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INTRODUCTION

Sufficient time has passed since the National Labor Relations Board asserted jurisdiction over colleges and universities in 1970 to make it clear that no other single representation field has spawned as much controversy in so short a time, and has left as many unanswered questions. It is the purpose of this article to review the Board's activity in the area, to comment on precedent, and to raise a number of questions about past and potential Board action so that those just coming into contact with the field of university bargaining will be, if not well armed, at least aware.

Basic among such questions will be the issue of the extent to which the Board should decline to exercise jurisdiction because an institution has a public or quasi-public character. Two recent decisions of the Board suggest that it shall interpret very narrowly strictures upon jurisdictional assertion contained in extant legislation. A second issue that will be examined is the justification for the Board's departure in its faculty decisions from the established precedent of including regular part-time employees with regular full-time employees in one overall bargaining unit. The implications of that departure will be discussed particularly with respect to fragmentation of those persons with similar teaching interests into potentially competitive units. Another question that will be addressed is the propriety of including department chairmen in faculty voting units because the department "shares authority" with the chairmen in personnel decisional areas. Ultimately, the question that will be raised is whether the Board, in including department chairman in full-time faculty units, has placed too much emphasis on a chairman's managerial style and his self-determined grant of authority to departmental members. Other important questions considered will include the scope of the bargaining unit, special collective bargaining issues in higher education, and the significant impact of the Board's doctrine of exclusive representation on traditional collegial governance forms.

I. JURISDICTION

The nation's institutions of higher learning remained immune from the impact and influence of the National Labor Relations Act¹ for thirty-five years. The decision that colleges and universities fell outside the ambit of the jurisdiction conferred under the Act was initially made by the National Labor Relations Board in 1951 in *Trustees of Columbia University*.² There, the Board, while finding that the Uni-

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¹ 29 U.S.C. § 151 *et seq.* [hereinafter the Act].

² 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951).

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versity satisfied the requirements of the Act in terms of its effect on interstate commerce,³ nevertheless held that non-profit organizations were intended to be within its jurisdiction "only in exceptional circumstances and in connection with purely commercial activities of such organizations."⁴ Based on this interpretation of the Act, the Board continued for nearly two decades to decline jurisdiction over institutions of higher learning.⁵ During this period, however, the nation experienced a tremendous growth in institutions of higher education,⁶ which had a "massive impact" on interstate commerce. Faced with these factors, and following a re-examination of the legislative history of non-profit organizations, the Board in *Cornell University*⁷ specifically overturned *Columbia* and asserted jurisdiction over private colleges and universities.⁸

³ Section 159(c)(1) of the Act confers on the Board the jurisdiction to conduct hearings involving the certification or decertification of bargaining units if, after examining the petition, the Board determines "that a question of representation affecting commerce exists." The term "commerce" is defined in section 152(6) and (7) of the Act to mean "trade, traffic, commerce, transportation, or communication among the several states"

In determining whether the employer is sufficiently involved in interstate commerce to warrant the Board's assertion of jurisdiction, the Board has adopted minimum standards of interstate monetary dealings. Thus, in *Federal Dairy Co., Inc.*, 91 N.L.R.B. 638, 26 L.R.R.M. 1538 (1950), the Board stated that, given the time and budgetary constraints it faced, the Board would decline jurisdiction where the employer's only interstate dealings involved the direct inflow of goods and that inflow was less than \$500,000 in value annually. 91 N.L.R.B. at 639, 26 L.R.R.M. at 1539. (See also, *Dorn's House of Miracles, Inc.*, 91 N.L.R.B. 632, 633, 26 L.R.R.M. 1545, 1546 (1950) where a \$1,000,000 indirect inflow of goods was deemed sufficient to justify the assertion of jurisdiction).

⁴ 97 N.L.R.B. at 427, 29 L.R.R.M. at 1009. Section 152(2) of the Act excludes from the definition of the term "employer"

the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act

Petitioner, in *Columbia*, argued that the specific exclusion of only charitable hospitals in § 152(2) supported an inference that Congress did not intend to exclude from coverage of the Act other nonprofit organizations. 97 N.L.R.B. at 427, 29 L.R.R.M. at 1099. The Board, however, noted that the Conference Report on the LMRA indicated congressional approval of the Board's policy of asserting jurisdiction over nonprofit organizations "only in exceptional circumstances and in connection with purely commercial activities of such organizations." *Id.*

⁵ E.g., *Leland Stanford Junior Univ.*, 152 N.L.R.B. 704, 705-06, 59 L.R.R.M. 1161, 1161-62 (1965); *University of Miami*, 146 N.L.R.B. 1448, 1450, 56 L.R.R.M. 1085, 1086 (1964).

⁶ See *Cornell Univ.*, 183 N.L.R.B. 329, 332, 74 L.R.R.M. 1269, 1273 (1970).

⁷ 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970).

⁸ *Id.* at 334, 74 L.R.R.M. at 1275. In *Cornell University*, the Board, in reaching its decision to assert jurisdiction, first examined the tremendous interstate commercial involvement of the institution along with noting the magnitude of the institution's annual budget and then current assets and portfolio. *Id.* at 330, 74 L.R.R.M. at 1271. Next, the Board looked to § 14(c) of the Landrum-Griffin Act where Congress "authorized and set limits on the Board's discretionary refusal to exercise jurisdiction." *Id.* at 331, 74

Shortly after the *Cornell* decision, the Board, in Rule 103.1 specified a minimum gross annual revenue figure of \$1 million as the touchstone for determining which colleges would come within its fold.⁹ The Board estimated that approximately 80 percent of all private colleges and universities would be covered under this standard. However, certain questions concerning the Board's assertion of jurisdiction remain unanswered. The most troublesome of these concerns the distinction between public and private institutions in determining what constitutes a "private" institution over which the Board will assert jurisdiction.

The line between private and public institutions has not been neatly drawn. In the private industrial sector, growing governmental financial input has resulted in a situation where many of the so-called "private industries" are financed by a mix of public tax and private investment dollars.¹⁰ Similarly, many educational institutions which were originally established through private endowments have increasingly relied on heavy public support.¹¹ In contrast, many so-called "public universities" presently operate as essentially private institutions. These universities are virtually autonomous from the state in the sense that although they receive some government funding, they are managed internally by people who have no connection with the government.¹² This merging of public and private characteristics has presented the Board with the problem of determining, in the university sector, which universities should appropriately be considered "quasi-public" employers.

In interpreting Section 2(2) of the Act,¹³ the Board has dealt with the problem of defining a "quasi-public" employer in other in-

L.R.R.M. at 1272. See 29 U.S.C. § 164(c). The Board concluded from its examination of that section that "[w]hile the language of Section 14(c) does not compel the Board to assert jurisdiction, it does manifest a congressional policy favoring such assertion where the Board finds that the operations of a class of employers exercise a substantial effect on commerce." *Id.* at 332, 74 L.R.R.M. at 1272. In light of these statutory guidelines and in view of the economic impact of federal involvement in the educational institutions, the Board overruled *Columbia University* and asserted jurisdiction. *Id.* at 332-334, 74 L.R.R.M. at 1273-75.

The First Circuit, in the only circuit court decision in the area of college unit determinations, accepted as a valid exercise of its administrative authority the Board's reevaluation of the congressional policy on the question of Board jurisdiction over non-profit employers. For a discussion of that circuit court decision see text at notes 152-156 *infra*.

⁹ *National Labor Relations Board: Statement of Procedures, Rules and Regulations*, Series 8, as amended, 29 C.F.R. § 103.1 (1959).

¹⁰ Menard & DiGiovanni, *NLRB Jurisdiction over Colleges and Universities: A Plea for Rulemaking*, 16 WM. & MARY L. REV. 599, 604-05 (1975).

¹¹ Examples of this support are "government aid to education programs, public loans for students, and government contracts." Menard & DiGiovanni, *supra* note 10, at 604-05.

¹² See Menard & DiGiovanni, *supra* note 10, at 604.

¹³ Section 2(2) of the Act, 29 U.S.C. § 152(2) (1974) provides:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any

dustries. In determining whether a particular quasi-public industrial employer is a "political subdivision" within the framework of Section 2(2) and thus not subject to its jurisdiction, the Board, in general, has looked at three factors. The existence of even one of these factors constitutes a sufficient basis for a denial of jurisdiction. The first factor is whether the employer-institution was state created and/or administered by state-appointed officials; the second is whether the employer-institution performs an essential governmental function; and the third factor is significant state control.¹⁴

The Board's first post-Cornell decision in this area was *Temple University*.¹⁵ Originally chartered as a private-non-profit college, Temple was absorbed into the state's higher education system in 1965 by the Pennsylvania legislature. Although the institution remained nominally private, the Board did not assert jurisdiction, finding that the heavy degree of state control made it a "State-related University" and one which had a "unique relationship with the state."¹⁶ The Board ruled that because of this "unique relationship", "it would not effectuate the policies of the Act to assert jurisdiction over the University."¹⁷ In so holding, the Board rested its decision against jurisdiction upon its discretionary powers,¹⁸ and not on the theory that the University was a "political subdivision" of the state within the meaning of Section 2(2) and therefore specifically excluded from the purview of the Act. By resting its decision on Temple University's "unique relationship" to the state, the Board effectively carved out an exception to the jurisdictional standards of Rule 103.1.¹⁹ Yet, it failed

wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

¹⁴ Note, *The NLRB's Assertion of Jurisdiction Over Universities*, 32 UNIV. OF PITTS. L. REV. 416, 425-26 (1971), and cases cited therein.

¹⁵ 194 N.L.R.B. 1160, 79 L.R.R.M. 1196 (1972).

¹⁶ *Id.* at 1160, 79 L.R.R.M. at 1197. Among the factors considered by the Board in determining that Temple University was a "State-related University" were state control over the composition of the Board of Trustees, regulation of tuition for state residents, inclusion of the University's annual budget request in the state's overall budget, state reporting requirements and, perhaps most significantly, the fact that some 67% of the institution's budget was comprised of state money. *Id.*

Apparently, this 67% figure was significant to the Board since it demonstrated that the public financial support exceeded private endowment. *See id.*

¹⁷ *Id.* at 1161, 79 L.R.R.M. at 1198.

¹⁸ *See id.* The source of this discretionary power is unclear. Section 14(c)(1) of the Act, as amended, 29 U.S.C. § 164(c)(1) provides only that:

The Board in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employees where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . .

In *Temple*, however, the University admitted that it not only was an "employer" but also met the "affecting commerce" standard set forth in *Cornell*. *Id.*

¹⁹ See text at note 9 *supra*.

to articulate the distinctions, if any, between this exception and the exclusion of "political subdivisions." This failure to articulate the distinctions, and, additionally, the failure to enunciate any standards for the application of the "unique relationship" exception might allow an unwarranted expansion of the "political subdivision" exception as it has developed in industrial contexts.

These factors may, however, no longer present a problem. In recent decisions, the Board, while not officially abandoning this "unique relationship" jurisdictional exception, has seemingly indicated that the exception will be stringently limited to situations where state intervention affects the university's handling of its labor relations. An example of this shift may be seen in the Board's treatment of *Howard University*.²⁰ Originally, in *Howard*, the Board, over a strong dissent, relied upon the "unique relationship" jurisdictional exception in refusing to assert jurisdiction over the University.²¹ The dissenters argued that the Board should adopt its *Cornell* approach²² in the quasi-public university area in all situations except where the Government has effective control over the conduct of labor relations at the educational institution.²³ Recently, however, the Board reevaluated the facts of

²⁰ 211 N.L.R.B. 247, 86 L.R.R.M. 1389 (1974).

²¹ *Id.* at 248, 86 L.R.R.M. at 1391. The majority, in declining to assert jurisdiction over the University, initially noted that Howard University was established by congressional charter and its operations had been traditionally funded, in part, by the federal government. *Id.* at 247, 86 L.R.R.M. at 1391. Pursuant to its charter, Howard University received its funds from Congress by way of a line item in HEW's annual budget; however, to receive the money, the University had to relinquish to the Secretary of HEW the control and supervision of those appropriations. Consequently, when the University was expending federal funds for an item costing over \$2,500, it had to purchase that item through the GSA. The federal money had generally represented approximately 50% of the total academic budget. *See id.* at 247, 86 L.R.R.M. at 1390. In addition, the majority noted that it had been the University's policy to maintain comparability between the wages and benefits of its non-faculty employees and those of the Federal Government employees. *Id.* Moreover, the majority concluded that because of the "unique relationship" between the Federal Government and the University, effective use of the collective bargaining process would involve many Federal Agencies over which the Board could not assert jurisdiction. *Id.* at 248, 86 L.R.R.M. at 1391.

²² In *Cornell* the Board focused on the University's impact on interstate commerce. See note 8 *supra*.

