percent of all symphony orchestras, except college, or approximately 28 percent of the professional metropolitan and major orchestras, within reach of the Act. The Board is satisfied that symphony orchestras with gross revenues of \$1 million have a substantial impact on commerce and that the figure selected will not result in an unmanageable increase on the Board's workload. The adoption of a \$1 million standard, however, does not foreclose the Board from reevaluating and revising that standard should future circumstances deem it appropriate.

In view of the foregoing, the Board is satisfied that the \$1 million annual gross revenue standard announced today will result in attaining uniform and effective regulation of labor disputes involving employees in the symphony orchestra industry whose operations have a substantial impact on interstate commerce.

Sec. 103.3 *Horseracing and dogracing industries.*—The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries.*

DECLINATION OF ASSERTION OF JURISDICTION

On July 18, 1972, the Board published in the Federal Register a notice of proposed rulemaking which invited interested parties to submit to it (1) data relevant to defining the extent to which the horseracing and dogracing industries are in commerce as defined in section 2(6) of the National Labor Relations Act, and to assessing the effect upon commerce of a labor dispute in those industries, (2) statements of views or arguments as to the desirability of the Board exercising jurisdiction, and (3) data and views concerning the appropriate jurisdictional standards which should be established in the event the Board decides to promulgate a rule exercising jurisdiction over those industries. The Board received 96 responses to the notice. After careful consideration of all the responses, the Board has concluded that it will not assert

⁴ As reflected in the rule, this figure includes revenues from all sources, excepting only contributions which, because of limitations placed thereon by the grantor, are not available for operating expenses. These contributions encompassing, for example, contributions to an endowment fund or building fund, are excluded because of their generally nonrecurring nature. (Cf. *Magic Mountain, Inc.*, 123 NLRB 1170.) Income derived from investment of such funds will, however, be counted in determining whether the standard has been satisfied.

⁵ The latter three categories are defined by the American Symphony Orchestra League principally on the basis of their annual budgets.

* The following statement was published by the Board concurrently with the issuance of this rule, 38 F.R. 9537.

jurisdiction over the horseracing and dogracing industries. A rule declining to assert such jurisdiction has been issued concurrently with the publication of this notice.¹

The jurisdiction of the National Labor Relations Board under section 9 of the National Labor Relations Act, as amended,² to determine questions concerning representation, and under section 10 of the Act to prevent unfair labor practices, extends to all such matters which “affect commerce” as defined in section 2(7) of the Act.³ Under section 14(c) of the Act,⁴ the Board in its discretion may decline to assert jurisdiction over labor disputes involving any class or category of employers if such labor disputes will not have a substantial impact in commerce and provided that it had not asserted jurisdiction over such class or category prior to August 1, 1959. The Board has consistently declined to assert jurisdiction over labor disputes in the horseracing and dogracing industries⁵ as well as over labor disputes involving employers whose operations are an integral part of these racing industries.⁶ After carefully considering the responses, the Board has decided not to alter its position with respect to the horseracing and dogracing industries and has concluded that it will continue to decline to assert jurisdiction over labor disputes in these industries.

In prior decisions, the Board declined to assert jurisdiction over these industries noting, *inter alia*, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the “integrity” of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States continuing interest in and supervision over the industries.

In addition, the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force. This is further evidenced by a pattern of short workhours and sporadic and short periods of active employment with any given employer.

Besides minimizing the impact on commerce of the industries, this pattern of short-term employment also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the Act within the highly compressed timespan of active employment which is characteristic of the industries.

Thus, we have concluded that the operations of these industries continue to be peculiarly related to, and regulated by, local governments and, further that our exercise of jurisdiction would not

¹ See title 29, ch. I, pt. 103, *supra*.

² 61 Stat. 140, 143, 146, 29 U.S.C. secs. 158, 159, 160.

³ 61 Stat. 137, 29 U.S.C. sec. 152(7). See *N.L.R.B. v. Fainblatt et al.*, 306 U.S. 601.

⁴ 29 U.S.C. sec. 164.

