§ 1131.77 [Amended]

12. In § 1131.77, the last sentence is removed.

§ 1131.85 [Amended]

13. In § 1131.85, paragraph (b) is removed and reserved.

[FR Doc. 95–23896 Filed 9–27–95; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 103

[INS No. 1692–95]

RIN 1115–AD92

Fees Assessed for Defaulted Payments

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend existing Immigration and Naturalization Service (Service) regulations to increase the fee imposed when a check submitted to the Service in payment of a fee is not honored by the bank upon which it is drawn, from $5.00 to $30.00. The purpose of the proposed change is to enable the Service to recoup the administrative costs incurred in processing all returned checks and other defaulted payments. This action will result in the Service no longer losing money as a result of bad check activity.

DATES: Written comments must be submitted on or before November 27, 1995.

ADDRESSES: Written comments should be submitted, in triplicate, to Chief, Debt Collection and Cash Management Branch, Office of Finance, Immigration and Naturalization Service, 425 I Street, NW., Room 6309, Washington, DC 20536–0002. Facsimile submissions may be made to (202) 514–7860. To facilitate processing, please reference INS No. 1692–95 on all correspondence.

Before adopting this proposal, consideration will be given to any written comments that are submitted to the Service. All such comments received from the public pursuant to this notice of proposed rulemaking will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Debt Collection and Cash Management Branch, 425 I Street, NW., Room 6309, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Allen H. Sinsheimer, Systems Accountant, Debt Collection and Cash Management Branch, Office of Finance, Immigration and Naturalization Service, 425 I Street, NW., Room 6008, Washington, DC 20536, telephone (202) 616–7715.

SUPPLEMENTARY INFORMATION:

I. Introduction

Changes in the current regulation are needed to make the bad check charge consistent with the actual costs incurred by the Service in processing returned checks and other defaulted payments. The current bad check charge is $5.00.

The Service has studied the costs incurred by several Administrative Centers attributable to the return of a bad check from a financial institution. The Administrative Center, Dallas, and the Administrative Center, Twin Cities, were asked to identify each action that must be undertaken and quantify the time and costs involved in processing a bad check. Meaningful and reliable accumulations of the time and expense involved in the average costs of processing each bad check have been gathered, since these centers handle a substantial number of financial transactions each year. For example, three employees at the Dallas Administrative Center each spend 38 hours each month processing bad checks. Over 900 bad checks are processed each year at the Dallas Administrative Center. Data for over 1,800 bad checks were provided by the Administrative Centers.

As a result of our study, we have determined that the average cost to the Service to process each bad check received is $30.11. We have rounded off the cost to $30.00.

The Service notes that the United States Customs Service has recently completed a review of the costs incurred in processing bad checks and has also concluded that a $30.00 fee is appropriate compensation for the costs it incurs in processing bad checks.

Regulatory Flexibility Act and Executive Order 12866

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and for the reasons stated in the preamble, it is certified that the proposed rule would not have a significant impact on a substantial number of small entities. Accordingly, the proposed rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. The proposed rule would not result in a ''significant regulatory action'' under Executive Order 12866.

List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, part 103 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended to read as follows:

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252(b), 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. Section 103.7 is amended by:

a. Redesignating paragraph (a) as paragraph (a)(1);

b. Removing in the fifth sentence of newly designated paragraph (a)(1) the term ''$5.00'' and adding in its place the term ''$30.00''; and

c. Removing the sixth sentence of newly designated paragraph (a)(1); and

d. Adding a new paragraph (a)(2) to read as follows:

§ 103.7 Fees.

(a) * * *

(2) A charge of $30.00 will be imposed if a check in payment of a fee, fine, penalty, and/or any other matter is not honored by the bank or financial institution on which it is drawn. A receipt issued by a Service officer for any such remittance shall not be binding upon the Service if the remittance is found uncollectible. Furthermore, credit for meeting legal and statutory deadlines will not be deemed to have been met if payment is not made within 10 business days after notification by the Service of the dishonored check.

* * * * *

Dated: September 12, 1995.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 95–23917 Filed 9–27–95; 8:45 am]

BILLING CODE 4410–10–M

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

Appropriateness of Requested Single Location Bargaining Units in Representation Cases

AGENCY: National Labor Relations Board (NLRB).

ACTION: Notice of proposed rulemaking.

SUMMARY: To set forth the decisive factors for the appropriateness of most single location units, the National Labor Relations Board (the Board) proposes to amend its rules to include a new provision specifying the appropriateness of requested single location bargaining units. This rule, as proposed, would be applicable to all Board cases in which the issue arises as to whether a unit of unrepresented employees at a single location is an appropriate unit in all industries currently under the Board's jurisdiction, excluding the utility industry, construction industry, and seagoing crews in the maritime industry. The Board is publishing this notice to seek timely comments and suggestions from the public, labor organizations, employer groups, and other interested organizations on how the Board may best fulfill its statutory obligation to determine an appropriate unit when a single location bargaining unit is requested. Although the Board has given the matter considerable thought, we emphasize that the rule we are proposing is just that—a proposal—and not a final decision on what the rule, if any, should be. In some sections of this document we are more tentative than others and have specifically invited commentary or empirical information. In other sections we have not expressly asked for comments but nonetheless welcome them.

DATES: All responses to this notice must be received on or before November 27, 1995.

ADDRESSES: All responses should be sent to: Office of the Executive Secretary, 1099 14th Street, NW, Room 11600, Washington, DC 20570, Telephone: (202) 273–1940. All documents shall be filed in eight copies, double spaced, on 8½ by 11 inch paper and shall be printed or otherwise legibly duplicated.

FOR FURTHER INFORMATION CONTACT: John J. Toner, Acting Executive Secretary, Telephone: (202) 273–1940.

SUPPLEMENTARY INFORMATION: The following is an outline of the contents of this Notice:

I. Background
II. Validity and Continuing Desirability of Rulemaking
A. Opposition to Rulemaking
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2. All factors should be retained
3. Lack of empirical evidence
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I. Background

On June 2, 1994, the Board published an Advanced Notice of Proposed Rulemaking (ANPR) in the Federal Register entitled ''Appropriateness of Requested Single Location Bargaining Units in Representation Cases.'' 59 FR 28501 (June 2, 1994). The ANPR set forth several reasons why the Board was considering rulemaking to determine the appropriateness of single location units for initial organizing cases in the retail, manufacturing, and trucking industries. The Board specifically stated, however, that it had made no decision on the propriety of rulemaking in this area.

The Board sought comments on: (a) The wisdom of promulgating a rule or rules on the appropriateness of single location units in retail, manufacturing, and trucking industries; and (b) the appropriate content of such a rule or rules. The ANPR suggested that there could be separate rules for each industry, or a single rule applicable to all three industries. To encourage discussion and comments on the scope and content of a possible rule, the ANPR suggested language for a rule. The suggested rule was a single rule which set forth factors which would be necessary for the rule to apply, i.e., to grant a requested single location unit. The rule also provided for ''extraordinary circumstances'' which would render the rule inapplicable and require the case be decided by adjudication. Interested parties also were invited to address what constitutes a ''single facility.'' Member Cohen and former Member Stephens filed a separate joint statement in the ANPR. The comment period ended July 29, 1994.

The Board received 41 written comments. Five comments were received from unions: Amalgamated Clothing and Textile Workers (ACTWU, C–8 [1]); Retail, Wholesale and Department Store Union, AFL–CIO (RWDSU, C–14); International Brotherhood of Teamsters (IBT, C–21); International Federation of Professional and Technical Engineers (PTE, C–22); and the AFL–CIO (AFL, C–33).

Trucking industry employers submitted 17 comments. Retail industry employers submitted 2 comments.

Seven comments were received from trade associations: U.S. Chamber of Commerce (USCC, C–7); National Association of Manufacturers (NAM, C–12); American Trucking Associations (ATA, C–13); National Council of Chain Restaurants (NCCR, C–24); Ohio Grocers Association (OGA, C–29); National Retail Federation (NRF, C–32); and the International Mass Retail Association (IMRA, C–41).

Four responses were received from policy organizations: National Right to Work Legal Defense Foundation (NRW, C–16); Council on Labor Law Equality (COLLE, C–18); Labor Policy Association (LPA, C–19); and Society for Human Resource Management (HRM, C–38).

Six comments were submitted by individuals.

II. Validity and Continuing Desirability of Rulemaking

Commentators generally did not take issue with the Board's statutory authority to engage in rulemaking concerning bargaining units. The general validity of the Board's statutory power to engage in rulemaking under Section 6 of the National Labor Relations Act (Act) is set forth fully in

[1] C–8 denotes Comment Number 8, for example.

the notices of proposed rulemaking for units in the health care industry. See, Collective-Bargaining Units in the Health Care Industry, Notice of Proposed Rulemaking, 52 FR 25142, 25143–45 (July 2, 1987); Second Notice of Proposed Rulemaking, 53 FR 33900, 33901 (September 1, 1988) and Final Rule, 54 FR 16336, 16337–38 (April 21, 1989), reprinted at 284 NLRB 1516, 1519–20, 1528, 1529–30 and 1582–83. Moreover, in *American Hospital. Association* v. *NLRB*, 499 U.S. 606 (1991), the Supreme Court upheld the Board's authority under Section 9(b) of the Act to resolve disputes regarding appropriate bargaining units by using its rulemaking authority.

The ANPR set forth several reasons supporting the Board's desire to engage in rulemaking for single location units, including the historical likelihood in most cases that a single facility unit will be found appropriate, the extensive litigation currently involved, the unnecessary delays frequently caused by such litigation, the need for more certainty in such cases, and the fact that many of the factors considered in such cases have not affected the outcome of single location cases.