²³ 211 N.L.R.B. at 250, 86 L.R.R.M. at 1392. The dissenters argued that the University had not ceded its administrative independence to the Federal Government, and they further argued, citing *Cornell University*, that Government funding had, in the past, been rejected by the Board as a sufficient basis for exempting from the Board's jurisdiction an educational institution. *Id.* at 249, 86 L.R.R.M. at 1391. The dissenters went on to assert that, in determining whether to take jurisdiction over such quasi-public institutions, the proper question for the Board to ask is "whether enough authority over labor relations is lodged in the University to enable a satisfaction of bargaining obligations under the Act." *Id.*, 86 L.R.R.M. at 1392. Moreover, the dissenters noted that the majority's reasoning, based on Federal Agency involvement, opened the door for a new area of labor relations not covered by congressional legislative regulation: "For if state labor relations agencies follow the same rationale, they will also decline jurisdiction wherever other governmental agencies are sufficiently involved in the financial affairs of private employers, regardless of who actually conducts their labor relations." *Id.* at 250, 86 L.R.R.M. at 1392.

Howard,²⁴ and held that Howard's relationship to the Federal Government was distinguishable from Temple's relationship to Pennsylvania, for, in spite of receipt of substantial Federal monetary aid (representing about 60% of the University's budget) and some policing of expenditures of such funds, Howard had never been required to cede administrative independence to the Federal Government. The most important element noted by the Board was Howard's autonomy over its own personnel and labor relations matters.²⁵ Thus, while the Board purported to apply the *Temple* "unique relationship" jurisdictional standard, it would seem that, given the existence of the significant financial involvement of the Federal Government in the University, and further given the Board's emphasis on the University's autonomy in handling its personnel and labor relations matters, the Board was, in fact, applying the standard enunciated by the dissenters in the original *Howard* decision.

The Board's decision in *University of Vermont*²⁶ may be reviewed as additional support for the inference that the Board has, or is prepared to limit the "unique relationship" exception. In that decision, the Board was confronted with another hybrid educational institution,²⁷ yet it made no reference to the "unique relationship" standard. The Board simply ruled that the University, although receiving about a quarter of its funds from the State, was not a "political subdivision" of the State.²⁸ Since the University was not a "political subdivision" of the State and since the University met the requisite interstate commerce standards,²⁹ the Board asserted jurisdiction over the institution.³⁰

While the *University of Vermont* decision can be read merely as an example of a quasi-public institution that is so independent of state influence that a "unique relationship" analysis is unwarranted, it would seem that the *Vermont* decision, coupled with the Board's decision in *Howard University*, indicates that the Board will assert jurisdiction over a quasi-public university as long as there exists the requisite interstate commerce and university autonomy in the handling of its labor relations, and as long as the university is not a "political subdivi-

²⁴ 224 N.L.R.B. No. 44, 92 L.R.R.M. 1249 (1976).

²⁵ *Id.* at , 92 L.R.R.M. at 1251.

²⁶ 223 N.L.R.B. No. 46, 91 L.R.R.M. 1570 (1976).

²⁷ State legislation in 1955 had transformed the University from a private institution to "an instrumentality of the state for providing public higher education." No. 66 [1955] Vt. Acts 57.

²⁸ 223 N.L.R.B. No. 46, 91 L.R.R.M. 1570 (1976). The Board found that the University, "although receiving about 25 percent of its total revenues from the State is completely independent of the State as to administration, personnel policies, accounting procedure and in other essential areas free from state control." (The L.R.R.M. report has omitted the jurisdictional section of the Board's decision in *UVM*, therefore see *University of Vermont*, No. 626 (D-Vt., filed March 29, 1976)).

²⁹ The University's gross annual revenue exceeded \$1 million and it purchased or received goods valued in excess of \$50,000 from points outside of the State. *University of Vermont*, slip op. at 2.

³⁰ *University of Vermont*, slip op. at 2.

sion" of the state or Federal Government.

II. UNIT DETERMINATIONS

A. *Part-Time Faculty*

(1) *Part-Time Faculty Included in the Unit*

For forty years, the Board has followed in the industrial sector a consistent policy of including in the same unit regular part-time employees with full-time employees doing similar work. This policy controlled despite the fact that regular part-time and full-time employees frequently enjoy different economic benefits and working conditions.³¹ The Board followed this practice when it first entered the area of college-unit determinations, and rejected employer arguments that faculty should be treated differently from industrial employees. Thus in *Long Island University (C.W. Post Center)*,³² the Board included part-time faculty in the unit of full-time faculty despite the fact that they were not eligible for the same fringe benefits as full-time faculty; had no voting or tenure rights; and had substantially lesser salaries when compared on a semester-hour basis to full-timers.³³ In making such a unit determination the Board emphasized the fact that part-time faculty were professionals, performing the same basic function as full-time faculty. In light of the shared teaching role, the Board stated that neither the difference in benefits, the high ratio of part-time to full-time employees, nor the fact that the part-timers received additional compensation elsewhere militated against including the part-time faculty in the full-time unit. This finding was buttressed by the fact that, although unable to vote, the part-timers could attend and participate in faculty meetings.³⁴

A similar fact pattern existed in *University of New Haven*³⁵ where part-timers were also included in the bargaining unit.³⁶ However, while in *C.W. Post* the Board made no distinction between part-timers on the basis of the number of class hours taught, in *University of New Haven*, the Board emphasized that the adjunct faculty members were "regular" part-time employees and defined the term "regular part-time employees" as including only those part-time faculty members who taught at least three hours a week (compared to twelve hours for

³¹ *Sears, Roebuck & Co.*, 172 N.L.R.B. 1266, 1266, 68 L.R.R.M. 1469, 1469 (1968); *Southern Ill. Sand Co.*, 137 N.L.R.B. 1490, 1492, 50 L.R.R.M. 1414 (1962); *Booth Broadcasting Co.*, 134 N.L.R.B. 817, 820, 49 L.R.R.M. 1278 (1961); *Jat Transp. Corp.*, 128 N.L.R.B. 780, 786, 46 L.R.R.M. 1405 (1960). The practice goes back at least to 1937 - see *William Diamonds & Co.*, 2 N.L.R.B. 859, 865, 1 L.R.R.M. 116 (1937).

³² 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

³³ *Id.* at 906, 77 L.R.R.M. at 1003.

³⁴ *Id.*

³⁵ 190 N.L.R.B. 478, 77 L.R.R.M. 1273 (1971).

³⁶ *Id.* at 478, 77 L.R.R.M. at 1274.

full-time faculty members); participated in deliberations of the school's board of governors; and had an average length of service of six years.³⁷ The Board extended this rationale in *University of Detroit*,³⁸ where it adopted a new standard to define "regular" part-time employees. In *University of Detroit*, the Board determined that only part-time faculty who taught at least 25% of a full load would be considered "regular" part-time employees, and thereby could be included in a unit with full-time faculty.³⁹ The Board believed that such a standard was necessary to insure that the part-timers included in the full-time faculty unit would have a substantial and continuing interest in the wages, hours, and conditions of employment of the unit employees.⁴⁰

Despite wide application,⁴¹ the *University of Detroit* standard was substantially modified in *Catholic University*⁴² due to difficulties in applying the 4:1 ratio.⁴³ After some extensive alterations and adaptations, the Board in *Catholic University* included in the bargaining unit any part-time faculty with 25% or more of a full load and any part-timers who maintained this teaching load pursuant to a written appointment in at least one semester during any two of the previous three consecutive academic years.⁴⁴

(2) *Part-Time Faculty Excluded*

Although significantly altered in *Catholic University*, the *New Haven* rule was not officially abandoned until the Board's decision in *New York University*.⁴⁵ In that decision the Board excluded all part-time faculty members from the faculty unit.⁴⁶ The decision was grounded on four principal distinctions between full- and part-time employees: compensation; participation in University governance; eligibility for tenure; and working conditions.⁴⁷ With respect to compensation, the Board found that although part-time faculty received modest salaries amounting to a "respectable honorarium," most of

³⁷ *Id.*, 77 L.R.R.M. at 1274.

³⁸ 193 N.L.R.B. 566, 78 L.R.R.M. 1273 (1971).

³⁹ *Id.* at 567, 78 L.R.R.M. at 1274.

⁴⁰ *Id.* In *University of Detroit* part-timers participated in University governance, had educational backgrounds similar to full-timers and "in the classroom engage[d] in exactly the same activity—teaching." *Id.* On the other hand, most fringe benefits were not available to them, and they could not attain tenure. *Id.*

⁴¹ *E.g.*, Tusculum College, 199 N.L.R.B. 28, 32, 81 L.R.R.M. 1345, 1349 (1972); Manhattan College, 195 N.L.R.B. 65, 66, 79 L.R.R.M. 1253, 1254-55 (1972); cf. Florida Southern College, 196 N.L.R.B. 888, 889, 80 L.R.R.M. 1160, 1163 (1972).

⁴² 201 N.L.R.B. 929, 82 L.R.R.M. 1385 (1973).

⁴³ *Id.* at 930, 82 L.R.R.M. at 1386. From the record the Board was unable to calculate a precise average teaching load for the full-time faculty.

⁴⁴ *Id.* at 931, 82 L.R.R.M. at 1386.

⁴⁵ 205 N.L.R.B. 4, 83 L.R.R.M. 1549 (1973).

⁴⁶ *Id.* at 8, 83 L.R.R.M. at 1553.

⁴⁷ *Id.* at 7, 83 L.R.R.M. at 1552.

their income came from other sources.⁴⁸ Furthermore, part-time faculty were not eligible for fringe benefits.⁴⁹ As for general University governance, the Board found that part-timers were excluded in that they could not participate in department decisions on appointments, promotions or tenure, nor were they consulted with regard to curriculum matters, degree requirements, selection of department chairmen, or admissions requirements. The Board further found that unlike full-time faculty, none of the part-time faculty was eligible for tenure. Finally, with respect to working conditions, the Board observed that part-timers were not expected to engage in research, writing or other creative endeavors; nor were they expected to counsel students or participate in department or University affairs.⁵⁰

Considering all of the foregoing facts, a majority of the Board was persuaded that there existed such a dissimilarity of interests between full and part-time faculty, that they should not be in the same unit.⁵¹ Chairman Miller dissented, however, arguing that the majority's fragmentation of the unit would impede rather than further the purposes of the Act. By mandating separate bargaining units, the majority, in effect, was creating two competing faculty units that would separately bargain for the same budget dollars, and thereby hinder any University attempts at accommodation.⁵² Member Fanning also dissented, arguing that the Board's original rationale for the inclusion of the part-time faculty—similar qualifications and functions—should be controlling. Fanning asserted that "tangential matters only indirectly related to the faculty's role as teachers should not be allowed to obscure [the Board's] judgment."⁵³ The arguments presented in dissent have not proved persuasive, however, as the *New York University* ruling has been widely followed.⁵⁴ Still, the decision raises the perplexing issue of whether the part-time faculty, now segregated from full-timers, can exist as a separate unit.

(3) *Part-Time Faculty in a Separate Unit*

One of the concerns voiced in dissent in *New York University* was whether the Board, by excluding all part-time faculty members, was inevitably moving towards recognizing a unit composed of only part-

⁴⁸ *Id.* The majority of the N.Y.U. part-timers were "moon-lighting" high school teachers in the School of Continuing Education. *Id.* at 7 n.11, 83 L.R.R.M. at 1552 n.11.

⁴⁹ *Id.* at 7, 83 L.R.R.M. at 1552.

⁵⁰ *Id.*, 83 L.R.R.M. at 1552-53.

⁵¹ *Id.*, 83 L.R.R.M. at 1553.

⁵² *Id.* at 10, 83 L.R.R.M. at 1555.

⁵³ *Id.* at 11, 83 L.R.R.M. at 1555.

⁵⁴ University of Vermont, 223 N.L.R.B. No. 46, 91 L.R.R.M. 1570, 1573 (1976); Yeshiva Univ., 221 N.L.R.B. No. 169, 91 L.R.R.M. 1017, 1019 (1975); University of Miami, 213 N.L.R.B. 634, 637, 87 L.R.R.M. 1634, 1639 (1974); Point Park College, 209 N.L.R.B. 1064, 1064, 85 L.R.R.M. 1542, 1544 (1974); University of San Francisco, 207 N.L.R.B. 12, 13, 84 L.R.R.M. 1403, 1404 (1973).

time faculty members.⁵⁵ The majority chose not to respond to this issue in the abstract, but left the question open for later decision.⁵⁶ In *Goddard College*,⁵⁷ the only case to date in which the Board has reached the issue of the appropriateness of a unit composed solely of part-time faculty, the Board denied the petitioners unit status.⁵⁸ In that case, the American Federation of Teachers (AFT) sought to represent part-time faculty in its own bargaining unit, rather than in a unit comprised both of full-time and part-time faculty. The Board in *Goddard* recognized the unit comprised of full-time faculty, but excluded, among others, the cycle (part-time) faculty in the adult degree program.⁵⁹ With respect to the AFT's alternative request to represent a separate unit of part-time faculty which included the cycle faculty as well as other part-timers, the Board noted that the excluded groups were essentially heterogeneous, with their only similarity being part-time status.⁶⁰ The Board therefore denied certification based on what it believed to be a lack of sufficient community of interest between the groups.⁶¹ This denial casts doubt on the ability of part-timers to achieve independent unit status and thus emphasizes the significance of any decision to exclude part-timers from the full-time faculty unit.