⁵ *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (horseracing track); *Jefferson Downs, Inc.*, 125 NLRB 386 (horseracing track); *Meadow Stud Inc.*, 130 NLRB 1202 (horse owner/breeder); *Hialeah Race Course, Inc.*, 125 NLRB 388 (horseracing track); *Walter A. Kelley*, 139 NLRB 744 (horse owners/breeders); *Centennial Turf Club, Inc.*, 192 NLRB 698 (horseracing track); *Yonkers Raceway Inc.*, 196 NLRB 373 (horseracing track); *Jacksonville Kennel Club*, Case 12-RC-3815, May 5, 1971 (dogracing track) (not reported in NLRB volumes).

⁶ *Pinkerton's National Detective Agency*, 114 NLRB 1363; *Hotel & Restaurant Employees & Bartenders International Union, Local 343 (Resort Concessions, Inc.)*, 148 NLRB 208.

substantially contribute to stability in labor relations. We are also not unmindful of the fact that relatively few labor disputes have occurred in these industries in recent years, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries is insubstantial and does not warrant the Board's exercise of jurisdiction.⁷

Accordingly, for the above reasons, the Board⁸ reaffirms its earlier conclusion and declines to assert jurisdiction over these industries.

Member Fanning does not join in the Board's conclusion to decline to assert its jurisdiction over the said industries, based on the reasons spelled out in his dissenting position in *Centennial Turf Club, Inc.*, 192 NLRB 698.

⁷ *Walter A. Kelley*, supra.

⁸ Chairman Miller and Members Jenkins, Kennedy, and Penello.

Subpart B—Election Procedures

Sec. 103.20 *Posting of election notices.*—(a) Employers shall post copies of the Board’s official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term “working day” shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of section 102.69(a).*

EXPLANATORY STATEMENTS

On March 11, 1987, a notice of proposed rulemaking was published in the Federal Register (52 FR 7450) wherein the Board proposed to amend its rules to include a provision requiring employers to post a notice of election 3 days before an election is conducted. The proposed rule provided that the employer shall post copies of the Board’s official Notice of Election in conspicuous places at least 3 full working days prior to the commencement of an election. The term “working days” was defined as all days other than Saturdays, Sundays, and holidays. The rule further provided that a party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting, and that an employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office to the contrary at least 5 working days prior to the commencement of the election.

The supplementary information accompanying the proposed rule recognized that the official Board Notice of Election contains important information with respect to employee rights under the Act and that such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately apprised of their rights. By establishing a specific length of time for posting, the provision made clear to the parties their respective responsibilities and obligations with respect to notice posting and attempted to eliminate unnecessary and time-consuming litigation on this issue.

In response to the Board’s proposal, nine written comments were received from individuals and organizations. All but one spoke favorably of the Board’s proposal and commended its efforts to establish clarity and uniformity in this area. Comments from the Board’s Regional Offices noted

* The first of the statements that follow was published by the Board in the Federal Register concurrently with the issuance of the rule on July 6, 1987, 52 F.R. 25213–25215, and the second on December 23, 1987, 52 F.R. 48534.

that the proposal was generally in accord with current practice and thus could easily be implemented.

Most of the comments, however, also contained suggestions for amending the proposed rule. Two suggestions clearly had merit. One pointed out that the proposed rule referred, in the summary preceding the rule, only to elections conducted under section 9(c) and thus did not apply to UD elections under section 9(e) and recommended that the rule refer simply to elections conducted under section 9 of the Act. As the Board did not intend that 9(c) elections be conducted differently from 9(e) elections, this suggestion was adopted and the summary, as set forth above, was redrafted accordingly. The other suggestion was that, although the proposed rule implied that the failure to post the notice would be objectionable conduct, the rule should affirmatively state that failure to post will be grounds for setting aside an election upon timely filing of an objection. Such an addition would remove any doubt as to the objectionable nature of the conduct as well as clearly place the burden of raising the failure to post on the other parties to the election thereby eliminating any argument that the Regions should police the rule. The Board agreed with that position. Accordingly, the following sentence has been added as a separate paragraph (d) at the end of § 103.20:

Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a).

Two nurses' associations suggested that the 3-day period be increased to 5 or 7 days as employees in the health care field frequently do not work a normal 5-day week but instead work long hours for 3 or 4 days and then have 3 to 4 days off. The Board considered this suggestion but still concluded that a posting of 3 full working days is a sufficient period of time to adequately apprise most voters of their rights. The Board was reluctant to complicate the rule by establishing different posting periods for different industries. However, because of other suggestions relating to how the "3 full working days" is defined, as discussed below, we have changed the definition of "working days"; as a practical matter, because of the way "working days" is defined, the actual posting period will normally be longer than 72 hours.