After carefully examining all the comments, the Board continues to believe its reasons for desiring to engage in this rulemaking are valid and appropriate to effectuate the purposes of the Act. This Notice of Proposed Rulemaking (NPR) clarifies the Board's principal purpose for engaging in this rulemaking. That purpose is to let the public and practitioners know what is required for a single location unit to be found appropriate. The Board will, however, continue to decide novel and unusual cases by adjudication under the extraordinary circumstances exception to the rule, and therefore does not foresee a major change in results of these cases but merely a more expeditious method of deciding them. The Board believes the major benefit of this rulemaking will be a reduction in litigation over this issue and more efficient use of Board resources as well as improved service to the parties. In addition, because the law in this area will be codified and clarified, we believe the rule will facilitate the negotiation of stipulated election agreements.

A. Opposition to Rulemaking

1. Adjudication Should Be Retained.

The major contention of the majority of the commentators opposing rulemaking was that the case-by-case adjudication approach should be retained. (USCC, C–7 ; SAIA MotorFreight, C–9; LPA, C–19; COLLE, C–18; and NCCR, C–24[2]). Commentators maintained that this approach is an invaluable tool to ensure that all facts and factors are considered in deciding a particular case. In their view, this approach has worked well over the many years that the Board has decided single location cases by adjudication.

Although it is true that the Board has previously decided these cases by adjudication, the Act also permits the Board to decide representation cases by rulemaking. As discussed in great detail in the health care rulemaking, the courts, commentators, and others have urged the Board to use its dormant rulemaking authority to decide representation cases. See Collective-Bargaining Units in the Health Care Industry, Notice of Proposed Rulemaking, 52 FR 25142, 25144–45 (1987), and Final Rule, 54 16336, 16337–39 (April 21, 1989), reprinted at 284 NLRB 1516, 1518–20, 1580, and 1583. We believe that a rule concerning the appropriateness of single location units would be a proper use of that authority.

The Board recognizes one of the most frequently made arguments favoring adjudication is that it allows the parties to put before the Board all the available evidence which may be relevant to this issue in each particular case. While adjudication affords the parties the opportunity to present voluminous evidence in the hope that some of it will be found critical, a rule tells the parties, in advance, which evidence the Board has decided is critical. By announcing an intention to decide these cases by rule over adjudication, the Board is tentatively choosing between two legitimate methods of deciding representation cases. The Board is exchanging what is sometimes thought of to be the enhanced individual justice of adjudication, with its vagaries and unpredictability as to which facts are important, for the clarity and predictability of a rule. This choice may not be appropriate for all representation cases, but for the many reasons outlined in the ANPR and this Notice, the Board believes it is appropriate for the majority of single location cases.

The arguments for retaining adjudication fail to address one of our major reasons for intending to use rulemaking in this area, most notably, our desire to reduce extensive litigation and use of Board and party resources to decide routine single location cases. Although the Board's only other bargaining unit rulemaking addressed a history of difficult and inconsistent health care precedent, rulemaking also is appropriate for other reasons, including the desire to use our limited and declining resources more efficiently.

A major reason for litigation of this issue is the attempt by the parties to prove the existence of certain factors and the ''significance'' of those factors. Were the Board to establish a rule specifying under which fact situations a single location unit will automatically be found appropriate, there would be considerably less litigation over the significance or lack of significance of these facts, and the factors to which they relate.

The desirability of reducing litigation is evident from the current approach. The Board currently considers a number of factors in single location cases to determine whether the presumptive appropriateness of a requested single location has been rebutted. Often, the parties seek to prove the existence or absence of various factors by introducing voluminous testimony and documentary evidence concerning a myriad of facts. The parties litigate the significance of each fact and factor, and then the Regional Director and, if a request for review is filed, the Board determines whether the various factors exist and are significant. The parties and the public are left to their own devices to deduce which facts and factors may or may not be deemed most significant in a particular case, although, as indicated, the result in the majority of cases is that the single facility unit requested is found appropriate.

We believe our decision to decide these cases under a rule will have little effect on the substantive results of most routine single location unit cases. Moreover, as described later in this document, the rule provides for an extraordinary circumstances exception to address those novel and difficult cases which should be decided by adjudication.

2. All Factors Should Be Retained

Most commentators also argued that the Board should retain all the factors historically considered in deciding single location cases by adjudication. (SAIA, C–9; NAM, C–12; LPA, C–19 and NRF, C–32.) These factors, they contend, should continue to be determinative in single location cases. Their comments, however, have not, to date, given reasons to support this contention. As discussed more fully below in Section III.B., it seems to us, based both on our experience and a

[2] Citation of a particular comment is intended to be illustrative of the comments made regarding a particular point. Such citation does not necessarily represent the entirety of the comments.

reexamination of prior and recent cases, that only a few of the several factors historically considered in single location cases actually have made, or in the future should make, a material difference in the outcome of these cases.

Moreover, the current multi-factor approach is difficult for lay people and even for lawyers to understand. The current approach represents itself as a shifting, unpredictable mix of many facts and factors. No single fact or factor is said to be determinative. Board decisions weigh the evidence supporting the factors and decide, without setting forth any precise standards, that there is sufficient evidence supporting the existence of certain factors in one case, but not in another. The Board then pronounces that certain factors are ''significant'' or ''substantial'' to support a particular result. There are no announced, pre-set standards, however, for what is ''significant'' interchange, a ''substantial'' distance between locations, or local autonomy which is ''severely circumscribed.'' These imprecise and vague litigation-producing factors are the very ambiguities which rulemaking appears well-suited to address.

We believe that for many cases this litigation is wasteful and that this area is ripe for consideration of the alternative approach of rulemaking. While there remain cases which will benefit from adjudication and a thorough consideration of all the facts and factors, our experience indicates that the results of most single location cases can be made more predictable.

3. Lack of Empirical Evidence

Several commentators challenged the rule because no supporting empirical evidence regarding the number of single location cases was cited in the ANPR. (USCC, C–7; NAM, C–12; and IMRA, C–41.) The comments argued, for example, that because 80 percent of Board elections are by stipulation and consent, few cases are litigated and still fewer are likely to involve single location issues. Representatives of the trucking industry in particular cited the paucity of recent published decisions in that industry. (SAIA MotorFreight, C–9; ATA, C–13; Viking Freight et al., C–30.) Commentators from the trucking industry also disputed that the single location unit is usually found appropriate, based on cases decided in the 1980's. (Viking Freight, et al., C–30.)

It is commonly recognized, however, that single location unit issues have arisen with some frequency since the inception of the Act. See P. Hardin, Developing Labor Law, 468–72 (3d ed. 1992). In any event, the Board's desire to engage in this rulemaking is not predicated solely on the number of cases involving this issue. This proposed rule merely recognizes that a group of cases which are periodically and repeatedly addressed by the Board are appropriate for rulemaking for the reasons stated in the ANPR and this Notice.

4. Rule Unnecessary

Several commentators argued that rulemaking is unnecessary because the circumstances here are unlike those which gave rise to the health care rules. (NAM, C–12; COLLE, C–18; LPA, C–19; and MotorFreight, C–35.) The ANPR, however, did not represent that the circumstances here are the same as those which resulted in the health care rulemaking. As we indicated above, we do not believe that the reasons supporting this rulemaking must mirror the circumstances or the reasons which supported the health care rulemaking. We believe the ANPR and this Notice set forth a number of legitimate reasons for this rule, particularly the Board's desire that, in a significant number of cases, the specific factors necessary for an appropriate single location unit be made clear and known in advance to all interested parties. There are, however, common goals and benefits between the two rulemakings. As with the health care rules, the Board is attempting to bring more clarity to the issue of appropriateness of bargaining units and to avoid lengthy litigation, possibly inconsistent results, and unnecessary expenditure of limited Board resources and the resources of the parties. See Collective-Bargaining Units in the Health Care Industry, Notice of Proposed Rulemaking, 52 FR 25142, 25144–45 (1987), reprinted at 284 NLRB 1516, 1518–20.

5. Other Concerns

Some commentators believe that a rule simply will add to the advantage they claim unions already have in these cases (NAM, C–12); that the result will be increased legal fees to conduct campaigns and to negotiate contracts, and impairment of an employer's efficiency and productivity (TNT Reddaway Truck, C–10; NCCR, C–24; and NAM, C–12;); that it will be harder to administer contracts and transfer employees between union and non-union locations (NCCR, C–24; NRF, C–32,); and that by representing splintered or fragmented units, unions may use whipsaw strikes to enforce their bargaining demands (NRF, C–32; NCCR, C–24.).

Most of these concerns, however, exist whenever single facility units are found appropriate, regardless of whether they would be decided by adjudication or rulemaking. The major fear of these commentators appears to be that a rule will exacerbate these perceived problems by increasing organizing activity. A major purpose of the Act, however, is to encourage collective bargaining; increased organizing is not, therefore, a proper basis for not engaging in rulemaking. Moreover, experience with the health care rules demonstrates that it cannot be presumed that increased organizing will materialize because of a rule. See Burda, Hospital Elections Continue to Decline, Modern Healthcare 26, May 2, 1994, in which it was reported, relying on Board statistics, that the Board's health care rules ''haven't led to unbridled organizing efforts at hospitals, as many executives had feared.'' It has also been our experience that the health care rule has benefited the Board by reducing the delay in processing health care cases caused by litigation of unit scope questions. These previous delays were caused by lengthy hearings and the substantial time necessary to prepare decisions.

Hence, we do not believe that these concerns about unions' organizing efforts, which exist even outside of rulemaking, should preclude the Board's attempt to decide these cases more expeditiously. Moreover, where novel and unusual situations are presented, the rule provides for continued decision by adjudication.