(4) *Part-Time Faculty As Independent Contractors*

At this juncture, the Board has merely segregated part-timers from full-time faculty units. A reasonably defensible argument may be made, however, for their total exclusion from bargaining units on the basis of their status as independent contractors.⁶² In general terms,

⁵⁵ 205 N.L.R.B. at 10, 83 L.R.R.M. at 1555.

⁵⁶ *Id.* at 8 n.12, 83 L.R.R.M. at 1553 n.12.

⁵⁷ 216 N.L.R.B. No. 81, 88 L.R.R.M. 1228 (1975).

⁵⁸ *Id.* at , 88 L.R.R.M. at 1230.

⁵⁹ *Id.* at , 88 L.R.R.M. at 1231. The core faculty in the Goddard Masters program, the faculty in the Goddard-Cambridge Graduate Program in Social Change, all visiting faculty, and the faculty in the Goddard Experimental Program in Further Education were the other part-timers excluded.

⁶⁰ *Id.* at , 88 L.R.R.M. at 1230.

⁶¹ *Id.*

⁶² In its *New York University* decision, the Board faced the full-time faculty as independent contractors question:

Although the Employer correctly urges that the central issue in determining independent contractor status is whether the recipient of services has the right to control the manner and means of performance as well as the result, the only significant factor suggesting a positive conclusion is the faculty's relative freedom in determining course content. Even there the individual faculty member is not totally free, since the general content of the course may be determined by a consensus of the school or department involved, and the University's rules of tenure provided that he "should not introduce into his teaching controversial matter that has no relation to his subject." Its weight is further diluted by the professional status of the faculty, which demands the exercise of discretion and judgment. Determination of the details, and indeed the manner, of instruction would appear to be peculiarly within the province of a professional teacher and

the distinction between an independent contractor and an employee hinges on "whether the recipient of services has the right to control the manner and means of performance as well as the result."⁶³ Part-time faculty, as the Board noted in *New York University*, have their primary employment elsewhere.⁶⁴ They often contract to teach one or more courses at a negotiated price per course, rather than a proration of a full-timer's annual salary. In fact, some of the very factors which controlled the *New York University* decision to exclude part-time faculty, such as lack of tenure or fringe benefits and non-participation in governance,⁶⁵ are also factors which argue for independent contractor status.

Another factor in favor of characterizing part-timers as independent contractors is the factor of autonomy. In many circumstances, part-timers are less subject than full-timers to employer control in teaching. This is true because many part-time faculty are hired to teach a specialized course, often of their own creation and centering on their own unique expertise. The contrary argument, based on the Board's conclusion in *New York University* that faculty in general do not have substantial control over the manner and means of performance of their teaching functions, is open to serious dispute.⁶⁶ Teaching is very much an art which few practice alike. The university does not control what occurs in the classroom, and a teacher's effectiveness depends in large part upon his own individual style. Further, the Board's citation of the New York University's rules of tenure prohibition against "controversial matter unrelated to the subject"⁶⁷ may be sadly out of context; for such a restriction does no more than mark the boundaries of academic freedom — which ensures that faculty will have substantial freedom in the performance of their teaching duties. Thus, since the faculty in general have arguably substantial control over the manner and means of performance of their function and further since part-timers are often subject to even less employer control than the full-time faculty, the possibility exists that the Board could ultimately resolve the part-time faculty unit status question by finding part-timers to be independent contractors.

the absence of this latitude would cast serious, and probably fatal, doubts on his professional status.

Other factors all point to the conclusion that the faculty are employees. Instruction is performed on the Employer's premises with its equipment; faculty may become tenured; and they receive sabbatical leave, a fixed annual salary, and Employer contributions to a retirement fund. The faculty are not subject to the entrepreneurial risks and profits normally associated with independent contractors.

205 N.L.R.B. at 5-6, 83 L.R.R.M. at 1551.

⁶³ *Id.* at 5, 83 L.R.R.M. at 1551.

⁶⁴ *Id.* at 7, 83 L.R.R.M. at 1552.

⁶⁵ See text at notes 46-51 *supra*.

⁶⁶ See note 62 *supra*.

⁶⁷ *Id.*

Commentary

The Board's exclusion of part-time faculty in *New York University* has several problems. As Member Fanning pointed out in his dissent in that case, the Board cannot rely on the difference in salaries between part-time and full-time faculty members if it insists that full-time faculty do more work, proportionately, than their part-time brethren.⁶⁸ Then too, if part-time faculty are excluded because full-time faculty work a 50 to 60 hour week, why are professional librarians—who may work a 35 or 40 hour week—included in the unit?⁶⁹ As for participation in governance, Fanning pointed out that not all the full-time faculty at New York University enjoyed that privilege. Further, Fanning perceived that the majority's reliance on this factor seemingly designates participation in governance as a mandatory subject of bargaining,⁷⁰ for the concept of community of interest, which lies at the heart of any unit determination, is based on all members of a bargaining unit having similar continuing interests in the mandatory subjects of bargaining—wages, hours, and conditions of employment. Therefore, since the majority found the part-timers' non-participation in governance a significant factor in excluding the part-timers from the full-time faculty unit, it would follow that the majority viewed governance as a mandatory subject of bargaining. Moreover, if governance is indeed a mandatory subject of bargaining, then a faculty senate could be considered a "labor organization" within the meaning of Section 2(5) of the Act, and as such could conflict with the union which represents the faculty at the university.⁷¹ If governance is not a mandatory subject of bargaining, then it is difficult to understand the majority's reliance on it as a factor warranting the exclusion of part-time faculty, especially since the Board's self-expressed function in unit determination proceedings is to establish units which have "a direct relevancy to the circumstances within which collective bargaining must take place."⁷²

⁶⁸ 205 N.L.R.B. at 11, 83 L.R.R.M. at 1556.

⁶⁹ See Part II, Section D(2) *infra*. The Board's position that librarians may be an appropriate part of a faculty unit appears to have changed. See *Yeshiva Univ.*, 221 N.L.R.B. No. 169, 91 L.R.R.M. 1017, 1021 (1975).

⁷⁰ 205 N.L.R.B. at 11-12, 83 L.R.R.M. at 1556.

⁷¹ For a discussion of faculty senates as "labor organizations" see Part IV, Section A(1) *infra*. A "labor organization" is defined in § 152(5) of the Act as:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. (emphasis supplied).

The topics enumerated in the definition above represent mandatory subjects of bargaining. If governance is included as such a mandatory subject, the faculty senate could be ruled a "labor organization" since it deals with the university extensively in the area of the scope of faculty participation in governance.

⁷² *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715 (1962) quoted, interestingly enough, by the majority in *New York University* as support for their exclusion of part-time faculty.

The majority's reliance on tenure as a reason for excluding part-time faculty from the full-time faculty unit is also suspect. The tenure system does not apply to all full-time faculty. In *University of Miami*,⁷³ for example, the Board noted the distinctions between full-time faculty on regular, term and indefinite appointments, yet included all of the full-time faculty in the unit.⁷⁴ The *Miami* decision was followed in *New York University Medical Center*,⁷⁵ where the Board, in the course of dismissing a recognition petition for a unit of psychiatrists on the ground that the separate unit was too fragmented, stated that differences in tenure or tenure-eligibility was not a significant factor.⁷⁶ Furthermore, in other decisions the Board has included terminal-contract faculty,⁷⁷ those who have been denied tenure, and librarians⁷⁸—not ordinarily eligible for tenure—in the same unit with full-time faculty. In addition, the very factor of tenure itself must be re-examined especially in view of the fact that it is nothing more than a guarantee of certain procedural protections. Tenure provides a measure of job security only insofar as it protects a faculty member from termination for arbitrary or invidious reasons. It entitles him to an opportunity to *contest* his dismissal—it does not insure against it. Thus, the availability of tenure should not be determinative of the appropriateness of including part-time faculty in a bargaining unit containing full-time faculty.

The final factor relied on by the majority in determining to exclude the part-timers from the full-time faculty unit in *New York University* was "working conditions." The unpersuasiveness of this final factor is best illustrated by Member Fanning, who pointed out that the research and citizenship responsibilities of the full-time faculty were ancillary to their primary employment relationship and as such should not be regarded as a significant factor in determining that the full-time faculty have working conditions critically different from those of the part-timers.⁷⁹ Member Fanning further noted that the record clearly indicated that research activities were not uniformly required of all full-time faculty, as well as the fact that both parties stipulated that research scientists in all ranks should be excluded from the full-time faculty unit.⁸⁰ Needless to say, librarians, athletic coaches, and other professionals who have been included in the unit because their ultimate purpose converges with that of full-time faculty⁸¹ are not ex-

⁷³ 213 N.L.R.B. 634, 87 L.R.R.M. 1634 (1974).

⁷⁴ *Id.* at 638, 87 L.R.R.M. 1640. In that case the Board also included in the unit research scientists and program specialists in governance. *Id.* at 638-39, 87 L.R.R.M. at 1641.

⁷⁵ 217 N.L.R.B. No. 116, 89 L.R.R.M. 1045 (1975).

⁷⁶ *Id.* at , 89 L.R.R.M. at 1049.

⁷⁷ See Part II, Section D(3) *infra*.

⁷⁸ See note 69 *supra*.

⁷⁹ 205 N.L.R.B. at 11, 83 L.R.R.M. at 1556.

⁸⁰ *Id.*

⁸¹ See Part II, Section D *infra*.

pected to engage in such activities.⁸²

Of course, the clear implication of the total exclusion of part-timers from representation would be not only to deny them self-organizational rights common to full-time faculty, but, also, to place them in the posture of excommunicants, cut off from participation at the bargaining table without either an administration or union spokesman to represent their interests. In the realpolitik of collective bargaining only one result, as already perceived by the dissenters in *New York University*, can obtain, and that is that part-time interests will be subverted.⁸³ Whether the true purposes of the Act will be served by the exclusion of such a significant faculty group from the collective bargaining process or whether, alternatively, the interests of the college or university will be served by the exclusion of part-timers is doubtful. If a college is a community of scholars, the creation of a class of scholar more equal than another class appears discriminatory and divisive. Certainly, some part-time faculty are so casual and transient that their exclusion from the unit is proper, but the Board's sweeping presumption of exclusion should be reassessed. A better rule would be a presumption for inclusion unless it can be shown that part-time employment is so intermittent that exclusion is justified or that the nature of their contractual arrangement with the institution is so significantly different from that of regular full-timers that departure from the historical precedent of inclusion of part-time personnel is warranted.

B. Department Chairmen

Perhaps the single most difficult issue the Board has confronted in the college unit area is the question of the supervisory status of department chairmen.⁸⁴ Section 2(11) of the Act⁸⁵ defines "supervisor" as follows:

... any individual having authority, in the interest of the

⁸² In the health care industry, the Board has continued to adhere to its traditional rule and has included regular part-time employees in the unit with full-timers. See, e.g., *Annapolis Emergency Hospital*, 217 N.L.R.B. No. 148, 89 L.R.R.M. 1173, 1174 (1975) (part-time and full-time registered nurses in the same unit). The Board has, however, excluded temporary employees from a full-time unit. *Paramount General Hospital, Inc.*, 217 N.L.R.B. No. 22, 89 L.R.R.M. 1853, 1854 (1975).

⁸³ See 205 N.L.R.B. at 10-13, 83 L.R.R.M. at 1555-58.

⁸⁴ Most institutions are divided by subject area into schools or colleges, which are usually headed by a dean. This position has consistently been excluded as supervisory, either by stipulation or pursuant to a determination by the Board upon an established record. The schools or colleges are further broken down into departments, headed by a chairman or department head. At some institutions the term "sequence" is used instead of "department." On occasion, several related departments are grouped into a division, headed by a chairman or director. In addition, an institution may have certain "programs" headed by a director or chairman. Finally, the supervisory status of assistant and associate deans, and directors of admissions is sometimes disputed. The Board's treatment of the issue with respect to department chairmen will be analyzed as illustrative of its treatment of all these positions.

⁸⁵ 29 U.S.C. § 152 (11) (1970).

employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Inasmuch as this language is set forth in the disjunctive, possession of any one of the indicia of authority listed confers supervisory status.⁸⁶ Furthermore, the authority need not be exercised; possession alone is sufficient.⁸⁷ The Courts of Appeals have generally deferred to the Board's expertise to distinguish from among the many possible "subtle gradations of authority"⁸⁸ those which require the exercise of independent judgment as opposed to those which merely require routine application of previously set guidelines.

The characteristics of the position of department chairman vary both from institution to institution, and often from one department to another within an institution. Chairmen may be elected by the faculty,⁸⁹ appointed by the dean with⁹⁰ or without⁹¹ consultation of the faculty, or may serve on a rotating basis.⁹² They may be selected from the department's faculty or come from without the institution. On occasion, they rise to higher administrative positions; more often, they return to ordinary faculty status at the expiration of their term of office. They usually—but not always—receive an increment in salary upon assuming office.⁹³

The major controversy over whether a department chairman is a supervisor revolves around two areas: whether the chairman's recommendations in personnel areas are "effective", thereby coming within that part of Section 2(11) which provides that an employee may

⁸⁶ *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387, 24 L.R.R.M. 2350, 2352 (6th Cir. 1949), *cert. denied* 338 U.S. 899 (1949).