As indicated, several commentators had problems with the language in the proposed rule requiring that notices be posted "at least 3 full working days prior to the commencement of the election." "Working days" was defined in the proposed rule as "all days other than Saturdays, Sundays, and holidays." Commentators thought that the rule was confusing as it was unclear as to whether the day of the election was included in the 3 days and also as to exactly when the 3 days would begin, i.e., 12:01 a.m. on the first day or when employees actually arrived for work on the first day. One commentator suggested that the rule require a period of at least 72 consecutive hours during the preceding 3 working days. The Board considered these suggestions and agreed that the proposed language could be improved to make clear that the rule specifically excludes the day of election. Accordingly, the first sentence in § 103.20(a) has been rewritten to require that notices be posted at least 3 full working days prior to 12:01 a.m. of the day of the election. The Board did not adopt the suggestion that the rule should describe the time period in hours rather than 3 working days because requiring consecutive hours does not allow for Saturdays, Sundays, and holidays. We recognized, however, that the phrase "3 full working days" needed a more precise definition. Accordingly, the definition of "working days" in § 103.20(b) has been revised to equate a full working day with an entire 24-hour period excluding Saturdays, Sundays, and

holidays. As noted above, these changes make longer posting likely, as an employer will no doubt post the day before rather than stay up until 12:01 a.m. of the first day to post the notice.

Two comments took issue with the burdens placed on the employer by the rule. One commentator decried the mandatory nature of the requirement as it includes situations in which the employer has acted in good faith. This commentator argued that such requirement would increase rather than decrease litigation especially over issues such as who removed or tampered with the notice and when. Another opposed the idea that an employer is presumed to have received notices unless it notifies the Regional Office 5 days before the election, and that an employer is presumed to have knowledge of the Board’s posting requirements. This commentator suggested that the notice be sent by certified mail.

The Board recognized that the proposed rule does not solve all notice-posting problems and that various issues, including tampering with a timely posted notice, will still have to be litigated if raised. With respect to adequately informing employers of their notice-posting obligations, the Board has again rejected the use of certified mail as it would impose an undue extra burden on the Regions. It was the Board’s intention to discuss with the Regional Offices what method of notification would be practicable, and that has now been done. The Board considered adding a footnote to the Decision and Direction of Election, much like the *Excelsior* footnote, describing when the notices would be mailed, the employer’s obligation to post the notices when received, and the employer’s obligation to notify the Regional Office if not received; or, alternatively, including such information in any cover letter to employers that accompanies the Decision and Direction of Election or the cover letter that is sent to all parties with a copy of the petition. The Board rejected the first suggestion on the grounds that many Decisions and Directions of Election were already rather lengthy and thus should not be further burdened and the second on grounds that not all Regions send a cover letter with the Decision and Direction of Election. The Board did believe, however, that the last suggestion is a good idea in that the cover letter accompanying service of the petition already recites various obligations of the parties with respect to the petition and thus could easily be amended to include reference to the new notice-posting requirement. This makes the employer aware of its obligations at an early date, and the petition and cover letter are already being sent by certified mail and consequently the Region would be assured that the employer had been adequately apprised of its obligations. The Board also has informed the General Counsel’s Division of Operations to add a line to the Election Order Sheet (Form 700), which the Board agent would initial when he or she orally reminds the employer of its notice-posting obligations shortly before the notices are mailed.

Lastly, the Board rejected the suggestion made in one of the comments that the rule specifically define the term “conspicuous” as that location normally utilized by an employer to post notices to employees. That the notice be posted in a conspicuous place has long been a requirement of notice posting, and the Board saw no need specifically to describe the term or limit the number of places that could be called “conspicuous.”

* * * * *

On July 6, 1987, a final rule was published in the Federal Register (52 FR 25213–25215) wherein the Board amended its rules to include a provision requiring employers to post a notice of election 3 full working days before an election is conducted.

The Supplementary Information accompanying the final rule stated that the Regional Offices would provide both a written notification to the employer of its notice-posting requirements and an oral reminder. It was anticipated that the written notice would be accomplished by amending the cover letter accompanying the service of a petition to specifically refer to the employer’s

notice-posting obligations. Thereafter, the Board agent was to orally remind the employer of the notice-posting rule shortly before the notices were mailed and to indicate such reminder by initialing the Election Order Sheet (Form 700).