6. Summary and Tentative Conclusions

Although the general tenor of many opposing comments was that a rule would be a radical departure from the Board's current treatment of these cases, we believe, to the contrary, that for routine cases there will be little substantive change in results. Thus, under adjudication the Board applies a presumption that single location units are appropriate. The presumption is based on Board decisions which note that Section 9(b) lists the ''plant'' unit as one of the units appropriate for bargaining. See *Dixie Belle Mills,* 139 NLRB 629, 631 (1962); *Haag Drug Co.,* 169 NLRB 877 (1968).[3] This

[3] We recognize that two Courts of Appeals have questioned the presumption. See, *NLRB* v. *Cell Agricultural Manufacturing,* 41 F.3d 389 (8th Cir. 1994), denying enf. in relevant part of 311 NLRB 1228 (1993); *Electronic Data Systems Corp.* v. *NLRB,* 938 F.2d 570 n.3 (5th Cir. 1991), enfg. 297 NLRB No. 156 (1990) (not reported in printed Board volumes). On the other hand, at least seven circuits have recognized the validity of the presumption. *Staten Island University Hospital* v . *NLRB,* 24 F.3d 450, 456 (2nd Cir. 1994); *NLRB* v. *Aaron's Office*

presumption of appropriateness is, to some extent, already a ''rule,'' as the Board recognized in the health care rulemaking. See Collective Bargaining Units in the Health Care Industry, Final Rule, 54 FR 16336, 16338 (1989), reprinted at 284 NLRB 1580, 1583 (1989), in which the Board noted, in support of those rules, that the Board has long made use of ''rules'' of general applicability to determine appropriate units, citing, inter alia, the single facility unit presumption.

Moreover, the Board has recognized that a single location unit furthers certain policy considerations with regard to Section 9(b). In *Haag Drug Co.*, 169 NLRB 877 (1968), the Board stated that Section 9(b) directs the Board to ''assure employees the fullest freedom in exercising the rights guaranteed by this Act'' and, absent sufficient evidence to destroy the separate identity of the single location, the employees' ''fullest freedom'' is maximized by treating the single location unit as normally constituting the appropriate unit.

We recognize, however, that the statutory goal of assuring employees their fullest freedom in exercising their rights is tempered by the Board's desire not to unduly fragment an employer's workforce. Although we continue to believe that a rule is desirable, in view of the concerns of some commentators about the potential for fragmentation of an employer's workforce, we solicit comments addressing any available empirical evidence regarding the feasibility of bargaining as reflected in the relative success (or lack thereof) of administering contracts, transfers, etc., in workforces which are partially or completely organized by location versus those workforces which are organized on a multi-location basis. We invite these comments as to each of the specific elements of the rule outlined in Section III.B. of this proposed rule.

In sum, we believe the net effect on Board law of this proposed rule is that its results will largely be consistent with our current treatment of single location cases and, hence, not a significant departure from current law, although more rationally explained and more widely disseminated and understood. We believe, therefore, that the arguments for retention of the current adjudicatory approach appear to underestimate the benefits of the proposed rule, while overstating its practical impact on the substantive result in most routine single location cases.

B. Support for Rulemaking

All five unions which submitted comments reiterated the reasons mentioned in the ANPR supporting the decision to promulgate a rule or rules. The AFL (C–33) and ACTWU (C–8) also cited reasoning from the Board's health care rulemaking: that case by case analysis should be abandoned in favor of administrative rulemaking where an industry is susceptible to rules of general applicability; that courts and academics have long favored use of the Board's rulemaking powers because the current method is inefficient; that several state labor boards determine bargaining units by rules; and that by codifying its jurisprudence in this area, the Board can make its processes more understandable.

The AFL noted that the health care rulemaking has met with well deserved praise from commentators and the Administrative Conference of the United States. This praise should encourage the Board to continue to move away from ''Talmudist'' methods of adjudging the appropriateness of bargaining units and from making it difficult for the outside world to know which factors, if any, are crucial. The AFL contends that rulemaking on single location units is a particularly appropriate next step.

C. Conclusion

The Board believes that a rule will be of service to the public and the labor bar to set forth more clearly the decisive factors in most single location cases. Moreover, the public and the labor bar will know, in advance, which facts and factors are critical for most single location cases. Members of the labor bar will be better able to advise their clients about which issues should or should not be litigated. Parties will not have to engage in drawn out litigation to determine if a unit is appropriate; in many cases, simple application of the rule will tell them.

Knowing in advance what facts are determinative will eliminate much of the confusion and uncertainty inherent in the current approach. We believe much of the current litigation is driven either by parties' attempts to persuade the Board that facts and factors exist in support of a particular result, or by the mistaken belief as to which facts or factors are critical for finding a single location unit appropriate. This litigation exists despite the fact that, in the majority of cases, requested single location units are found appropriate. Through this proposed rule, we intend to define those facts and factors which will be determinative. It no longer will be necessary in most cases to persuade the Board that certain facts exist and then for the parties to place their interpretation of those facts before the Board, not knowing which facts or factors will be deemed determinative.

We believe, therefore, that the proposed rule will cut litigation costs and the time currently and unnecessarily expended by the parties and the Board in most single location cases. The Board and its Regional Directors should have fewer and hopefully shorter transcripts to read and decisions to write. Knowing in advance which facts are necessary to support a single location finding, the parties can concentrate their resources on the election or collective bargaining if the unit is appropriate under the rule.

We also anticipate that the proposed rule may lead to more stipulated election agreements. Currently, parties seeking to reach a stipulated election agreement for a single facility unit must negotiate over a number of often unclear and little understood factors. The proposed rule, however, codifies what will in most cases establish the appropriateness of a single facility unit and uses only a few reasonably clear factors. Because the parties will be better able to understand this area of the law, they will be in a better position to negotiate a stipulated election agreement; they will no longer need to waste time and effort in disputing what we have determined are essentially immaterial factors.

The parameters of the proposed rule, however, are not designed to decide every case involving single location units, only the large percentage of cases that are neither close nor novel. When the parameters of the proposed rule are met and there are no novel issues, litigation will be unnecessary. When, however, the parameters are not met, the rule will not apply. Furthermore, even if the proposed parameters are met,

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Furniture Co., 825 F.2d 1167, 1169 (7th Cir. 1987); *NLRB* v. *Child World, Inc.*, 817 F.2d 1251, 1253 (6th Cir. 1987); *Beth Israel Hospital* v. *NLRB*, 688 F.2d 697 (10th Cir. 1982), modifying and reaffirming en banc 655 F.2d 1028 (10th Cir. 1981); *NLRB* v. *Living and Learning Centers, Inc.*, 652 F.2d 209, 212 (1st Cir. 1981); *Spring City Knitting Co.* v. *NLRB*, 647 F.2d 1011, 1014 (9th Cir. 1981); *NLRB* v. *Western & Southern Life Ins. Co.* v. *NLRB*, 391 F.2d 119, 123 (3d Cir. 1978), cert. denied, 393 U.S. 978 (1968). We note that the facilities in *Cell* were less than a mile apart and thus, the rule we propose would not have applied in that case in any event. In *Electronic Data Systems*, the court pointed out in that in a prior case arising in that Circuit, *NLRB* v. *Purnell's Pride*, 609 F.2d 1153, 1160–61 & nn.4 and 5 (1980), that court expressed the opinion that the presumption was confusing and useless in practice. Without agreeing with this court's view of the presumption, we believe our clear delineation as to which factors are critical to finding a single location unit appropriate will remove much of the confusion regarding the appropriateness of most requested single locations units, will be useful in practice, and to that extent may satisfy some of the court's concerns.

extraordinary circumstances may be shown to exist, and cases will be adjudicated. It is only these unusual close cases which will benefit from and, absent stipulation, receive adjudication.

III. The Proposed Rule

A. Scope

1. Generally

The ANPR stated that the Board proposed promulgating a rule, or rules, to govern single location units in the retail, manufacturing, and trucking industries. The rationale for these three industries was that ''large groups of cases have centered'' on them, that factors considered in these cases are well-settled, and that the outcomes of single facility cases are reasonably predictable.

Many commentators opposed grouping all employers of a single industry under one rule, and others, particularly the trucking industry, objected to grouping their industry with retail and manufacturing. (ATA, C–13; NAM, C–12; NRF, C–32; SAIA, C–9; Con-Way Southern Express, C–26; Viking Freight System, et al., C–30). These comments generally asserted that industries and employers are too diverse to be covered by a single rule. They also contended that it would be difficult to define coverage of employers under a rule or rules, presumably because of the common and overlapping functions and services of employers. None of the commentators opposing a single rule, however, offered thoughts on how the Board could structure separate rules covering separate industries.

The AFL (C–33) and IBT (C–21), on the other hand, contended that a single rule is preferable to three separate rules for the three industries mentioned in the ANPR. The AFL contended that if the justification for the rule in the three industries is the large number of cases centered on them, there would seem to be no reason to distinguish among them for purposes of a rule. Moreover, the AFL contended that there was no reason to exclude non-trucking portions of the transportation industry from the rule.

2. Industries Covered

a. Reasons. The Board's original intention for this rulemaking was to limit the coverage to these three industries because it was our belief that the bulk of the single location cases fell into these categories. Although we approached the coverage issue from a quasi-statistical point of view, commentators representing unions, industry, and policy organizations approached this as a practical issue. While industry, policy organization, and trade association commentators generally thought any rulemaking was inappropriate, and union commentators thought rulemaking was appropriate, each discussed the problem of covering so many diverse employers under rules. All pointed to the difficulty of classifying industries and then determining which employers fall under a particular industrial category. All emphasized that many industries, particularly the transportation industry, are becoming difficult to categorize as they provide an array of services beyond their nominal industrial classification.[4]

The AFL suggested that the solution to these questions of categorization was to broaden coverage of the rules, while the industry, policy organization, and trade association commentators generally offered no specific suggestions on how to classify industries and employers. The LPA (C–19), however, although opposed to rulemaking in this area, suggested that if the Board does decide to adopt rules, ''[i]t would not be wise to formulate rules specifically tailored to each industry.'' The LPA apparently was concerned that industry-specific rules might lead to ''ever more narrow rules,'' presumably in other areas. The LPA thought any rule adopted should be as broad as possible.