⁸⁷ *Id.* at 388, 24 L.R.R.M. at 2353. The Board, however, has refused to recognize the genuineness of "paper" supervisors. *Omaha Neon Sign Co.*, 170 N.L.R.B. 1385, 1386-87, 68 L.R.R.M. 1585 (1968); *See NLRB v. American Oil Co.*, 387 F.2d 786, 787-88, 66 L.R.R.M. 2539, 2540-41 (7th Cir.), *cert. denied* 391 U.S. 906 (1967). A "paper supervisor" is a nonsupervisory employee who is "promoted" to supervisor without receiving any more duties or responsibilities. *See Omaha Neon Sign Co.*, 170 N.L.R.B. at 1387.

⁸⁸ *NLRB v. Magnesium Casting Co.*, 427 F.2d 114, 117, 74 L.R.R.M. 2234, 2236 (1st Cir. 1970) *aff'd*, *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971) *citing NLRB v. Swift & Co.*, 292 F.2d 561, 48 L.R.R.M. 2695 (1st Cir. 1961). *But see, NLRB v. Southern Airways Co.*, 290 F.2d 519, 521-25, 48 L.R.R.M. 2205, 2207-09 (5th Cir. 1961) *enforcing in part*, 124 N.L.R.B. 749, 44 L.R.R.M. 1483.

⁸⁹ *C.W. Post*, 189 N.L.R.B. 904, 906, 77 L.R.R.M. 1001, 1004 (1971).

⁹⁰ *Id.*

⁹¹ *University of Detroit*, 193 N.L.R.B. 566, 568, 78 L.R.R.M. 1273, 1275 (1971).

⁹² *Fairleigh Dickinson Univ.*, 205 N.L.R.B. 673, 675, 84 L.R.R.M. 1033, 1035 (1973).

⁹³ *See, for example, University of Detroit*, 193 N.L.R.B. 566, 568, 78 L.R.R.M. 1273, 1275 (1971).

be found to be a supervisor if that employee has the authority to "effectively . . . recommend such action,"⁹⁴ and, even if "effective," whether the chairman's "collegial" relationship to his faculty so dilutes the recommendations that he cannot be considered an individual supervisor exercising independent judgment on behalf of the employer.

(1) *Chairmen Included*

In cases where the Board has ruled that department chairmen were not supervisors, the position of chairman was found to be essentially titular rather than functional. The chairmen were really only a conduit for faculty action regarding policy and personnel matters rather than effective heads of the departments. Thus, in *University of Detroit*,⁹⁵ the department head was found to be merely one voice among many, possessing no real authority effectively to recommend personnel and policy matters.⁹⁶

In declining to recognize chairmen as supervisors in the *Detroit* case the Board said: "the chairman's recommendation [on personnel matters], if any, is just one of several made to the appropriate university official or body . . . the record does not reveal whether the chairman's recommendations are accorded greater weight than those of the faculty or dean."⁹⁷

This concept of effective authority has remained the primary factor in the Board's determination of the status of department chairmen. For example, when the problem of the department chairmen's status at Fordham University came before the Board in 1971 and again in 1974,⁹⁸ chairmen were included in the bargaining unit.⁹⁹ As in its *University of Detroit* decision, the Board looked primarily to the effectiveness of the chairmen's recommendations on personnel matters. In *Fordham I* the Board found that a chairman's personnel recommendations were made with the advice and consent of his

⁹⁴ See text at note 85 *supra*.

⁹⁵ 193 N.L.R.B. 566, 78 L.R.R.M. 1273 (1971).

⁹⁶ *Id.* at 568, 78 L.R.R.M. at 1275. For example, in hiring situations the department chairman and the faculty would separately review candidates (the record being unclear as to whether each submitted separate recommendations to the dean on any promotion and tenure case) with a University committee of faculty and administrators overseeing the entire process. If a chairman found that a faculty member was not performing satisfactorily, he would report this to the dean without a formal recommendation. There was no evidence that chairmen played any role in the decision not to reappoint nontenured faculty, or in dismissal proceedings for tenured faculty. The chairman did assign courses in some departments but did not direct the work of the faculty in any way. He had no role in determining salaries for faculty. *Id.*

⁹⁷ *Id.*

⁹⁸ 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971) & 214 N.L.R.B. No. 137, 87 L.R.R.M. 1643 (1974).

⁹⁹ 193 N.L.R.B. at 139, 78 L.R.R.M. at 1183; 214 N.L.R.B. at , 87 L.R.R.M. at 1648.

faculty.¹⁰⁰ The Board further noted that both tenure and promotion decisions were made by a department committee.¹⁰¹ Thus, although the chairmen received a reduced workload and an extra stipend,¹⁰² the chairmen's lack of effective authority was found to be the controlling consideration in the Board's finding that the department chairmen were not supervisors.¹⁰³ Similarly, in *Fordham II*, the Board remained unconvinced that the chairmen's recommendations were sufficiently effective to warrant a positive delineation of supervisory status, especially since many of the chairmen's recommendations were modified by the dean.¹⁰⁴

In an attempt to clarify the Board's position on the supervisory status of department chairmen, the employer in *Rosary Hill College*¹⁰⁵ urged the Board to establish specific criteria to provide guidance for the resolution of the issue of college and university department chairmen. The Board's response was evasive, however, as it simply indicated that:

we are not persuaded, on the basis of our experience . . . with university cases in which . . . supervisory status is in issue, that faculty department heads generally have or exercise supervisory authority as it is defined in the Act. And we see no reason at this time for departing from our usual practice of requiring an affirmative showing that the disputed faculty department heads have been given one or more of the indicia of supervisory authority set forth in

¹⁰⁰ 193 N.L.R.B. at 137, 78 L.R.R.M. at 1181.

¹⁰¹ *Id.*

¹⁰² *Id.* at 138, 78 L.R.R.M. at 1182.

¹⁰³ The Board in *Tusculum College*, 199 N.L.R.B. 28, 81 L.R.R.M. 1345 (1972), compared the status of "division directors" at Tusculum College to that of the chairmen in *Fordham I* and similarly ruled that the directors were not supervisors both since their recommendations were merely one among many, and thus were not necessarily effective since the administration viewed them as faculty. *Id.* at 29, 81 L.R.R.M. at 1346-47.

At Tusculum College the directors drew up "job descriptions" with qualifications for new faculty positions only after full consultation with faculty. Candidates were interviewed by various faculty members, who thereafter submitted their recommendations along with those of the chairman. Although directors made tenure and reappointment recommendations, other faculty did so as well. *Id.* at 28, 81 L.R.R.M. at 1346.

Again in *University of Miami*, 213 N.L.R.B. 634, 87 L.R.R.M. 1634 (1974), the Board, in determining the status of department chairmen, saw the effectiveness of the chairmen's recommendations as the critical criterion for determining supervisory authority. The Board noted that in promotion and tenure cases, separate recommendations from the chairman and his faculty were forwarded up the chain of command to the dean, dean of faculties, president and, ultimately, to the Board of Trustees. *Id.* at 637, 87 L.R.R.M. at 1369. As in *Fordham*, the faculty's recommendation controlled:

In most cases the faculty and chairman are in agreement, but, when they differ, the higher academic officials give greater weight to a strong faculty recommendation than to a contrary recommendation by their department chairman.

Id.

¹⁰⁴ 214 N.L.R.B. at , 87 L.R.R.M. at 1647.

¹⁰⁵ 202 N.L.R.B. 1137, 82 L.R.R.M. 1768 (1973).

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Section 2(11) or that their recommendations affecting personnel status are relied on and generally followed.¹⁰⁶

In *Rosary Hill*, the chairmen's duties and authority were found to be similar to those of the chairmen in *Fordham*, and thus they were included in a faculty bargaining unit.¹⁰⁷

The question of whether department chairmen should be classified as supervisors arose again in *Northeastern University*,¹⁰⁸ where the Board made a limited excursion into the development of the criteria requested in *Rosary Hill*. The Board in *Northeastern* found the chairmen not to be supervisors since they generally "shared" their duties with the faculty in their departments. Their role was "one more of power through persuasion than power through decree."¹⁰⁹ In so finding, the Board summarized its position on inclusion of the chairman in the bargaining unit:

In appropriate cases where the chairman's powers have been effectively diffused among the department faculty pursuant to the principle of collegiality, the Board has included the chairmen. The facts in the present case show that the chairmen of the various university departments fall within this qualification. . . . Accordingly, we find that the department chairmen are neither supervisors nor managerial employees and we shall include them in the unit.¹¹⁰

Thus, while not providing the specific criteria requested in *Rosary Hill*, this summary represents at least a limited guide to the resolution of the issue of college and university department chairmen status.

(2) *Chairmen Excluded*

The Board has found department chairmen to be supervisors in a number of cases, and therefore has excluded them from the faculty unit. In so ruling, the Board has primarily pointed both to the chairmen's ability to manipulate effectively the hiring of faculty and to the effectiveness of the chairmen's recommendations pertaining to faculty status and merit increases. In the first reported cases following the *Cornell* decision, the Board excluded department chairmen as supervisors. In *Long Island University (C.W. Post Center)*,¹¹¹ for exam-

¹⁰⁶ *Id.* at 1137, 82 L.R.R.M. at 1768.

¹⁰⁷ *Id.* at 1139, 82 L.R.R.M. at 1770. Chairmen at *Rosary Hill* were involved in screening and interviewing candidates for hire, but the chairmen were overshadowed by a hiring committee selected by the faculty which could veto a chairman's hiring decision. In cases of promotion or tenure, the chairmen, the faculty, and the students all submitted recommendations. *Id.* at 1138, 82 L.R.R.M. at 1770.

¹⁰⁸ 218 N.L.R.B. No. 40, 89 L.R.R.M. 1862 (1975).

¹⁰⁹ *Id.* at , 89 L.R.R.M. at 1868.

¹¹⁰ *Id.* at , 89 L.R.R.M. at 1868-69. Most recently, department chairmen were included in the unit in *Yeshiva Univ.*, 221 N.L.R.B. No. 169, 91 L.R.R.M. 1017 (1975).

¹¹¹ 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

ple, the Board concluded that the chairmen were supervisors, based upon their authority in the hiring of new faculty,¹¹² and based upon their ability to recommend "change of status" of faculty to the dean, to hire and supervise support personnel, and to recommend budgets.¹¹³ Subsequently, in *Adelphi University*¹¹⁴ the Board again excluded the department chairmen from the faculty bargaining unit despite the fact that the chairmen's supervisory powers were far more "shared than those of the chairman in *C.W. Post*."¹¹⁵ The Board rested its exclusion of chairmen on two grounds: the chairman's authority to recommend the hiring and reappointment of part-time faculty (who were included in the unit); and his power to allocate merit increases to all faculty in the department without departmental approval.¹¹⁶ Inasmuch as this authority alone was considered sufficient to treat the chairmen as supervisors, the Board did not reach the question whether they would find supervisor status absent this authority. In more recent cases, the Board has continued to exclude department chairmen from the full-time faculty unit when the record indicated that the chairmen had significant responsibilities and authority in the areas of hiring, retention of personnel,¹¹⁷ and allocation of merit increases.¹¹⁸

Commentary

In determining whether the chairman's recommendations are effective, the Board is wont to lay great stress on the frequency with

¹¹² The chairmen conducted interviews and discussed terms of employment with prospective candidates. *Id.* at 906, 77 L.R.R.M. at 1004.

¹¹³ *Id.* at 906, 77 L.R.R.M. at 1004. In *Long Island Univ. (Brooklyn Center)*, 189 N.L.R.B. 909, 77 L.R.R.M. 1006 (1971), the Board merely noted that the duties of chairmen were similar to those in *C.W. Post* and that therefore the chairmen should be excluded. *Id.* at 909, 77 L.R.R.M. at 1006.

¹¹⁴ 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972).

¹¹⁵ The Board noted that most of the department chairmen's administrative functions "are performed in consultation with and upon agreement of the department's entire faculty." *Id.* at 641, 79 L.R.R.M. at 1549.

¹¹⁶ *Id.* at 642, 79 L.R.R.M. at 1549.

¹¹⁷ *Rensselaer Polytechnic Inst.*, 218 N.L.R.B. No. 220, 89 L.R.R.M. 1844, 1846-47 (1975); *Fairleigh Dickinson Univ.*, 205 N.L.R.B. 673, 675, 84 L.R.R.M. 1033, 1035 (1973); *Point Park College*, 209 N.L.R.B. 1064, 1064, 85 L.R.R.M. 1542, 1543-44 (1974).

¹¹⁸ *Rensselaer Polytechnic Inst.*, 218 N.L.R.B. No. 220, 89 L.R.R.M. 1844 (1975). The Board in *Rensselaer* found the chairmen's authority to allocate the total dollar amount for merit increases within his department to be the most important indicator of supervisory status. *Id.* at , 89 L.R.R.M. at 1847.

In that decision, the Board effectively summarized the particular responsibilities that will lead to a supervisory classification of a department chairman.