Upon further consideration, the Board has decided that a second written notification to the employer, rather than an oral reminder, is a preferable way to apprise employers of their notice-posting obligations. Accordingly, instead of giving an oral reminder, Board Regional Offices will undertake to send out a second written reminder of the notice-posting requirement by attaching a copy of the rule to the Decision and Direction of Election or the approved election agreement at the time these documents are mailed to the employer. For those Regions which send a cover letter with the decision or election agreement, the letter may be amended to include a reference to the attachment. In those instances where it is unnecessary to mail an election agreement, as the parties have already been given a copy of the agreement at the Regional Office, the Region may mail (or otherwise provide) a copy of the rule to the employer as a separate document.

This second reminder, sent at the time of the Decision and Direction of Election or election agreement, together with the first written notification given in the cover letter accompanying the service of the election petition, will help ensure that employers are reminded of their notice-posting obligations. The Board wishes to clarify, however, that both of these reminders are merely an effort by the Board to keep employers apprised of their obligations under the notice-posting rule and in no event will the failure of the Board or its agents to provide such notice be the basis of an election objection or constitute a defense to an election objection based on an employer's failure to post election notices or otherwise perform its obligations as set forth in the Board's rule. The rule itself is not amended or changed in any way by this revision to the Supplementary Information.

Subpart C—Appropriate Bargaining Units

Sec. 103.30 *Appropriate bargaining units in the health care industry.*—(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

- (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 nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. *Provided That* a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) “Hospital” is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) “Acute care hospital” is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term “acute care hospital” shall include those hospitals operating as acute care facilities even if those hospitals

provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) "Psychiatric hospital" is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term "rehabilitation hospital" includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A "non-conforming unit" is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.

Subpart F—Remedial Orders

Sec. 103.100 *Offers of reinstatement to employees in armed forces.*—When an employer is required by a Board remedial order to offer an employee employment, reemployment, or reinstatement, or to notify an employee of his or her entitlement to reinstatement upon application, the employer shall, if the employee is serving in the armed forces of the United States at the time such offer or notification is made, also notify the employee of his or her right to reinstatement upon application in accordance with the Military Selective Service Act after discharge from the armed forces.*

EXPLANATORY STATEMENT

When the Board finds that an employer has violated the National Labor Relations Act in such a manner as to cause an employee loss of employment, it requires as a remedy that that employer offer the employee employment, reemployment, or reinstatement, as the case may be. When the employee is in the Armed Forces of the United States at the time the required offer is made, the Board uniformly requires that the employer's offer also notify the employee of his right to reinstatement established by the Military Selective Service Act of 1967.¹ Similarly, when the Board finds that a strike is an unfair labor strike, it requires as a remedy that the employer offer the striking employees reinstatement upon their application and, as to employees precluded from applying because serving in the Armed Forces of the United States, notify them of their right to reinstatement under that statute after their release from service.² In these circumstances, the Board's determination of the employee's right to employment, or reinstatement upon application, may be determinative of his right to reinstatement under the Military Selective Service Act of 1967 after release from service.

This proposed rule does not alter those requirements in any way. It is intended rather to simplify the present practice of the Board under which the order and the notice to be posted by an employer must, in each reinstatement situation, include an undertaking to notify the employee if serving in the Armed Forces of his right to reinstatement under the Military Selective Service Act of 1967. If the rule is adopted as here proposed, it is intended to discontinue the practice of including the applicable provision in each order and notice, since publication of the rule will serve as formal notice of the requirement. The regional offices of the Board will, of course, continue to assure this notification requirement is satisfied before the case is closed upon compliance with the Board's order.

* The following statement was published by the Board at the time of publication of the notice of proposed rulemaking, 37 F.R. 15710.

¹ 65 Stat. 75, 50 U.S.C. App. Sec. 451, *et seq.*, amending and renaming Selective Service Act of 1945, 62 Stat. 604; see also 82 Stat. 790. See, e.g., *Stationers Corporation*, 96 NLRB 196; *Aerovox Corporation*, 102 NLRB 1526. Compare *The Federbush Co., Inc.*, 34 NLRB 539, 565.

² *Gerhard Landgraf and Peter Landgraf doing business as Bay Standard Products Mfg. Co.*, 167 NLRB 340, 341.