The commentators' responses regarding the practical difficulty of attempting to narrow the scope of coverage reminded us that the Board's current approach generally does not provide for separate standards, or ''rules,'' for separate industries. With the few exceptions discussed below, the Board treats all industries the same with regard to single location units and applies the same standards. The Board applies the single location presumption to analyze the appropriateness of requested single location units, and considers the same factors relevant in determining whether the presumption has been rebutted. When the standard has been cited in trucking cases, the Board has cited and applied the same standard applied in retail cases. See *Bowie Hall Trucking,* 290 NLRB 41 (1988), citing *Sol's,* 272 NLRB 621 (1984). When the standard has been cited in retail cases, the Board has cited and applied the same standard applied in trucking industry cases. *Globe Furniture Rentals,* 298 NLRB 288 (1990), citing *Dayton Transport Corp.,* 270 NLRB 1114 (1984). The standard cited, therefore, is the same regardless of the industry. See *Esco Corp.,* 298 NLRB 837 (1990), in which the Board relied on cases from the manufacturing, retail drug store, retail apparel shop, and trucking industries; *Haag Drug Co.,* supra 169 NLRB at 878, in which the Board applied the presumption to retail chains, noting that the single location factors are no different from those applied to manufacturing or insurance industries.

Because the Board currently applies the same single location standards to most industries, we have concluded it does not make sense to change that practice and have different rules for different industries. We, therefore, in response to the comments, propose that the scope of the rule apply to all industries to which the Board currently applies the single location presumption. Besides conforming to the current practice, this coverage will be, practically speaking, simpler and easier to administer. Even were we to attempt to define industrial classifications of employers, the comments concerning the changing functions and services of employers indicate to us that in many instances we would still encounter difficulty, and parties may well have to resort to litigation to determine which set of rules apply. We also believe that a broad based rule will avoid the possibility of inconsistent findings based on different rules. Finally, even for cases that do not involve single location units, as for example cases involving unit placement or composition, the Board generally has applied the same community of interest standards without regard to the industries involved. Having a single rule for all industries for single location issues would be consistent with that approach as well.

b. Excepted industries. As indicated, we propose a few narrow exceptions to coverage under the rule, although as discussed below, we specifically invite comments on other exemptions from the rule and supporting reasons. The proposed exceptions involve industries or segments thereof as to which the single facility presumption has not been applied. Thus, public utilities would be excluded from coverage because in that industry the Board has traditionally

[4] This was vividly illustrated by the responses of some trucking industry commentators who persuasively contended that ''there is no such thing as the trucking industry,'' stating that the so-called trucking industry is evolving into much broader areas such as the ''delivery'' or ''transportation'' industry. (MotorFreight, C–35 at 3; Emery Air Freight, C–36 at 3.). The Board itself has addressed this same problem in recent cases involving segments of the package handling industry. See *United Parcel Services,* 318 NLRB No. 97 (Aug. 25, 1995), and *Federal Express,* 317 NLRB No. 175 (July 17, 1995); see also, *International Longshoremen's Association,* 266 NLRB 230 (1983), where in a similar vein the Board, inter alia, struggled with the appropriate characterization of containerization in the shipping industry (whether more like trucking or more like shipping) with regard to the lawfulness of the alleged work preservation objectives of the International Longshoremen's Association.

regarded a system-wide utility unit to be the ''optimal unit.'' See, e.g., *New England Telephone and Telegraph,* 280 NLRB 162 (1986). Likewise, crews on ocean-going vessels would be excluded, as the presumptively appropriate unit there historically has been found to be ''fleet-wide'' (which is different from employer-wide). See, e.g., *Moore—McCormack Lines, Inc.,* 139 NLRB 796 (1962). The Board proposes that employers primarily engaged in the construction industry will be excluded from coverage under the rule because identifying the ''location'' in a construction case would frequently be difficult and require litigation. Construction industry employers typically have several ongoing construction projects at different locations, each of which could be considered a separate site or location. Also, the separate projects are usually of short duration. Thus, the single facility presumption is not readily applicable to that industry.

As we noted above, although we believe a rule with broad scope is desirable, the Board is open to comments on whether other industries should be excluded. Although several comments to the ANPR argued that a single rule would fail to take account of the uniqueness and diversity of particular industries or employers, we believe that none of these commentators demonstrated this uniqueness or diversity in any persuasive manner. Indeed, none suggested a specific rule for their industry. We hope commentators who argue for an exception will justify why an industry which currently is subject to a uniform standard under adjudication nevertheless should not be subject to a uniform standard under a rule.

Several trucking industry commentators pointed out that unlike retail and manufacturing, requested single location units in this industry must be evaluated differently because drivers are mobile while employees in other industries remain relatively fixed in one location. (SAIA, C–9; Con-Way Southern Express, C–26; Viking Freight, et al., C–30.) We are cognizant of this concern and invite more specific commentary about the ambulatory nature of this industry, and whether and in what manner the final rule should take account of that difference.

c. Summary. Having a single rule and broadening the coverage of the rule to most industries is consistent with the Board's handling of single location cases by adjudication. Under adjudication, the Board generally has applied the same factors to all industries. By a single rule, the Board will avoid the possibility of confusion caused by different industry rules, and by the inconsistent results that might follow. Having a single rule also will be consistent with the goals of creating clear and uniform standards, reducing litigation, and processing these cases more efficiently.

3. Applicability to Board Cases

The ANPR stated that the proposed rulemaking would be applicable to ''initial organizing petitions.'' We have, however, modified the applicability of the rule in two respects. First, the proposed rule substitutes ''unrepresented'' for initial organizing to avoid possible confusion over the language ''initial organizing.'' We believe this better expresses our original intention in the ANPR of applying the rule to locations where the employees currently are not represented for collective bargaining. Thus, if a union previously but unsuccessfully attempted to ''organize'' the location separately or as part of a larger bargaining unit, the rule would still apply to any subsequent petition the union might file for a single location unit, provided the employees are not represented. The same would be true where other locations of the employer are already represented, including those separately represented on a multi-location basis.

Second, although the rule in the ANPR applied to representation petitions seeking an election (RC and RM petitions), we propose that it be applicable to any other type of Board case in which the issue of a single location unit involving unrepresented employees arises. We believe this approach is necessary to avoid potentially inconsistent treatment between single location cases arising under all election petitions (except decertification petitions), and those arising in unfair labor practice cases. See, e.g. *Gissel* bargaining unit cases, *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969). The rule also would apply in cases presenting an accretion issue, since a group of separately located employees cannot be accreted if they can be considered a separate appropriate unit. See, *Compact Video Services,* 284 NLRB 117, 119 (1987); *Gitano Distribution Center,* 308 NLRB 1172 (1992). The applicable Board law in these cases would be the rule, unless extraordinary circumstances could be established.

The proposed rule, however, is subject to a number of limitations: 1. As the rule is limited to requested single facility units, it could not be invoked to defeat a request for a broader unit; in such situations the single facility unit presumption is inapplicable. See, *NLRB* v. *Carson Cable,* 795 F.2d 879 (9th Cir. 1986); *Capitol Coors Co.,* 309 NLRB 322 (1992). Thus, the rule will have no bearing on petitions for broader units. 2. The rule will not apply to petitions filed under *General Box Co.,* 82 NLRB 678 (1949), in which a voluntarily recognized union seeks an election for the benefit of certification. Such an election would involve employees currently represented, albeit through voluntary recognition. 3. As proposed, the rule does not address the question of the appropriate unit within a facility: that is, the proposed rule does not preclude units that are less than wall-to-wall at the facility requested. Our current case law does not require a wall-to-wall unit if the unit is otherwise appropriate.[5] 4. Although there were comments urging the Board to apply the rule more broadly to decertification petitions (NRW, C–16), the Board has long held that the appropriate unit for decertification elections must be coextensive with either the unit previously certified or the one recognized as the collective bargaining unit. *Delta Mills,* 287 NLRB 367, 368 (1987); *Campbell Soup Co.,* 111 NLRB 234 (1955). The Board applied this principle in the Health Care Rulemaking as well. See Collective-Bargaining in the Health Care Industry, Second Notice of Proposed Rulemaking, 53 FR 33900, 33930 (1988), reprinted at 284 NLRB 1528, 1570 (1988); *North Country Regional Hospital,* 310 NLRB 559 (1993). We see no reason to depart from well-established Board precedent, and thus, the proposed rule will not apply to decertification petitions.[6]

4. Summary and Conclusions

The scope of the rule as originally proposed would be revised, therefore, to make it applicable to all industries under the Board's jurisdiction, except the construction industry, public utilities, and the maritime industry with respect to ocean-going crews. The rule would apply to all Board cases in which an issue is whether a single location unit of unrepresented employees constitutes a separate appropriate unit. This would include election petitions, unit clarification petitions, and unfair labor practice cases. The rule could not be used to defeat broader units sought by a petitioner or other employee

[5] Moreover, as with the Health Care Rule, this rule does not prevent the parties from stipulating to a different unit.

[6] This also follows from the fact that decertification elections are by their nature conducted in units already represented, whereas the rule applies only to requested units of unrepresented employees.

representatives. The rule would not apply to decertification petitions.