Based on the foregoing and the record as a whole, we are satisfied that the department chairmen exercise the authority to make effective recommendations as to hiring and change of status of faculty members, and that they exercise substantial control over the day-to-day operations of their respective departments including assignments and monetary benefits and allowances.

which the dean follows the chairman's recommendations as opposed to the recommendations of others. This, in effect, makes the dean the arbiter of "effectiveness." The authority to make effective recommendations, however, is usually vested in the department chairman by the university's by-laws, not by the dean. The fact that a second-line supervisor (the dean) does not always, or even usually, follow the advice of the foreman (the department chairman) does not mean that the foreman is not a supervisor; he may simply be a supervisor with whose judgment the second-liner disagrees.

In addition, the fact that a chairman may solicit input from the department faculty should not serve to vitiate his authority. A good supervisor often solicits the input of his fellow workers, and such an approach is especially appropriate among professionals. Indeed, the elements of discourse and "sharing" of authority are at the heart of "collegiality," which describes a working condition that many would consider essential to academic life. Yet, it is crucial that the Board not be misguided by academic rhetoric to render decisions which destroy this collegial concept. Decisions which find the dean to be the first level of supervision will have this effect, for under such precedent, the dean, in a labor relations context, will be far less likely to weigh departmental interests than would the chairmen. Further, by superceding the departmental hierarchy, the Board thereby places inordinate and unrealistic power in the hands of the university deans. One consequence of the cases which find department chairmen to be non-supervisors may well be that deans will be called upon by the administration to make personnel decisions which they are, for lack of departmental input from the chairmen, ill-equipped to make.

(3) *The "50%" Rule*

The Board has added to the controversy on the issue of department chairmen by applying a so-called "50%" rule to its determinations of supervisory status. This rule, as it has evolved, states that an individual who supervises only non-unit employees will be found to be a supervisor, and thus excluded, only if his supervisory functions account for more than 50% of his time. The "50%" rule had its genesis in *Great-Western Sugar Company*.¹¹⁹ In that case, the Board considered the question whether individuals employed in a seasonal industry who spent the major portion of their time as rank-and-file employees, but who were assigned supervisory duties for a remaining period, should be excluded from the rank-and-file unit and denied a voice in the selection of a bargaining representative. The Board held that such individuals were to be included in the unit, but only with respect to their rank-and-file duties.¹²⁰

Id. at , 89 L.R.R.M. at 1847.

¹¹⁹ 137 N.L.R.B. 551, 50 L.R.R.M. 1186 (1962).

¹²⁰ *Id.* at 553, 50 L.R.R.M. at 1187.

Dissenting Board members in *Great Western* raised the issue of divided loyalty. The dissenters first noted that many of the so-called "seasonal" supervisors had also been officers and trustees of the union.¹²¹ They further noted that such seasonal supervisors most likely wished to retain not only their supervisory status but also the protection afforded employees under the Act. Given this assumption, the dissenters asserted that an inherent conflict of interest in the position of these supervisors would necessarily exist should they be included in the employee unit.¹²² Since the dissenters believed that both management and the union are entitled to total loyalty, they asserted that the possibility of divided loyalty represented a sufficient basis for excluding the seasonal supervisors from the employee unit.¹²³

In *Westinghouse Electric Company*,¹²⁴ the Board, cited the principles established in *Great Western Sugar Company*, and ruled that professional engineers, who during the preceding 12 months had spent 50 percent or more of their working time performing non-supervisory duties and who, when acting as supervisors, supervised only non-unit personnel, should be included in the bargaining unit.¹²⁵ In a footnote, the Board recognized the problem of "divided loyalty" but disposed of it by stating:

... this problem [of divided loyalty] is commonplace whenever an employer decides to promote a rank-and-file employee to be a supervisor; ... The problem would seem to be minimal here, if it exists at all, as the supervisory authority of engineers here involved is exercised with reference to a separately organizable and differently oriented group of temporary workers wholly outside the scope of the unit.¹²⁶

In *Adelphi University*¹²⁷ the Board introduced the "50%" rule to a university unit determination case and ruled that a chairman's authority to hire and fire a secretary was not, in and of itself, sufficient evidence of supervisory status.¹²⁸ In its discussion, the Board asserted that the underlying rationale for the "50%" rule was that employees whose principle duties were of the same nature as those of the employees in the unit should not be excluded from that unit on the basis of a sporadic exercise of supervisory authority over nonunit personnel, since the conflict of interest envisioned by Congress in adopting Section 2(11) of the Act was a general one, involving an alliance of the employee with management.¹²⁹

¹²¹ *Id.* at 556, 50 L.R.R.M. at 1188.

¹²² *Id.*

¹²³ *Id.*, 50 L.R.R.M. at 1189.

¹²⁴ 163 N.L.R.B. 723, 64 L.R.R.M. 1440 (1967).

¹²⁵ *Id.* at 727.

¹²⁶ *Id.* at 727 n.26.

¹²⁷ 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972).

¹²⁸ *Id.* at 644, 195 N.L.R.B. at 644, 79 L.R.R.M. at 1551.

¹²⁹ *Id.*, 79 L.R.R.M. at 1551-52.

Commentary

An examination of the legislative history of Section 2(3) indicates that Congress, in excluding supervisors from its definition of "employee," was primarily concerned with the problem of the domination of supervisors by the rank-and-file unions.¹³⁰ Congress apparently believed that this domination would necessarily manifest itself in at least some degree of supervisor disloyalty to management.¹³¹ However, in deciding to exclude supervisors from its definition of "employee" in the Act, Congress contemplated two types of cases involving potential union domination, *neither* of which approximate the type of situation in which the Board applies its "50%" rule. The two types of cases about which Congress was concerned involved so-called "independent" units of supervisors who supervised the rank and file union members;¹³² and the inclusion of the supervisors in a unit constituting the rank-and-file members whom they supervised.¹³³

In examining these two types of cases, Congress first found that even if the supervisors were separately organized there was, in fact, no practical independence from the rank-and-file union, since the supervisor unit must rely on the rank-and-file union for support if it is to negotiate effectively with the employer.¹³⁴ Secondly, Congress found that if the supervisors were directly organized with the rank-and-file employees whom they were supposed to supervise, the rank-and-file union influence would greatly decrease the supervisors' effectiveness.¹³⁵ Congress did not, however, consider the type of situation

¹³⁰ See H.R. REP. NO. 245 & S. REP. NO. 105, 80th Cong., 1st Sess. (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 304-08 (H. Rep. No. 245) & 409-11 (S. Rep. No. 105) (1948). The House Committee paid lip-service to the possible problem of management, through the supervisors, improperly influencing the workers' rights to organize and bargain, *id.* at 305; however, it is clear that the Committee was primarily concerned with the independence of the supervisors from rank and file control.

¹³¹ The House Committee on this question concluded that:

If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to [the] influence or control of unions . . . not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but [also] to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations. *Id.* at 307.

¹³² Union Collieries Coal Co., 41 N.L.R.B. 96, 11 L.R.R.M. 114 (1942); Packard Motor Car Co., 61 N.L.R.B. 4, 16 L.R.R.M. 43 (1945).

¹³³ Godchaux Sugars, Inc., 44 N.L.R.B. 874, 11 L.R.R.M. 122 (1942).

¹³⁴ LEGISLATIVE HISTORY, *supra* note 130, at 307. The supervisors could not successfully strike without an agreement from the rank-and-file that they would not do the work of the striking supervisors.

¹³⁵ *Id.* at 410. As an example of this problem, the Senate Committee cited Jones & Laughlin Steel Corporation, where, after the supervisory employees were organized by the United Mine Workers, disciplinary slips issued by those supervisors declined by two-thirds and the accident rate doubled. *Id.*

from which the Board developed its "50%" rule—that in which part-time supervisory employees are included in a unit of nonsupervisory employees, where the supervisory employees are only responsible for nonunit employees. The "50%" rule thus represents a judgment on the part of the Board that mere union involvement on the part of supervisory employees is not in and of itself sufficiently detrimental to supervisor loyalty to warrant the exclusion of the supervisors from the protection of the Act, as long as the supervisory employees only perform their supervisory functions part-time, and are only responsible for nonunit employees. It is submitted that although the validity of the Board's assumption that a supervisory employee can at the same time be both a viable union member and an effective tool of management is open to dispute,¹³⁶ the department chairmen situation involves special problems which warrant an abandonment of the "50%" rule, within the university context. As was discussed earlier, the Board has often excluded part-time faculty from full-time faculty units.¹³⁷ The conflict of loyalties with which Congress was concerned in enacting Sections 2(3) and 2(11) would certainly exist where departmental chairmen are involved in the hiring of part-time faculty and are at the same time included in the faculty unit because of the "50%" rule. Since part-time faculty often are considered a threat to full-time faculty positions in difficult financial periods, the chairmen could well be caught in the middle if it became necessary to save money by re-trenching some full-time faculty colleagues in the bargaining unit and by hiring part-time faculty instead. This is clearly the type of "divided loyalty" situation which Congress sought to avoid by excluding supervisors from the protection of the Act. Thus, in light of its treatment of part-time faculty, the Board should, at least within the university framework, refrain from applying its "50%" rule.

(4) *Department Chairmen As Managerial Employees*

The National Labor Relations Act, as amended, does not contain a specific exclusion for "managerial employees" as it does for supervisors. However, over the years, such an exclusion has been developed through case law.¹³⁸ The early cases established that such employees were not to be included in a unit with rank-and-file employees, since they were "closely related to management."¹³⁹ Thus, in *Ford Motor Co.*,¹⁴⁰ the Board summarized its position with respect to managerial employees.

We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to *formulate, determine, and effectuate* management

¹³⁶ See text at notes 121-23 *supra*.

¹³⁷ See discussion Part II, Section A(2) *supra*.

¹³⁸ See *Annual Survey of Labor Law*, 16 B.C. IND. & COM. 977-82 (1975).

¹³⁹ *Freiz and Sons*, 47 N.L.R.B. 43, 47, 11 L.R.R.M. 229 (1943).

¹⁴⁰ 66 N.L.R.B. 1317, 17 L.R.R.M. 394 (1946).

policies. These employees we have considered and still deem to be managerial, in that they express and make operative the decisions of management.¹⁴¹

A reasonably defensible agreement may be advanced that the position of chairman involves the formulation, determination and effectuation of management policy. Department chairmen usually participate in administrative meetings within their schools on a regular basis. In formal meetings between chairmen and deans, basic policies of the school—including budgetary and fiscal matters, curriculum planning, personnel procedures and problems, areas of student concern and reports from central administration—are discussed. In addition, deans frequently meet with individual chairmen on an informal basis throughout the year to review planning and problems within a particular department. Finally, chairmen are generally responsible for the effective administration of their departments, including operating on a budget, conducting departmental meetings, and developing policy and direction for the department. In light of these functions and responsibilities, department chairmen may be considered managerial employees, and as such may properly be excluded from the full-time faculty unit.

(5) *Chairmen As Confidential Employees*

The Board has not yet dealt with the question whether department chairmen may be excluded from the faculty unit as confidential employees. In *B.F. Goodrich Co.*,¹⁴² the Board defined the term "confidential" as applying only to those employees "who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations."¹⁴³ Confidential employees are not specifically excluded by the Act, as are supervisors, "but their implied exclusion has been deemed necessary in order to make the Act function,"¹⁴⁴ since such employees are privy to confidential information pertaining to labor relations.

In the university setting, even if the Board finds that chairmen are not managerial employees, they may find it proper to exclude them from coverage on the basis of their status as confidential employees. A number of factors militate in favor of finding that chairmen are confidential employees in light of the chairmen's relationship with the university deans. First, as the central administrative figures in

¹⁴¹ *Id.* at 1322, 17 L.R.R.M. at 395 (emphasis added). See, in accord, *Westinghouse Electric Co. v. NLRB*, 424 F.2d 1151, 74 L.R.R.M. 2070 (7th Cir.), cert. denied, 400 U.S. 831 (1970). See also *NLRB v. Tectron, Inc.*, 416 U.S. 267 (1974).

¹⁴² 115 N.L.R.B. 722, 37 L.R.R.M. 1383 (1956).

¹⁴³ *Id.* at 724, 37 L.R.R.M. at 1384. See also, *National Cash Register*, 168 N.L.R.B. 910, 912-13, 67 L.R.R.M. 1041, 1045 (1967); *Ed's Foodland of Springfield, Inc.*, 159 N.L.R.B. 1256, 1261, 62 L.R.R.M. 1465 (1966); *Vulcanized Rubber and Plastics Co.*, 129 N.L.R.B. 1256, 1257-59, 47 L.R.R.M. 1175 (1961).

¹⁴⁴ CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 217 (BNA 1971).

their colleges and schools, deans are responsible for policy-making, budget preparation, and formulation of personnel policies, and are thus "persons who formulate, determine and effectuate management policies in the field of labor relations." Chairmen meeting regularly with their deans in administrative councils share with the deans the responsibility for developing and effectuating such policies. Moreover, chairmen evaluate their faculty, have access to and develop their own personnel files, and are privy to information on the individual salaries of all employees in their department. Thus, in view of the fact that chairmen deal extensively with university administrative personnel, and in so dealing, are privy to valuable collective bargaining information, they would seem to be confidential employees and as such, subject to exclusion from the faculty bargaining unit.

Since most chairmen share indicia of either managerial or confidential status and as previously outlined, have a special trust imposed on them in these areas, it would appear that continued inclusion of chairmen in faculty units is contrary to the congressional intent of the Act. Their inclusion results in a misalignment of such persons with rank-and-file employees, and thus effectively removes them from positions where management can place full reliance upon them.

(6) *Collective Authority of Faculty*

One of the reasons that department chairmen are not found to be supervisors is that the supervisory authority that exists is shared with the faculty. The employers have seized on this concept of shared authority to argue that the faculty, in whole or in part, functions as a "collective" supervisor or manager. The Board squarely faced this issue in *C.W. Post* and, without setting forth a reasoned basis for its position, concluded:

[W]e are of the view that the policy-making and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the Act, or managerial employees who must be separately represented.¹⁴⁵

In *Adelphi University* the Board again faced the issue of collective authority. While the Board reached the same result as in *C.W. Post*,¹⁴⁶ it

¹⁴⁵ 189 N.L.R.B. at 905, 77 L.R.R.M. at 1003. In *Fordham I* the Board again made clear its position that the factor of collective rather than individual exercise of faculty authority precluded a finding of supervisory status. The Board, however, did not reach the issue of whether the Faculty Senate or personnel or grievance committees actually possessed authority to make effective recommendations on major policy matters. 193 N.L.R.B. at 135, 78 L.R.R.M. at 1179-80.

¹⁴⁶ 195 N.L.R.B. at 647-48, 79 L.R.R.M. at 1554-56. The personnel committee at Adelphi was comprised of only eleven individuals, as compared to the Faculty Senate at *C.W. Post* which included the entire faculty. *Id.* at 647, 79 L.R.R.M. at 1554.

rested its conclusions on a finding that the committee functioned solely in an advisory capacity. In so finding, the Board noted that the concept of collegiality did not square with the traditional authority structures with which the Act was designed to deal; however, the Board did not view this as a problem. Rather, it suggested that ultimate authority in the university structure rests with the Board of Trustees, who use the faculty committees not as supervisors or management representatives but simply as advisors.¹⁴⁷

The Board further retreated from the issue of faculty collective authority in *New York University*. There it indicated that *Adelphi* did not stand for the proposition that the exercise of "true" collegial authority by a faculty would warrant their exclusion from the Act. The discussion in *Adelphi*, the Board suggested, was premised on a theoretical distinction between the industrial and collegial models.¹⁴⁸ However, in its haste to disclaim any possibility that faculty members would be excluded from coverage, the Board offered an analysis which leads to anomalous results. By its own definition of "true collegiality" in *Adelphi*—ultimate authority resting with one's peer group—¹⁴⁹ a faculty possessed of such authority would be its own employer and hence would have no use for the collective bargaining process regulated by the Act.

A spin-off of the argument for collective supervisory status is the argument that participation in organizational activities by senior tenured faculty constitutes a "supervisory taint." Due to their involvement in personnel matters, tenured faculty who participate in personnel decisions inherently "coerce and restrain" the junior untenured faculty.

In *Northeastern University*,¹⁵⁰ the Board did not reach this argument because of a procedural defect; however, it is interesting to note the University's contention that "the Board-conceived doctrine of collective authority as precluding supervisory status fails to vitiate the impact of supervisory taint."¹⁵¹ This contention has some merit. Regardless of the Board's perception of the tenured faculty's supervisory status, it is a fact of life at most institutions that a faculty member cannot attain tenure without the approval of those who already enjoy it. Thus, given the probability of supervisory taint, it could be argued that at least the senior tenured faculty possess significant enough supervisory-like authority to warrant their exclusion from the faculty bargaining unit.

¹⁴⁷ *Id.* at 648, 79 L.R.R.M. at 1555-56. Member Kennedy squarely disagreed with the majority. In his opinion, the members of the personnel and grievance committees should be excluded if the committee considered as a whole met the statutory definition of "supervisor". Diffusion of authority throughout an entire faculty, he stated, was not analogous to the concentration of such authority in an eleven man committee drawn from a faculty of 600. *Id.* at 648, 79 L.R.R.M. at 1556.

¹⁴⁸ 205 N.L.R.B. at 5, 83 L.R.R.M. at 1550.

¹⁴⁹ 195 N.L.R.B. at 648, 79 L.R.R.M. at 1556.

¹⁵⁰ 218 N.L.R.B. at , 89 L.R.R.M. at 1865.

¹⁵¹ *Id.*

(7) *The Wentworth Decision*

To date, the only Court of Appeals decision in the area of college unit determinations is *NLRB v. Wentworth Institute*.¹⁵² In *Wentworth* the employer contended that faculty were not "employees" under the Act. It argued that the relationship of faculty to administrators, was characterized by the notion of shared authority, and thus was unlike the usual adversarial relationship of labor and management. Therefore, collective bargaining could only result in the erosion of collegiality and academic freedom.¹⁵³ The Court responded that it

¹⁵² 515 F.2d 550, 89 L.R.R.M. 2033 (1st Cir. 1975). Wentworth operated a two-year program in engineering technology at the "Institute" and a third and fourth-year program leading to a Bachelor of Science degree at the newer, smaller "College." The College had about 14 full-time faculty members, the Institute about 100. All had one-year contracts. The Faculty Senate made recommendations on policy matters, but by its own constitution these recommendations did not bind the administration and trustees. The faculty had four meetings per year in which the agenda was prepared by the provost. However, there was evidence that the following actions took place in faculty meetings: the administration polled the faculty as to preferences regarding class hours at the Institute and the academic calendars, which results were to play an important part in the final decision; the faculty was consulted on final examination and graduation requirements; the president discussed tenure with the faculty; the administration met with the executive committee of the faculty senate to discuss class hours, the academic calendar, and methods and timing of payment of faculty. *Id.* at 552, 89 L.R.R.M. at 2034. In *Wentworth*, the employer sought to challenge the Board's assertion of jurisdiction over colleges and universities by refusing to bargain with the union after it had been elected and certified as the faculty's bargaining representative. *Id.* Relying on the legislative history of the Act, Wentworth contended that there was a "congressional understanding" to exclude non-profit employers. *Id.* at 554, 89 L.R.R.M. at 2035. The First Circuit conceded that the Board had relied on the same legislative history when, in *Columbia University*, it declined to assert jurisdiction over colleges and universities. However, the court noted that the Board in its *Columbia University* decision never ruled that it lacked jurisdiction, but that it had only referred to the legislative history for guidance in the exercise of its discretion. Therefore, the court ruled that it was an entirely proper exercise of the Board's discretion for it to reevaluate the involvement of colleges and universities in interstate commerce, and then to assert jurisdiction, as it did in *Cornell*. *Id.* at 555, 89 L.R.R.M. at 2036. Quoting from the Supreme Court's opinion in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975), the court said such an "evolutional approach" was particularly suited to an administrative agency. 515 F.2d at 555, 89 L.R.R.M. at 2037. The court further indicated that its own study of the legislative history did not clearly show a congressional intent that non-profit employers be excluded from the Act's coverage. *Id.*, 89 L.R.R.M. at 2036.

In rejecting Wentworth's contention that the Board's assertion of jurisdiction over faculty would lead to results not intended by Congress, the court said:

[W]hile there are good arguments against permitting faculty members to bargain collectively, the converse is not so unthinkable as to justify our writing into the Act a jurisdictional exclusion where none now exists. Moreover we could not justify denying coverage of the Act to nonteaching as well as faculty employees, which would be the result of a finding of no jurisdiction.

Id. at 556, 89 L.R.R.M. at 2037. The court also dismissed Wentworth's argument that the Board erred by proceeding in college cases via adjudication rather than rulemaking, noting that while rulemaking may have been a preferable course, the Board did not abuse its authority by electing the former approach. *Id.*

¹⁵³ *Id.* at 556, 89 L.R.R.M. at 2037.

could not rule on the status of all faculty everywhere, as if it were a legislature, and that on the facts of the case before it, the Board was justified in refusing to consider faculty either as supervisory or as managerial employees. The court supported this view by pointing to its findings that the authority structure at Wentworth was indeed hierarchical, and that there was no significant faculty impact on policy or managerial matters.¹⁵⁴ As such, the court was apparently unwilling to place very much emphasis on the possible adverse effects of collective bargaining on collegiality. The Court expressly declined to comment generally on the Board's "developing views on the significance of a substantial faculty role in decisions on curricula, admissions, hiring degree requirements, and other educational policy matters."¹⁵⁵

The *Wentworth* decision appears to clash with the Board's refusal to exclude department chairmen as supervisors where their authority is shared with faculty. The Court in *Wentworth* indicated that faculty were employees because they did not possess significant supervisory or managerial authority. By contrast, the Board, in such decisions as *Fordham I* and *University of Miami* indicated that its unwillingness to exclude department chairmen from the faculty unit on the basis of supervisory status was based on the fact that the chairmen were not effective supervisors since their supervisory duties were shared with the faculty.¹⁵⁶ The Board's position on department chairmen and the First Circuit's position on faculty as employees are thus premised on two different assumptions which are seemingly very difficult to reconcile. This dichotomy should be resolved by a recognition that "shared authority" is a consequence of a chairman's style of management and personal proclivity, and that in most institutions the department chairman does possess the authority to grant to, or withhold from other faculty members the right to participate with him in decision-making functions in the personnel area. It is submitted that when it can be determined by an analysis of departmental prerogatives that the department, whether through the chairman or in concert with him, can effectively recommend to administration action in such matters as renewal, non-renewal, evaluation, tenure, or promotion, a presumption should be created by Board rule that the authority for such recommendations flows from the chairman, whether the chairman is elected or appointed. Therefore, under these circumstances, the chairman would presumptively be considered a "supervisor" under the Act. Such a presumption would be rebuttable, but only on a showing that delegation of such authority by the Board of Trustees or Administration has been made directly to the departmental faculty as an entity, and not to the chairman to be distributed as he sees fit. Of course, if it can be proven that the delegation is to the department at

¹⁵⁴ *Id.* at 557, 89 L.R.R.M. at 2038.

¹⁵⁵ *Id.* The court continued by noting that "[n]either do we suggest that faculty members with different relationships and status than those herein are necessarily included employees under the Act." *Id.* at 558, 89 L.R.R.M. 2038.

¹⁵⁶ See discussion Part II, Section A(1), *supra*.

large, the *Wentworth* issue of whether faculty are "employees" under the Act must be answered.

C. Scope of the Unit

(1) Multi-Campus Units

Many universities operate out of more than one campus. The Board faced the issue of multi-campus units in *Fairleigh Dickinson University* (FDU).¹⁵⁷ FDU operates three major campuses in New Jersey, located in Rutherford, Madison and Teaneck, and has additional facilities at two other locations. Since the University is centralized in one governing body and the faculty at the three campuses are subject to the same terms and conditions of employment, the American Association of University Professors (AAUP) and the University argued for a University-wide unit. The American Federation of Teachers (AFT) sought a unit limited to the Teaneck campus on the grounds that the Teaneck campus consisted of a homogeneous identifiable group of faculty members with sufficient community of interest to comprise an appropriate bargaining unit.¹⁵⁸ The Board listed the following factors to be considered where an employer operated a number of facilities: prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence or autonomy of facilities; differences or similarities in skills and functions of the employees; and geographical location of the facilities in relation to each other.¹⁵⁹ After considering these factors, the Board rejected the AFT's position and held that a unit limited to the Teaneck campus would be inappropriate. In support of this position, the Board noted that there was a substantial community of interest shared by all the faculty on the three campuses. This finding was based on the facts that the campus facilities were centralized and integrated, the wages, hours, and condi-

¹⁵⁷ 205 N.L.R.B. 673, 84 L.R.R.M. 1033 (1973).

¹⁵⁸ *Id.* at 673, 84 L.R.R.M. at 1033. The Board noted that conditions of employment such as minimum starting salaries, teaching hours, conditions for attaining promotions and tenure, and fringe benefits were identical for all faculty members, regardless of the campus at which they were located, and that none of these basic conditions of employment could be changed or modified at the campus or college level. In addition, all college budgets were subject to modifications predicated on the decisions of the central administration in relation to the overall budget. Though a minimum representation for each college on the Faculty Senate was guaranteed, representatives were chosen without regard to location. During the previous four years there had been approximately 16 instances where a member of the faculty transferred or temporarily interchanged from one campus to another. Further, the evidence indicated that there were several members of the faculty who taught courses at more than one campus. The three main campuses were all within forty miles of each other, and during the two years immediately preceding the filing of the petitions, a tri-campus faculty committee negotiated with the University for salary increases. *Id.* at 673-74, 84 L.R.R.M. at 1034.

¹⁵⁹ *Id.* at 674-75, 84 L.R.R.M. at 1034.