We believe that we have excluded all those industries to which the Board does not apply the single facility presumption or that are not appropriate for this rule. As indicated above, however, the Board invites comments from other industries or employers which seek to justify exclusion from the rule. Moreover, as indicated, while the scope of this rule is broad and covers most industries under the Board's jurisdiction, if novel issues arise with regard to a particular industry, and extraordinary circumstances are established, the rule will not apply and the case will be litigated by adjudication.

B. Content of the Proposed Rule

1. Factors Recited in Prior Single Location Cases

a. Introduction. The Board's recent decision *J&L Plate,* 310 NLRB 429 (1993), set forth a large number of factors ostensibly applied in single location cases:

> A single plant or store unit is presumptively appropriate unless it has been so effectively merged into a comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Dixie Belle Mills,* 139 NLRB 629, 631 (1962). To determine if the presumption has been rebutted, the Board looks to such factors such as central control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any. *Esco Corp.,* 298 NLRB 837, 839 (1990).

The suggested rule in the ANPR would find a requested single location unit an appropriate unit where: (a) A given number of employees were employed; (b) no other facility of the employer was located within a specified distance; and (c) a supervisor under the Act was located on the site, presumably to oversee the operation of the facility requested. A showing of extraordinary circumstances would render the rule inapplicable, and refer the case to adjudication, such as where a set percentage of the employees in the unit sought performed work at another location for a set percentage of the time.

In proposing the content of the rule, we have set forth those factors which in our experience have significantly affected the outcome of single location cases under adjudication. The Board noted in the ANPR that several factors, while cited and theoretically considered in single location cases, seldom have made a difference in the outcome. It would be difficult to prove which factors cited in hundreds of cases were, in fact, determinative. Nonetheless, part of rulemaking involves an effort to simplify, codify, and predetermine results by attempting to isolate the more significant factors. Discussed below are our reasons for selecting those factors which we believe should be (and for the most part, have been) most material to deciding single location cases, and an explanation of the evidence necessary to support the existence of those factors under the proposed rule.

Many commentators argued that the Board should retain all the factors historically said to be considered under adjudication. In the ANPR, we stated that most of these factors, while cited and ''considered,'' usually are not determinative and that only a handful of factors have had an important impact and effect on the outcome of single location cases. In our view, the factors of geographic distance, temporary employee interchange, and local autonomy as measured by a statutory supervisor on the site for a regular and substantial period are almost always material in single location cases. Factors such as functional integration, centralized control, common skills, permanent transfers, and bargaining history, while frequently mentioned, have for the most part not been material factors in deciding single location cases. Although not a current factor in single location cases, we propose that for the reasons stated below, the units granted under the rule should be limited to locations with a minimum number of employees. At this time we propose to adhere to 15 employees provided in the ANPR as the minimum size of a unit but are undecided whether this number of employees is too large or too small and request comments on the appropriate number.

b. Non-material factors.

1. Introduction. The factors which we have decided are not substantially material to requested single location units are generally relevant and material to community of interest issues and to other unit scope issues; they are particularly relevant and material to requested multi-facility units. We believe it is largely because of this relevancy to unit scope issues that the Board has traditionally, but nominally, included these factors in analyzing the appropriateness of single facility units. It does not, however, necessarily follow that because these factors are material to finding multi-facility units appropriate that they are also material to finding single facility units inappropriate. Any reasonably complex business enterprise has a multitude of potentially appropriate units. And a union is not required to seek the most appropriate unit but only an appropriate unit. *P. Ballentine & Sons,* 141 NLRB 1103 (1963). Although these factors may be material to deciding other unit scope issues, we find for the reasons discussed below that they are largely not material to deciding whether a requested single location unit is an appropriate unit.

2. Functional integration. The general standard for single location cases states that a single plant is presumptively appropriate ''unless it has so effectively merged into a comprehensive unit, or is so functionally integrated that it has lost its separate identity.'' *J&L Plate,* supra. Functional integration, therefore, is generally stated to be relevant to any unit scope issue, including the appropriateness of a single location unit. When applied, however, functional integration has been largely subsumed by the specific factors upon which the rule we now propose relies—geographic separation, lack of significant temporary interchange, and local autonomy. To the extent that other aspects of functional integration exist, we believe they are largely immaterial to determining the appropriateness of single location cases.

There have been Board decisions which have purported to rely, in part, on specific evidence of ''plant integration,'' citing the use of similar machinery, the transfer of machinery and materials between plants, and in general, collaboration of two or more plants to produce a common product. See, e.g., *Beaverite Products,* 229 NLRB 369 (1977); *Kent Plastics Corp.,* 183 NLRB 612 (1970); and *Kendall Co.,* 181 NLRB 1130 (1970). Other cases have recited evidence of the ''continuous flow'' of production or the ''single order flow process'' to find that there is integration. See, *Unelco Electronics,* 199 NLRB 1254 (1972); *Neodata Product Distribution,* 312 NLRB 987 (1993). In virtually all these cases, however, integration was supported by evidence of significant employee interchange, limited distance between plants, or limited local autonomy. Moreover, in many instances the Board has found that evidence of ''plant integration'' or the coordinated processing of orders was insufficient to rebut the single facility presumption in the absence of the critical factors of significant interchange, close geographic proximity, or too limited local autonomy. See *Courier Dispatch Group,* 311 NLRB 728, 731 (1993); *J&L Plate,* supra; *Hegins Corporation,* 255 NLRB 1236 (1981); *Penn Color,* 249 NLRB 1117 (1980); *Black & Decker Manufacturing,* 147 NLRB 825, 828 (1964).

Functional integration then, seems to be less significant as a separate factor than as another way of stating the conclusion that the evidence demonstrates that the single location has merged into the more comprehensive, or multi-facility unit. Thus, while a few Board decisions conclude that the single facility presumption has been rebutted because the single plant is ''highly integrated'' with other facilities, this conclusion is generally based on the more specific factors we propose now should be in the rule. In our view, it would be expected that plants that are so integrated as to rebut the presumption are close together, have significant interchange, and have little local autonomy.

Few would disagree that today most companies with more than one location are more or less functionally integrated in one form or another. Production may be integrated in the sense that different parts of the company's products are manufactured in different plants, and then shipped from one to another to be assembled. Records, orders, and other information may be integrated via computers or other means of direct communication. We believe, however, that product, administrative, or operational integration does not have any necessary or direct impact on the employees' relationship with their counterparts at other locations, absent evidence of the separate supporting factors we have included in the rule. See, *Penn Color*, 249 NLRB at 1119; *Black & Decker Manufacturing,* 147 NLRB at 828. The more significant principle in determining whether a single location unit is appropriate is not whether there is functional integration, but whether employees in the group sought have lost their ''separate identity.'' Our conclusion that, absent extraordinary circumstances, functional integration is immaterial to finding the single location unit appropriate is consistent with this standard.

3. Centralized control. Few businesses today with more than one location fail to maintain centralized control over the conduct of operations. In virtually all single location cases, this factor is essentially presumed and does not affect the Board's determinations. Centralized control over operations is a matter of good business practice and does not, in our view, affect the community of interest between employees at different locations. As with functional integration, although Board decisions may cite an employer's ''highly centralized operations'' as evidence supporting the multi-facility unit, it is our sense that other, more critical factors usually affect the outcome of the case. See *Courier Dispatch Group,* 311 NLRB 728, 731, in which the Board, while acknowledging the employer's centralized administrative and operational functions, nevertheless affirmed the Regional Director's finding that the employer had failed to rebut the single facility unit presumption, noting in particular the lack of significant employee interchange. Accord: *Haag Drug Co.*, 167 NLRB at 878. Moreover, even though personnel decisions ultimately may be decided at an employer's headquarters, that does not preclude the existence of sufficient local autonomy to support a single facility unit. See *J&L Plate,* 310 NLRB 429, in which personnel policies, as in most cases, were centrally determined but the single location unit was found appropriate as there were local autonomy, minimal interchange, and, as might be expected, separate functions performed at each plant.

4. Common skills, functions, and working conditions. Although common skills, functions, and working conditions among locations are often recited by the Board as factors to be considered in determining whether the single facility presumption has been rebutted, they seldom are relied on by the Board to find a requested separate unit appropriate. Logically, these factors may be relevant to show that there is a potential for interchanging employees from location to location; employees could not easily be interchanged if their skills were not similar. It is, however, the actual extent of temporary interchange, not its potential, that is material to determining whether the group of employees sought has retained a separate identity. We do not believe that, merely because employees at more than one location perform the same work, and use the same skills, employees necessarily lose their separate identity. Moreover, some businesses, including most chain stores, many warehouse and distribution facilities, and some manufacturers, operate with geographically dispersed but substantially identical facilities in which employee skills, functions, and working conditions would predictably be essentially identical. Yet, this does not mean that such facilities must be combined into a broader unit merely because of this factor.

5. Permanent transfers. We tentatively conclude that the factor of permanent transfers is immaterial to the appropriateness of a single location unit. Unlike temporary interchange, permanent transfers do not seem to us to demonstrate any continuing link between the employees at different locations. Even where the Board has stated it has considered permanent interchange supportive of a multi-facility unit, it is the temporary interchange which we think has proved significant in the Board's findings. See, *Sol's,* 272 NLRB 621, 623 (1984). Moreover, the Board recently stated in *Red Lobster,* 300 NLRB 908, 911 (1990), that permanent transfers are a ''less significant indication of actual interchange.'' Accord: *J&L Plate,* 310 NLRB at 430. Frequently, permanent transfers are voluntary or occur for the convenience of the employee involved and do not in any significant manner facilitate or foster a common identity among employees at two or more facilities. See, e.g., *Lipman's, A Division of Dayton—Hudson Corp.,* 227 NLRB 1436, 1438 (1977).