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tions of employment were identical on all campuses, and the rules and procedures relating to promotion and tenure were also standardized.¹⁶⁰

When the campuses involved have, in fact, lacked centralization and integration the Board has recognized separate units based on campus assignment. Thus, in *Goddard College*,¹⁶¹ the Board excluded from the unit the faculty of the Goddard-Cambridge graduate program in social change where the graduate program was located in Cambridge, Massachusetts and the main campus of the College was located in Plainfield, Vermont. The Board also took into consideration the semi-autonomous nature of the Cambridge program. The Cambridge-based faculty worked solely in Cambridge, and had little, if any, direct contact with Plainfield-based faculty; had no interchange with faculty members in other departments; and did not participate in any college committees other than those affecting the Cambridge program.¹⁶²

(2) *Separate Units for Graduate Professional Schools*

a. *Law Schools.* The existence of a sufficiently distinct community of interests has prompted the Board to find separate units appropriate for law schools. In *Fordham I*,¹⁶³ the American Association of University Professors (AAUP) petitioned to represent a unit which excluded the Law School, while the Law School Bargaining Committee sought to represent the Law School in a separate unit.¹⁶⁴ The Board noted that while a university-wide unit of professional employees had been found appropriate in *C.W. Post*, the operation of the Law School here involved was not "so highly integrated with that of the remainder of the University as to compel a finding that an overall unit alone is appropriate."¹⁶⁵ Inasmuch as there was no bargaining history on a

¹⁶⁰ *Id.* at 675, 84 L.R.R.M. at 1035.

¹⁶¹ 216 N.L.R.B. No. 81, 88 L.R.R.M. 1228 (1975).

¹⁶² *Id.* at , 88 L.R.R.M. at 1230. Compare *Mercy Hospitals of Sacramento*, 217 N.L.R.B. No. 131, 89 L.R.R.M. 1097, 1098-99 (1975), where the Board found appropriate an overall unit for two hospitals located 13 miles apart.

¹⁶³ 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971).

¹⁶⁴ *Id.* at 134, 78 L.R.R.M. at 1178-79. The University argued against the exclusion of the Law School from the overall bargaining unit. *Id.*

¹⁶⁵ *Id.* at 137, 78 L.R.R.M. at 1181. The Board noted many factors which distinguished the Law School from the general University community. The Law School operated out of a separate building, with other schools never using the Law School's classrooms and rarely using its facilities. Its faculty had never taught courses independently in any other schools, nor did other faculty ever teach at the Law School. Fifty-seven percent of the Law School faculty were full professors compared to only twenty percent for the rest of the University; and the Law School faculty were eligible for tenure after only three years, as opposed to seven for other faculty. Furthermore, Law School faculty averaged higher salaries than other faculty because private law firm rates were taken into consideration in setting these salaries. Furthermore, the New York Court of Appeals regulates admission to law practice in New York and had issued rules and regulations concerning legal education in the state. In addition, the Law School was a member of the Association of American Law Schools (AALS); and both the AALS and

broader basis and considering the fact that no labor organization sought to include the Law School in an overall unit, the Board found a separate unit appropriate. In so ruling, the Board stressed that the specialized training, the separate location, different calendar and lack of interchange were critical factors in excluding the school from a university-wide unit.¹⁶⁶

In Syracuse University,¹⁶⁷ the AAUP sought a university-wide unit, while a special law faculty group sought separate representation for the Law School.¹⁶⁸ For the first time, two unions were seeking to represent a law school. The Board found the *Syracuse* situation to be in all critical aspects similar to the situation in *Fordham* where the Board had found appropriate a separate unit of law faculty.¹⁶⁹ The Board, however, further noted that the industrial model for unit determinations developed by the Board under the Act was often inappropriate in the university area since in the educational field a group of faculty often have an intellectual allegiance to a particular discipline that transcends economic concerns. Because of this special character of university faculty, the Board asserted that it must guard the rights of minority groups whose intellectual interests differed from those of the general faculty.¹⁷⁰ Despite these considerations, the Board found that a unit of all faculty could be appropriate here. While the Law School faculty was an identifiable group of employees with a community of interest which was not submerged in the broader community of interest shared with the other University faculty members, the Law School faculty did, in fact, share those broad interests with the University faculty. In fashioning a remedy for the situation in which either separate or full faculty units would be appropriate, the Board opted for a self-determination election to ascertain whether the law faculty should be represented in the overall unit, should have separate representation, or should be unrepresented regardless of the choice of the University faculty as a whole.¹⁷¹

In light of the recent university unit determination cases involving petitions for separate units of law school faculty, it is clear that the Board has identified various operating factors which should be present if a petition for a separate law school unit is to be successful. They

the N.Y. Court of Appeals promulgated detailed regulations, some of which affected the terms and conditions of employment at the Law School, including hours during which classes could be held, length of class periods, faculty/student ratios, faculty offices and maximum teaching loads. Finally, the Law School operated on a different calendar than the rest of the University. *Id.* at 136, 78 L.R.R.M. at 1180-81.

¹⁶⁶ *Id.* The Board has followed its *Fordham* ruling in *Catholic Univ.*, 201 N.L.R.B. 929, 82 L.R.R.M. 1385 (1973), and *University of San Francisco*, 207 N.L.R.B. 12, 84 L.R.R.M. 1403 (1973), cases involving similar facts as *Fordham*.

¹⁶⁷ 204 N.L.R.B. 641, 83 L.R.R.M. 1373 (1973).

¹⁶⁸ *Id.* at 641, 83 L.R.R.M. at 1374.

¹⁶⁹ *Id.* at 644, 83 L.R.R.M. at 1376.

¹⁷⁰ *Id.* at 643-44, 83 L.R.R.M. at 1376.

¹⁷¹ *Id.* The Board again directed a self-determination election in *New York Univ.*, 205 N.L.R.B. at 4, 83 L.R.R.M. at 1550.

include: exclusive occupancy of a separate building; mandatory compliance with ABA and AALS accreditation standards; autonomous academic calendar; higher faculty salaries; shorter tenure eligibility period; higher percentage of tenured faculty; and operational independence.¹⁷² Nevertheless, while the existence of these operating factors plays an important role in determining whether the Board establishes a separate law school unit, the Board's overriding concern seems to be the preservation of the autonomy of special faculty groups whose intellectual interest would be detrimentally submerged if they were to be included in a general university faculty group; and as such, the absence of some of these factors may not prove detrimental to a separate unit petition.

b. *Other Graduate Professional Schools.* In a footnote, the Board in *Fordham I*, observed that many of the factors set forth concerning Fordham's law school were equally applicable to the University's other professional schools.¹⁷³ While it was unnecessary for the Board in *Fordham I* to reach the merits in passing on the appropriateness of granting separate unit status to the faculty of a professional school other than a law school,¹⁷⁴ this question has been elsewhere considered. In *University of Miami*, the Board excluded the Schools of Medicine and Marine Biology as well as the Law School from the larger University faculty unit.¹⁷⁵ While there was some evidence

¹⁷² See *University of Miami*, 213 N.L.R.B. 634, 635, 87 L.R.R.M. 1634, 1637 (1974).

¹⁷³ The Board has stressed the following factors as grounds for excluding a law school from the university unit: specialized training, separate location, different academic calendar, lack of interchange, different tenure eligibility rules, and separate accreditation.

¹⁷⁴ In *Fordham I* no party sought a separate unit for any professional schools other than the Law School. 193 N.L.R.B. at 137 n.12, 78 L.R.R.M. at 1181 n.12. See also *Fairleigh Dickinson Univ.*, 205 N.L.R.B. 673, 84 L.R.R.M. 1033. In *Fairleigh Dickinson*, the AFT argued that the Dental School should be excluded from the unit. The AAUP and University argued for its inclusion. *Id.* at 676, 84 L.R.R.M. at 1036.

The Dental School was located across the river from the University's Teaneck, New Jersey campus, occupying a building used almost entirely for dental instruction. Dental faculty served on the University Faculty Senate and had University-wide grievance procedures available to them. All University personnel policies applied with equal force to the dental faculty. Several courses were taught by the dental faculty in conjunction with faculty members from the Science and Engineering School.

On the other hand, a substantial number of its full-time faculty were dentists whose average salaries were substantially higher than their faculty counterparts elsewhere in the University. Dental faculty did not participate on a regular basis in general University governance, and the Dental School was scrutinized by separate outside accrediting bodies. *Id.* at 675-76, 84 L.R.R.M. at 1035. Furthermore, there was no functional integration between the Dental School and the other colleges, and the thrust of teaching in that school ("teaching a specific profession") was entirely different from the other colleges "whose basic goals are student matriculation within the framework of a much broader academic discipline." *Id.* at 676, 84 L.R.R.M. at 1036.

The Board ruled that while such factors could support a separate unit limited to the faculty of the Dental School, "as no labor organization seeks to represent them separately, we shall include the dental faculty in the overall unit." *Id.*

¹⁷⁵ 213 N.L.R.B. at 636-37, 87 L.R.R.M. at 1637-39.

militating against the Board's holding,¹⁷⁶ on balance, a number of factors persuaded the Board to grant separate unit status. The School of Medicine, first of all, was ten miles from the main campus, based on a medical complex of hospitals, clinics and institutes. Additionally, the Board noted that the 577 full-time faculty at the Medical School were responsible for the education of 640 students, while at the main campus, 520 faculty served the needs of 14,000-plus students. Further, more than 300 among the medical faculty were practicing physicians, devoting a substantial portion of their time to patient care. Other considerations included the facts that: the Medical School operated on a different school calendar than the rest of the University; the faculty had 12-month instead of 9-month contracts; and their average salaries were substantially larger than those of other faculty.¹⁷⁷ A final factor found significant by the Board concerned financing. Due to the availability of medical research and education grants, and to the large amount of income generated by patient-care activities, the salaries for the medical faculty came for the most part, from non-University sources.¹⁷⁸ Thus, it is apparent from the *Miami* decision that the Board is willing to apply its separate law school unit analysis to other graduate professional schools.

Commentary

The Board is assured of broad discretion in fashioning units which will effectuate the purpose of the Act; nonetheless, with the exclusion of part-time faculty and the faculty of graduate professional schools, it appears that the Board is tending towards over-fragmentation in college cases. The Board's treatment of graduate professional schools has involved the analysis of two issues: whether separate representation is appropriate, and whether a vote for separate non-representation is justified.

The Board in *Syracuse* reasoned that the law faculty had a "special allegiance" to their particular discipline which transcended their community of interest with the University faculty as a whole. Although such allegiance would not justify disenfranchisement from collective bargaining, the majority of the Board suggested that the law faculty deserved the protection of special procedures:

Granting a voice merely in determining whether such a group shall be swallowed up by the collective body or shall have separate representation will not answer. Rather, it requires yet another choice, that of standing alone without

¹⁷⁶ The Medical School faculty followed University policies and guidelines, had representation on the University Senate, and received standard fringe benefits. Also, there was a limited degree of faculty interchange (20-25 medical faculty out of 577 having taught at the main campus), and the Medical School faculty also helped to train student nurses from the University's Nursing School. *Id.* at 635, 87 L.R.R.M. at 1638.

¹⁷⁷ *Id.* at 635-36, 87 L.R.R.M. at 1638.

¹⁷⁸ *Id.* at 636, 87 L.R.R.M. at 1638.

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representation regardless of the choice of the university body as a whole.¹⁷⁹

The special procedure devised by the majority not only allowed the Law School faculty to vote on whether to be included in a University-wide unit but also provided a procedure by which the Law School faculty, should it desire to be treated separately, could opt for representation by one of the associations or for no representation.¹⁸⁰ This special procedure was different than the "Globe" procedure under which a minority group of skilled employees is allowed to vote for separate representation; however, if such separate representation is defeated by a majority of the skilled employees, then those votes in favor of representation in the larger group are counted in the general representation election.¹⁸¹ Members Fanning and Penello in dissent argued that the existing "Globe" election procedure not only provided adequate protection for the law faculty's special interest, but also, in contrast to the proposed procedure, provided for at least some form of employee representation.¹⁸²

The Board has not consistently applied its principles of separate representation and separate non-representation in cases involving graduate schools other than law schools. Logically, the majority's rationale in *Syracuse* for separate non-representation would seem to apply in instances where no labor organization sought separate representation for a particular graduate faculty unit. The fact that the option for separate representation is unavailable should not alter the availability of the other two options—non-representation or university-wide representation. Yet in *Fairleigh Dickinson University*,¹⁸³

¹⁷⁹ 204 N.L.R.B. at 643, 83 L.R.R.M. at 1376.

¹⁸⁰ *Id.* at 644, 83 L.R.R.M. at 1376-77.

¹⁸¹ "In a typical 'Globe' election, employees vote in two groups, with the minority group of skilled employees having the option of voting for representation in a separate unit. If separate representation is not favored by the majority in the skilled unit, then their votes are pooled with those of the other voting group to determine the question of representation in the overall unit. Thus, a 'Globe' election here would separate the faculty into 2 voting groups—one composed of the law faculty, the other consisting of the remainder of the faculty. The law faculty would vote whether it desired representation by the Law Faculty Association, which seeks the separate unit, by the AAUP, or by neither. If a majority of the law faculty did not select separate representation by the Law Faculty Association, then their votes would be pooled with those of the other faculty members to determine representation in the resulting overall unit. In that circumstance, the votes of the law faculty would be accorded their normal weight, whether for or against representation, save those votes for the Law Faculty Association, which would not be counted for or against representation in the overall unit." *Id.* at 645 n.11, 83 L.R.R.M. at 1378 n.11 (dissenting opinion).