6. Bargaining history. Bargaining history is given substantial weight to support the continued appropriateness of an existing unit; the Board is reluctant to disturb an established unit that is not repugnant to the Act or does not clearly contravene established Board policy. *Washington Post Co.,* 254 NLRB 168 (1981). See also *Batesville Casket Co.,* 283 NLRB 795 (1987), in which the Board declined to clarify an existing two-company existing unit that had been in existence without substantial changes for many years. Cf. *Rock-Tenn Co.,* 274 NLRB 772 (1985). Although bargaining history has been cited as a relevant factor in determining the appropriateness of a single facility unit, we believe it is, for the most part, immaterial to cases covered by the proposed rule.

In cases involving petitions to represent single facility units the proposed rule applies only to unrepresented employees. Thus, there would be no immediate, current bargaining history affecting the requested employees, and the rule would not be disruptive of existing collective-bargaining units. Also the rule would not apply to petitions seeking to sever a group of employees from a larger group of currently represented employees, as for example, existing multi-facility units. Compare, e.g., *Kaiser Foundation Hospitals,* 312 NLRB 933 (1993).

Past bargaining history affecting currently unrepresented employees may be material in showing that a multi-facility unit is appropriate, and to that extent, may have some limited bearing on the appropriateness of a requested single facility unit. In those cases, however, we believe that the factors deemed significant by the rule—geographic separation, local autonomy, and lack of significant interchange—

would outweigh any recent, but extinguished, bargaining history.

In a few situations, however, bargaining history may play a material role in determining the appropriateness of a single-facility unit. In *Joseph E. Seagram & Sons*, 83 NLRB 167 (1943), the Board stated that it would require one group of employees to organize on a multi-plant basis whenever other classifications of employees of the employer had organized themselves on that basis. The Board deemed controlling the overall bargaining pattern in these circumstances. In a later case, *Seagram*, 101 NLRB 101 (1952), the Board modified this holding and concluded that although the bargaining history of one group of employees was ''persuasive,'' it would not necessarily control the bargaining pattern for every other group of unorganized employees. After considering the circumstances, the Board in the second *Seagram* case found the petitioned-for employees could constitute an appropriate unit. Accordingly, if an employer can demonstrate that other classifications of its employees currently are organized largely or exclusively on a multi-plant basis, we could arguably consider that as an extraordinary circumstance. The Board may wish to weigh the significance of that bargaining history, and hence, the appropriateness of the unit sought would be decided by adjudication and not under the rule. We solicit comments concerning these issues.

7. Conclusion. Our overall experience has been that these ''non-material'' factors have not been determinative in deciding single location cases, but, at best, have been used as secondary, bolstering rationale. Although these factors may be relevant to the extent that they show a requested broader unit to be appropriate, they will not, under the rule, be considered controlling to establish that a single location unit is or is not an appropriate unit.

c. Material factors. 1. Introduction. In setting forth the contents of the proposed rule, we reiterate that we have tried to formulate a clear and relatively straightforward rule for determining whether a single location unit is appropriate. Although prior Board decisions were used as guides for establishing material factors, the Board also was guided by which factors it believes are objective and easily ascertainable. We believe the factors chosen are consistent with these goals, but emphasize again that the rule is a proposal only.

The rule suggested in the ANPR incorporated the factors of interchange, geographic distance, local autonomy, and number of employees in the unit. Below are described in greater detail the reasons the Board believes these factors are material and why the rule has been drafted in this manner. Virtually none of the industry, policy organization, or trade association commentators commented on the factors or the language that was proposed as part of the rule. The Board expects with the publication of this Notice, however, that more comments will be forthcoming on the contents. As stated at several points in this document, this is merely a proposed rule. Comments are invited as to what should and should not be in the rule, consistent with our goals for this rulemaking.

2. Temporary employee interchange. In our opinion, no other factor is more commonly determinative for or against the appropriateness of a requested single location unit than temporary employee interchange. Very few cases have been decided without an evaluation of this factor. See, *Executive Resources Associates*, 301 NLRB 400 (1991), in which the Board noted that the lack of significant interchange of the employees in the requested single facility is a ''strong indicator'' that the employees enjoy a separate community of interest; *Spring City Knitting Mills* v. *NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981), stating that interchange is a ''critical factor'' in determining if employees share a community of interest. The presence or absence of temporary interchange is one of the clearest reflections of whether there is likely to be common or separate identity between two or more locations. The more that employees from one facility work at a second facility and with its employees, the greater will be their common interests in the working conditions of both plants.

Because evidence regarding the level of interchange usually is in the possession of the employer, we have drafted the proposed rule so that this element need not be established for the rule to apply, but rather the employer must prove it, in effect, as an affirmative defense. Thus, if the level of interchange exceeded a particular level, it would be an extraordinary circumstance, the rule would be inapplicable, and the case would be decided by adjudication. As described more fully in the section describing extraordinary circumstances (Section IV), the employer would have to demonstrate affirmatively, first by an offer of proof and then by supporting evidence, that the level of interchange involves 10 percent or more of the employees at the requested location for 10 percent or more of the employees' time. It would be presumed to be below 10 percent unless the contrary is shown.

We propose measuring interchange by percentage so that the relative amount of interchange can be compared uniformly. Requiring that interchange be judged both as to the relative number of employees and the relative amount of time they spend at the second facility is, we think, a more precise measurement of interchange. In a slight modification of the rule suggested in the ANPR, we have added a time frame of the one preceding year for measuring the interchange, with the year running from the date the petition is filed for election cases, and from the date a bargaining obligation would arise for unfair labor practice proceedings.

Our use of the 10 percent threshold arises from our view that, for interchange to be an extraordinary circumstance, it must be at a level greater than *de minimis*. We propose 10 percent, but are open to suggestions of alternative levels or measurements. The IBT (C–21) contended that the 10 percent threshold was too low and should be increased to 25 percent to be more consistent with Board precedent, but cited no cases for this assertion. We encourage comments on this alternative as well as on the entire method of judging interchange in the proposed rule. For example, the time employees spend at another location could be measured as percentage of the overall number of work hours at the requested location. Or, there could be one measure for the relative number of employees transferring and another measure for the amount of time the employees spend away from the requested facility. The interchange also could be measured by the number and frequency of employees transferring into the requested facility.

We reiterate that a level of interchange which exceeds the proposed level would not necessarily mean that the unit is inappropriate but only means that the case be decided by adjudication. The Board has not set a standard percentage in prior cases.[7] If there is to be a rule, however, there must be a standard against which the amount of interchange is judged, and we specifically invite suggestions and comments on how best to set forth a reasonable, clear, and workable standard.

3. Geographical separation.We also propose that the rule take account of distance between facilities. As

[7] The Ninth Circuit, however, has characterized levels of interchange of 10% and 8% as ''relatively low'' in cases enforcing Board orders to bargain in which the single facility was found appropriate. See, *Spring City Knitting Co.* v. *NLRB*, 647 F.2d 1011 (1981) and cases cited therein.

proposed, the rule requires that no other facility [8] be within one mile of the proposed unit. Although distance is not as significant a factor as interchange in single location decisions, we believe that where the facilities are a mile or more apart, there is sufficient separation to justify a separate unit, if the other factors are met. Although the AFL–CIO (C–33) and the International Federation of Professional and Technical Engineers (PTE, C–22) argued that interchange should be the only factor considered in single location cases, considering both the level of interchange and the distance between locations ensures that there is neither significant actual interchange nor an immediate potential for interchange. Although we recognize that there are Board decisions in which there has been significant interchange despite the distance of 1 mile that we propose here, or conversely, lack of interchange where the distance between facilities is less than a mile, we are satisfied that where both standards are met, a separate facility unit will be appropriate, absent extraordinary circumstances.

Although a trucking industry commentator contended that geography is an unreliable guide in that industry (MotorFreight, C–35), this is only one factor, and the factor of interchange will help determine if distance is significant. Another commentator noted that with today's communication technology, distance should not be a determinative factor. (NAM, C–12.) Access to communications, however, would not necessarily negate the possibility of employees having a separate identity at a separate location.

Other comments contend that reliance on geography will run afoul of the prohibition of Section 9(c)(5) of the National Labor Relations Act that ''the extent to which the employees have organized shall not be controlling.'' (Strauss, C–1; USCC, C–7, NAM, C–12; IMRA, C–41.) Contrary to this argument, the rule does not place determinative weight on extent of organization, but contains several objective factors, none of which is controlling. Moreover, geographical separation may or may not be related to the extent of organization, but, regardless, the factors are not the same.

As to our proposed distance of one mile between locations for the rule to apply, although single location units have been found appropriate where the distance between locations is less than a mile, the line for applicability must be drawn somewhere. There is no logically compelling ascertainable optimum distance for a rule since single location decisions do not precisely correlate with mileage. Moreover, although the rule applies to locations a mile or more apart, that does not mean locations less than a mile apart cannot be appropriate units. Those units may be found appropriate by adjudication, but we are not sufficiently sure of their appropriateness to render them automatically acceptable under the rule. For example, although many retail chains locate their stores less than a mile apart, a single store unit may be found appropriate. See *Haag Drug Co.,* 169 NLRB 877 (1968); *Sav-on Drugs,* 138 NLRB 1032 (1962). We do not intend for the rule to affect such Board precedent but only that such cases must be resolved through adjudication.

4. Local autonomy. The suggested rule in the ANPR incorporated local autonomy by requiring that the single location have a statutory supervisor on the site. Although the AFL and PTE contended that this factor is unnecessary, requiring some level of local control is consistent with the Board's traditional treatment of this factor as significant in single location decisions. See *Executive Resources,* 301 NLRB at 402, in which the Board noted that local authority in the form of separate supervision was an ''important'' factor demonstrating that the employees enjoy a separate community of interest; see also *Haag Drug,* 169 NLRB at 878, in which the Board pointed out the ''significance'' of local autonomy in determining if a single location unit is appropriate. We continue to believe that the rule must incorporate evidence of local autonomy in some meaningful way to insure that there is some degree of independence and control at the requested location apart from other facilities. We are inclined to adhere to the requirement that a statutory supervisor be present at the requested location. Among other reasons, the Section 2(11) standards for determining supervisory status are generally known and understood.

Board decisions have evaluated local autonomy by an open-ended inquiry of the authority of local managers versus central managers. The full range of their authority is often litigated in an effort to determine the relative scope of local autonomy. See, e.g., *Red Lobster,* 300 NLRB at 912, in which the Board cited and distinguished seven Board decisions in evaluating the authority of local managers versus central managers. Although Board decisions have detailed the extent of local authority of local managers, virtually all of these managers have been statutory supervisors. Rather than analyze the relative scope of each manager's authority, we believe that if a local manager has sufficient authority to be a statutory supervisor, this is sufficient evidence of local autonomy for purposes of unit appropriateness under the rule. Any greater inquiry would perpetuate what we believe is wasteful litigation and unnecessary use of the Board's resources. The purpose of including this factor in the rule is to insure some level of local independence from other locations; it is not an attempt to draw fine lines about the relative authority of local versus central managers. Our inclination, then, is to find that it is sufficient to establish local autonomy if the local individual is a statutory supervisor under any of the indicia.

Yet, we do have some reservations. We are concerned about whether requiring that a statutory supervisor be present is a better approach for the rule than the current open-ended approach of examining the full range of supervisory authority. Will requiring that a statutory supervisor be present result in more disputes about whether an individual is a statutory supervisor? Is it likely that the parties will stipulate in most cases as to the status of a local supervisor, or will the Regional Director have to decide the supervisory status of the local person in charge before determining whether the rule applies? Will requiring a statutory supervisor result in greater litigation than the open-ended approach now in use? The Board invites comments on whether this approach to deciding local autonomy will constitute a satisfactory method of determining whether this element of the rule exists, or whether, on the other hand, it will unnecessarily complicate the rule.

We also propose to modify slightly the language requiring that a local supervisor be on the site of the requested unit. We have added the requirement that the supervisor be present on the site for a regular and substantial period. This does not mean that a statutory supervisor need be present on each and every shift. Our purpose is to require that the supervisor have more than a casual and sporadic relationship to the requested location. In most cases this will mean that his or her supervisory authority will primarily be over the employees in the requested unit.

5. Minimum unit size. The rule as set forth in the ANPR applies only to requested units of 15 or more unit employees. It is our intention that a unit

[8] The Board received virtually no comments on the issue of whether, and how, the Board should define whether a location is, in fact, a single or separate location. After carefully considering the scope of this rulemaking, we have decided that this issue should at the present time be left to litigation and the rule will not apply to this issue.

appropriate under the rule must contain a minimum number of employees, or likely eligible voters. The NAM (C–12) argued that in multi-location cases, the number of employees at a location has never been a factor, and would result in separating employees despite their strong community of interest. We agree that seldom has the number of employees been listed as a factor, but neither has the Board ever used rulemaking on this issue; we feel more comfortable finding a requested separate location unit automatically appropriate if it contains more than a mere handful of employees. The rule was limited to the relatively large number of 15 employees with the belief that the rule should not apply to very small units as these are more problematical and their appropriateness should be left to adjudication. For example, locations with a smaller number of employees may be more likely to be satellites of other locations that might not be appropriate separate from the main facility.[9]

Because the specific figure of 15 employees in the requested unit is not grounded on any mathematical rationale, we invite comments on possible alternatives to this proposed minimum number of employees. One possibility is for the Board to reduce the number to 6 or more employees, which would be consistent with the minimum requisite number of unit employees to which the health care rule applies. Collective Bargaining Units in the Health Care Industry, 54 FR 16336, 16341–42 (1989), reprinted at 284 NLRB at 1580, 1589–90. There, the Board stated that petitions for 5 or fewer employees would be decided by adjudication. The Board noted that there was ''no ineluctable logic'' to the number five, but indicated it was concerned that units of smaller numbers of employees would be impractical in the health care industry and that the employees' concerns for a separate unit might be outweighed by concerns over disproportionate, unjustified costs, and undue proliferation of units. *Id.*, 54 FR at 16342, reprinted at 284 NLRB at 1588.

Another alternative figure could be based on statistics from the Board's annual reports. Those reports contain a table analyzing the size of units in RM and RC representation elections for closed cases in each fiscal year. The statistics are not broken down for single location elections, however. The tables specify the number and relative percentage of all Board elections based on the sizes of the units the eligible employees voted in. The size of the various categories of units begins ''Under 10'' and increases in increments of 10. The Board does not maintain statistics for any smaller units. For fiscal year 1992, 22.6% of all elections occurred in units of fewer than 10 employees; and 20.8% of elections occurred in units of 10 to 19 employees. Thus, 43.4% of all elections in fiscal year 1992 were in units of 19 or fewer eligible voters. 57 Ann. Rep. Appendices, Table 17 (RC and RM Elections). For 1993, 19.6% of the elections were in units of 10 or fewer eligible voters; 20.5% were in units of 10 to 19 eligible voters. 58 Ann. Rep., Appendices, Table 17. For fiscal year 1994, the Board's preliminary statistics indicate that 19.7% of the elections were in units of 10 or fewer employees, and 19.5% were in units of 10 to 19 employees. Thus, it could be that a smaller number should be used as the threshold for the rule's applicability.

Whatever figure ultimately is contained in the rule, smaller single location units will not be precluded from being found appropriate. Their appropriateness, however, will not be decided by application of the rule but rather by adjudication.

d. Summary and tentative conclusions. We believe that when locations are geographically distant, interchange is minimal, a statutory supervisor is present, and the requested unit contains 15 or more employees, in most single location cases, the Board will find the requested single location unit appropriate; these factors also are clear and easily ascertainable. The proposed rule sets forth these factors as standards. We are open to comments on all these factors, as well as suggestions on possible alternative standards.

This rulemaking is not an attempt to shoehorn all single location unit cases into decision by rulemaking; it is rather an attempt to decide the majority of routine single location cases in a more expeditious manner. Where the stated elements of the rule do not exist, or the cases otherwise present unusual or novel issues, the rule will not apply. As discussed in more detail in the next section on the extraordinary circumstances exception, the novel and unusual cases will fall outside the rule and will be decided by adjudication.

Finally, we are aware of the paucity of empirical information on the feasibility or practicality of bargaining in single facility as opposed to multi-facility units. We specifically invite comments as to feasibility of bargaining in units based on these proposed elements or other elements.

IV. Extraordinary Circumstances Exception

In order to ensure due process, the Board has included in the proposed rule an exception for ''extraordinary circumstances.'' Even when the rule otherwise applies, the extraordinary circumstances exception renders the rule inapplicable upon a showing of good cause, and allows for adjudication, or individual treatment of unique cases so as to avoid accidental or unjust application of the rule.[10] While the petitioner or representative of the employees in the requested unit has the burden of establishing the elements of the rule, the party seeking to invoke the extraordinary circumstances exception has the burden of establishing, at first by an offer of proof and later, if appropriate, by the introduction of evidence, that the extraordinary circumstances exist. If the evidence proffered constitutes an extraordinary circumstance, the case will be decided by adjudication. As is true with the health care rule, see 53 FR at 33932, reprinted at 284 NLRB 1573, our intent is to construe the extraordinary circumstances exception narrowly, so that it does not provide an excuse, opportunity, or ''loophole'' for redundant or unnecessary litigation and the concomitant delay that would ensue.

We have codified the definition of extraordinary circumstances in the rule, as well as the burden, so that it is clear what this provision means. One common misconception regarding this exception to the rule is evident from our experience with the health care rules. The Board decides first whether the proffered evidence is an extraordinary circumstance. But even where the Board finds that an extraordinary circumstance

[9] The rule would not apply if the unit did not contain the minimum number of employees at the requested location. With regard to situations where the unit contains a sufficient number of employees but another location is allegedly a satellite of the requested location, and by virtue of its very small size or other characteristics could not be represented separately from the requested unit, we would find this to be an extraordinary circumstance which would require the case be decided by adjudication. If the other location is so closely associated to the requested unit that it would constitute an accretion to that unit if it had been newly formed, then the petition would have to be decided under adjudication. Thus, in situations where it is established that there is a facility which is a satellite to the requested unit, the latent inappropriateness of this facility would be directly relevant to the separate appropriateness of the requested unit.

[10] Single location cases may also be decided by adjudication if one of the elements of the rule is not present, e.g., the locations are less than one mile apart. This, however, is not an extraordinary circumstance, but a case to which the rule does not apply. In extraordinary circumstances, the rule on its face applies, but once extraordinary circumstances are established, the rule is inapplicable and the case is decided by adjudication.

exists, this does not mean that the requested unit is ''excepted'' from being an appropriate unit. Rather, establishing extraordinary circumstances means that the case will be decided by adjudication and the requested unit may or may not be found appropriate.

We have codified one specific extraordinary circumstance in the rule: where 10 per cent or more of the unit employees have temporarily transferred to other facilities of the employer 10 per cent or more of the time during the prior year. We also have requested comments on whether this proposed level of interchange is appropriate.

The rule, however, also allows for other extraordinary circumstances. We have suggested some possibilities in this supplementary information. In Section III.B.1.b.6, we mentioned the possibility that a successful history of bargaining on a broader basis might be an extraordinary circumstance. Section III.B.1.c.5, footnote 9, suggests treating the existence of a small satellite facility as an extraordinary circumstance. These, however, are merely suggestive of the type of situations that might raise an extraordinary circumstance. Invited comments may lead to our reassessing them.

Although we have described possible extraordinary circumstances, there undoubtedly are others; obviously we cannot foresee all circumstances involving the appropriateness of a requested single facility unit. It is for this reason that we have included an extraordinary circumstances exception. To the extent that there is concern that by rulemaking we will preclude addressing unusual cases outside the routine cases, we believe this provision adequately addresses those concerns. We are not mandating any particular result by characterizing a circumstance as extraordinary, but are only requiring that it be decided by adjudication. In inviting comments, however, we emphasize that it is our intention to construe this provision narrowly.

V. Docket

The docket is an organized and complete file of all the information submitted to or otherwise considered by the NLRB in the development of this proposed rulemaking. The principal purposes of the docket are: (1) To allow interested parties to identify and locate documents so they can participate effectively in the rulemaking process; and (2) to serve as the record in case of judicial review. The docket, including a verbatim transcript of any hearings that may be held, the exhibits, the written statements, and all comments submitted to the Board, is available for public inspection during normal working hours at the Office of the Executive Secretary in Washington, DC.

VI. Regulatory Flexibility Act

As required by the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), the Board certifies that the proposed rule will not have a significant economic impact on small entities. Prior to this rule, parties before the Board were required to litigate the appropriateness of a single location unit if they could not reach agreement on the issue. On implementation of this rule, parties will no longer be required in every case involving this issue to engage in litigation to determine the appropriateness of units, thereby saving all the parties the expense of litigation before the Board and the courts in cases governed by the rule. To the extent that organization of employees for the purpose of collective bargaining will be fostered by this rule, thereby requiring small entities to bargain with unions, and that employees may thereby exercise rights under the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), the Board notes that such was and is Congress' purpose in enacting the Act.

VII. Statement of Member Cohen

On June 1, 1994, the Board issued an Advance Notice of Proposed Rulemaking (ANPR) with respect to a rule concerning single-facility units. Although I had reservations about the wisdom and necessity for such a rule, I joined my colleagues in issuing the ANPR. I did so because public comment would serve to clarify the issues and to enlighten the Board's decision-making processes concerning these matters.

The comments have now been received, and I have studied them carefully. Having done so, I am still not firmly persuaded that there is a need for a rule. Further, assuming arguendo that there is such a need, I have some reservations about the content of the rule proposed by my colleagues. However, I have decided to withhold final judgment on these matters, pending public response to the specific rule that is now being proposed. Accordingly, without necessarily endorsing all that my colleagues have said about the proposal, I join them in soliciting further public response to it.

As I see it, the proposed rule departs from the multi-factorial approach described in *J & L Plate,* 310 NLRB 429 (1993). Concededly, that departure has the potential advantage of bringing greater clarity and expedition to the processing and disposition of these cases. In addition, it may reduce occasionally burdensome and expensive litigation. On the other hand, the current system has its own values. The relevant factors are well known, and they can be applied to accommodate the peculiarities of individual cases. The Board decisions, with rare exceptions, have been upheld by the courts. In addition, the stipulation rate remains high. Finally, even the litigated cases are usually resolved within a reasonably short period of time.

To be sure, there is always room for improvement, and some cases linger far too long. As I see it, the issue before the Board is one of balance: whether the potential benefits of obtaining greater expedition and clarity under the proposed rule outweigh the potential risks of jeopardizing the precision, stability, and general judicial acceptance of the current approach. I welcome the public's experience and expertise concerning the resolution of this delicate balance.

List of Subjects in 29 CFR Part 103

Administrative practice and procedure, Labor management relations.

Regulatory Text

For the reasons set forth at 59 FR 28501 (June 2, 1994) as supplemented and modified by this Supplementary Information, 29 CFR Part 103 is proposed to be amended as follows:

PART 103—OTHER RULES

1. The authority citation for 29 CFR Part 103 is revised to read as follows:

Authority: 5 U.S.C. 553; 29 U.S.C.156.

2. Section 103.40 is added to subpart C to read as follows:

§ 103.40 Appropriateness of single location units.

(a) The rule in this section applies to all employers over which the Board asserts jurisdiction except: public utilities; employers engaged primarily in the construction industry; and employers in the maritime industry in regard to their ocean-going vessels.

(b) An unrepresented single location unit shall, except in extraordinary circumstances, be found appropriate for the purposes of collective bargaining; Provided:

(1) That 15 or more employees in the requested unit are employed at that location; and

(2) That no other location of the employer is located within one mile of the requested location; and

(3) That a supervisor within the meaning of Section 2(11) of the National Labor Relations Act is present at the

requested location for a regular and substantial period.

(c) Whenever a party, first through an offer of proof and then by supporting evidence, establishes that an extraordinary circumstance exists or where an employer falls outside the rule in this section, the Board shall determine the appropriateness of a requested single location unit by adjudication.

(d) An extraordinary circumstance will be found to exist, inter alia, if 10 percent or more of the unit employees have been temporarily transferred to other facilities of the employer for 10 percent or more of their time during the 12 month period preceding the filing of a petition for an election or, where no petition for election has been filed during the 12 month period preceding either the demand for recognition or the time when a bargaining obligation would arise.

Dated, Washington, DC, September 22, 1995.

By Direction of the Board.

National Labor Relations Board.

John J. Toner,

Acting Executive Secretary.

[FR Doc. 95–24001 Filed 9–27–95; 8:45 am]

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Parts 1228 and 1232

RIN 3095–AA18

Audiovisual Records Management

AGENCY: National Archives and Records Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Archives and Records Administration (NARA) proposes to revise and expand the regulations pertaining to audiovisual records management and the transfer of permanent audiovisual records to NARA from Federal agencies. The revisions are necessary in order to update standards, to provide coverage for new audiovisual media that are used in the creation of Federal records, and to reflect the transfer to the Department of Commerce's National Technical Information Services of the centralized audiovisual distribution services formerly performed by the National Audiovisual Center. This regulation affects Federal agencies.

DATES: Comments must be received in writing on or before November 27, 1995.

ADDRESSES: Comments should be sent to the Director, Policy and Planning Division (PIRM–POL), National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740–6001.

FOR FURTHER INFORMATION CONTACT: Mary Ann Hadyka or Nancy Allard at 301–713–6730 or TDD 301–713–6760.

SUPPLEMENTARY INFORMATION: Following is a discussion of the significant changes proposed by this regulation:

Part 1228

Four significant changes are made to § 1228.184 of this part, which governs the transfer of permanent audiovisual records to NARA from Federal agencies. First, the revised regulation provides for the transfer of a videotape as well as a projection print for motion picture film, if both exist. The requirement for preprint (negatives, masters, etc.) is still the same, however. Second, the record elements for compact discs and video discs are described for the first time. Third, audio and video tape recordings are cross-referenced to § 1232.30 of this subchapter which requires the use of open-reel audiotapes and industrial-quality or professional videotapes for the creation of original audiovisual records. Fourth, the revision permits agencies to provide related captions or finding aids in electronic form that are in accordance with § 1228.188 of this part which governs the transfer of electronic records.

Part 1232

The revision includes audiovisual definitions and updates sources for various standards. Section 1232.20, Agency program responsibilities, remains essentially the same as the current § 1232.4, but requirements for training and inspection of contractor facilities have been added. Other sections have been reorganized and revised for greater emphasis and clarity and to provide more detailed instructions on nitrocellulose film, unstable cellulose acetate film, storage conditions, maintenance and operations, choosing formats, and disposition. The standard for residual sodium thiosulfate (hypo) on newly processed black-and-white film has been modified. The storage standard for relative humidity has been lowered to 30–40 percent from the earlier range of 40–60 percent. X-ray film is included in this regulation for the first time, because it is generally scheduled for long retention periods and must therefore be stored under controlled environmental conditions. The provision for temporary storage space in NARA's cold storage vaults has been deleted because the space has been reserved for color film materials that are transferred to the legal custody of the National Archives. The regulations governing centralized audiovisual services under the current § 1232.6 have been deleted from this regulation because of the transfer of this function to the Department of Commerce. NARA no longer offers the Stock Footage Depository Program which was described in the current § 1232.6. Agencies may establish their own programs or dispose of the footage in accordance with an approved records schedule.

This revision does not address digital photographic records, as standards have not been developed for these records. NARA is investigating the technology and plans to provide records management guidance for these records. Government-wide requirements cannot be established at this time.

This rule is a significant regulatory action for purposes of Executive Order 12866 of September 30, 1993. As such, it has been reviewed by the Office of Management and Budget. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small entities.

List of Subjects

36 CFR Part 1228

Archives and records.

36 CFR Part 1232

Archives and records, Incorporation by reference.

For the reasons set forth in the preamble, NARA proposes to amend 36 CFR chapter XII as follows:

PART 1228—DISPOSITION OF FEDERAL RECORDS

1. The authority citation for part 1228 continues to read as follows:

Authority: 44 U.S.C. chapters 21, 29, and 33.

2. Section 1228.184 is revised to read as follows:

§ 1228.184 Audiovisual records.

The following types of audiovisual records appraised as permanent shall be transferred to the National Archives as soon as they become inactive or whenever the agency cannot provide proper care and handling of the records, including adequate storage conditions, to facilitate their preservation by the National Archives (see part 1232 of this chapter). In general the physical types described below constitute the minimum record elements for archival purposes that are required to provide for future preservation, duplication, and reference needs.