¹⁸² *Id.* at 645, 83 L.R.R.M. at 1378. The dissenters also queried whether the majority's concern for the protection of special interests would carry over into the industrial sector since within the industrial sector craftsmen are arguably more clearly distinct from unskilled workers than law faculty are from their fellow university faculty members. *Id.*

¹⁸³ 205 N.L.R.B. 673, 84 L.R.R.M. 1033 (1973). For a discussion of the *Fairleigh Dickinson* decision see note 174 *supra*.

the Board approved a unit which included the School of Dentistry, without affording the school's faculty the choice of separate non-representation. The Board based its decision on the fact that no labor organization sought to represent the school separately, while the AAUP was willing to represent it as a part of the overall unit.¹⁸⁴ From this decision, it appears that the Board is concluding that dentists, unlike lawyers, do not deserve "another choice, that of standing alone without representation, regardless of the choice of the University body as a whole." Similarly, in *New York University Medical Center*¹⁸⁵ the Board refused to allow a petition to represent a unit of clinical and teaching psychiatrists on the grounds that any separate community of interest that they enjoyed had been largely submerged in the broader community of interest they shared with other physicians and (possibly) other "allied" professionals in the health care industry.¹⁸⁶ As such, the Board, when dealing with medical faculty as opposed to legal faculty, seems to be less sensitive to the existence of any "special allegiance" that would warrant separate unit status.

In analyzing what seems to be inherent inconsistencies in the Board's treatment of legal faculty and their medical counterparts, it is interesting to note that Congress has expressly noted its concern over the possibility of over-fragmentation in the health care industry.¹⁸⁷ Thus, the Board's unwillingness to provide separate unit status for medical faculty may merely be an example of Board implementation of expressed congressional policies. Thus, there seemingly is a policy basis from which to conclude that the Board's concern for establishing effective and stable bargaining units should override its desire to maintain the autonomy of a so-called "second profession." It may be, then, that the Board's treatment of legal faculty could well change with respect to the granting of separate unit status.

D. Other Professionals

Congress has stated that no bargaining unit which includes both professional employees and non-professionals is appropriate unless a majority of the professionals to be included in the unit vote for the

¹⁸⁴ See note 174 *supra*.

¹⁸⁵ 217 N.L.R.B. No. 116, 89 L.R.R.M. 1045 (1975).

¹⁸⁶ *Id.* at , 89 L.R.R.M. at 1049.

¹⁸⁷ See 120 CONG. REC. S. 6940 (1974); 120 CONG. REC. S. 7311 (1974). Although the Board usually accords great weight to Congress' expressed concern over the possible proliferation of bargaining units in the Health Care industry, it has nonetheless found that registered nurses have a "singular community of interest" separate from other health care professionals, due in large part to their long history of separate representation. See *Gnadden Huetten Memorial Hospital*, 219 N.L.R.B. No. 79, 89 L.R.R.M. 1761, 1762 (1975); *Dominican Santa Cruz Hospital*, 218 N.L.R.B. No. 182, 89 L.R.R.M. 1504, 1505-06 (1975); *Mercy Hospitals of Sacramento*, 217 N.L.R.B. No. 131, 89 L.R.R.M. 1097, 1099-1101 (1975).

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non-professionals' inclusion.¹⁸⁸ In general terms, Congress has defined a "professional employee" in Section 2(12) of the Act as one whose work is predominantly of an intellectual nature, involves the exercise of discretion, is not of such character as to create a product that can be standardized, and requires knowledge of the type usually obtainable only through a prolonged course of specialized instruction. Also included in the definition is an employee who has completed a specialized intellectual course of instruction, and who is presently working under the supervision of a professional to qualify himself to become a professional.¹⁸⁹ While no claim has been advanced that faculty are not professional employees, there are certain non-teaching employees in the university structure whose status as professionals is less clear. Moreover, even when these non-teachers are classified as professionals, there often remains the question whether it is proper to include them in a unit with faculty.

(1) *Classification of Non-Teaching Employees*

a. *Librarians.* Librarians are often the largest body of non-teaching professionals on campus. As their job ordinarily requires "knowledge of an advanced type . . . acquired by a prolonged course of specialized intellectual instruction," their professional status is not usually in question. Not all librarians are, however, required to hold advanced degrees; where this is the case, their status as professionals can be successfully challenged. Thus, in *Endicott College*¹⁹⁰ four librarians and one cataloger were excluded from a faculty bargaining unit. In that case, the librarians and cataloger did not hold faculty rank, handled routine receipt and discharge of books and answered

¹⁸⁸ Section 9(b)(1) of the Act provides:

[T]he Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.

¹⁸⁹ 29 U.S.C. § 152(12). "Professional employee" is defined in Section 2(12) of the Act as:

(a) Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) Any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

¹⁹⁰ *Endicott Junior College*, Case No. 1-RC-12,672 (Sept. 12, 1973).

student reference questions. Moreover, the job requirements for the librarian position could be learned in about two weeks of in-service training. Accordingly, these individuals were not included in the unit.¹⁹¹

b. *Guidance Counselors.* Guidance counselors are more likely to be classed as professional employees than academic and admissions counselors in that they deal with the students' psychological and emotional problems. Further, they often hold advanced degrees in the field of psychology.¹⁹² However, academic and admissions counselors ordinarily do not hold degrees in a specialized area directly related to their work. Based on this fact, the Board in *C.W. Post* would not classify the academic and admissions counselors as professionals and therefore excluded them from the faculty unit. In reaching this conclusion, the Board noted that Congress' definition of a "professional employee" requires that the duties performed be related to a science or discipline the study of which involves an advanced, prolonged course of specialized instruction. In *C.W. Post* the Board asserted that all that was required of academic or admissions counselors was a knowledge of the school; accordingly, it denied those counselors professional status.¹⁹³

c. *Coaches.* Athletic coaches were found to be professional employees in *Manhattan College*¹⁹⁴ based on the fact that all had academic degrees and all engaged in teaching.¹⁹⁵ Similarly, members of the department of physical education were classed as professionals in *Rensselaer Polytechnic Institute*,¹⁹⁶ where the record established that every one of them did some teaching.¹⁹⁷ However, in *University of Miami* coaches were held not to be professionals inasmuch as their

¹⁹¹ *Id.* at

¹⁹² *C.W. Post*, 189 N.L.R.B. 904, 908, 77 L.R.R.M. 1001, 1005 (1971); *Northeastern*, 218 N.L.R.B. No. 40, 89 L.R.R.M. 1862, 1869 (1975).

¹⁹³ As to academic and admission counselors, the Board noted that "[t]he knowledge they are required to possess and the duties they perform are not related to a discipline or field of science, but require only a knowledge of the Center's curriculum and services." *C.W. Post*, 189 N.L.R.B. at 908, 77 L.R.R.M. at 1005.

¹⁹⁴ 195 N.L.R.B. 65, 79 L.R.R.M. 1253 (1972).

¹⁹⁵ In that decision the Board described the coaches and their jobs:

[A]ll have academic degrees and at least one has a master's degree. They are engaged in substantial part in teaching physical and mental skills, utilizing educationally acquired knowledge of their specialty. In short, their jobs might well be characterized as the practice of a specialized form of physical education. The fact that their activities relate to an extracurricular matter, while perhaps of some importance to the students, is less significant in classifying the nature of the work. We think that these coaches qualify as professional employees under Section 2(12) of the Act.

Id. at 66, 79 L.R.R.M. at 1255.

¹⁹⁶ 218 N.L.R.B. No. 220, 89 L.R.R.M. 1844 (1975).

¹⁹⁷ *Id.* at , 89 L.R.R.M. at 1849.

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coaching duties did not require advanced degrees and they did no teaching.¹⁹⁸

d. *Research Personnel.* Research personnel are generally held to be professional employees if they are more than mere technicians¹⁹⁹ since they can usually be included under that part of Congress' definition which refers to employees who have completed advanced studies but are working under the supervision of a professional in order to become a professional. Often times, however, such personnel may not be employees of the institution. It is quite usual for research personnel who are working on grant-funded projects to be paid by the institution, covered by its insurance and entitled to some fringe benefits. However, the institution does not always have control over the grant monies, in which case, the research personnel may be deemed not its employees.²⁰⁰

e. *Graduate Students.* In *Leland Stanford Junior University*²⁰¹ the Board held that graduate students who were paid for doing research were not professional employees, but were merely students receiving a form of financial aid. The graduate students were paid the same amount regardless of the time they actually worked; they were not expected to "produce" anything of value; and they were, in effect, being paid for doing what was required of them to earn their degrees.²⁰² Previously, in *Adelphi University*, the graduate students (teaching and research assistants) were excluded from the unit on a different ground; namely, that as students they lacked a sufficient community of interest with the faculty. The Board did not hold that the students were not employees—and in fact this would have been more difficult than in *Stanford*, since in *Adelphi* the graduate assistants had defined duties, varied salary structures, and definite work output requirements.²⁰³ However, the question of graduate student status may have ultimately been resolved by the Board's recent decision on the employee status of medical interns.

Graduate assistants may be equated to interns and residents in hospital situations in terms of the nature of their duties, training, salary structures and work requirements. Both graduate assistants and interns may be said to be understudying professionals—not yet at the terminal level of study needed to meet the requirements of Section 2(12) (b) of the Act. Significantly, in the recent decision of *Cedars-Sinai*

¹⁹⁸ 213 NLRB at 639, 87 L.R.R.M. at 1641.

¹⁹⁹ See, for example, *C.W. Post*, 189 N.L.R.B. at 906-07, 77 L.R.R.M. at 1004-05.

²⁰⁰ Compare, *Fordham I*, 193 N.L.R.B. at 136, 78 L.R.R.M. at 1180 (research assistants not employees), with *Northeastern*, 218 N.L.R.B. at , 89 L.R.R.M. at 1870-71 (research assistants professional employees).

²⁰¹ 214 N.L.R.B. No. 82, 87 L.R.R.M. 1519 (1974).

²⁰² *Id.* at , 87 L.R.R.M. at 1520-21.

²⁰³ 195 N.L.R.B. at 640, 79 L.R.R.M. at 1548.

*Medical Center*²⁰⁴ the Board held that interns and residents were not employees within the meaning of the Act but rather were primarily students engaged in graduate educational training. Thus, the students' status as "professionals" is foreclosed, since this issue would only be confronted if initial employee status were found. Since the case for finding employee status of hospital housestaff is much stronger than graduate assistants in that the interns receive generally higher rates of pay, have greater status and work responsibilities, are eligible for fringe benefits, and experience far more continuity of employment than graduate assistants, it would appear, for the sake of consistency, that the Board should not find that graduate assistants are employees under the Act.

(2) Unit Placement

As noted above, librarians, athletic coaches, counselors, and research personnel who are not graduate assistants may all qualify as professional employees. Once this hurdle is overcome, the remaining issue is whether they should be placed in faculty units.

Librarians have been included in units with full-time faculty,²⁰⁵ unless either supervisory status²⁰⁶ or lack of professional status is found.²⁰⁷ While the librarians are, as a general rule, included in the faculty unit, the Board noted the following differences between librarians and faculty in *New York University*:

Professional librarians are titled curator, associate curator, assistant curator, or library associate in descending order of rank. Unlike faculty, the function of a librarian may change with title, and promotion may depend on the existence of a vacancy. Further distinguishing librarians from faculty are their regular workweek; retirement age; tenure requirements; separate grievance procedure; lack of proportional representation in the university senate (though the dean of libraries, like other deans, is a member); and, perhaps more

²⁰⁴ 223 N.L.R.B. No. 57, 91 L.R.R.M. 1398, 1400, *rehearing den.*, 224 N.L.R.B. No. 90, 92 L.R.R.M. 1309 (1976). In determining that the interns were primarily students, the Board noted that an internship was a requirement for the state examination for licensing. The Board further noted that while the interns spent a large portion of their time in direct patient care, such direct contact was the only viable learning process for a medical student. Moreover, the Board emphasized the fact that an intern's compensation was merely a living allowance and as such bore no relationship to the number of hours worked. Also, the Board noted that the purpose of the internship programs was educational and not designed to meet the staffing needs of the hospital. Finally, the Board noted that few interns at Cedars-Sinai established an employment relationship with the hospital upon completion of their internship thus indicating the educational nature of the program. *Id.* at _____, 91 L.R.R.M. at 1400.

²⁰⁵ *But see*, *Yeshiva Univ.*, 221 N.L.R.B. No. 169, 91 L.R.R.M. 1017 (1975).

²⁰⁶ *See, for example*, *Northeastern Univ.*, 218 N.L.R.B. No. 40, 89 L.R.R.M. 1862, 1869-70 (1975).

²⁰⁷ *See, for example*, *Endicott Junior College*, Case No. 1-RC-12,672 (Sept. 12, 1973).

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basically, the fact that they are not considered faculty.²⁰⁸

Despite these differences, the Board held that the librarians shared a sufficient community of interest with faculty, as a "closely allied professional group whose ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner."²⁰⁹

The Board has also included other non-teaching professional personnel in the faculty unit when it has found a sufficient community of interest between those non-teachers and the faculty. Thus, athletic coaches have been included with the faculty when found to be professional employees and when further found to share many of the same benefits of the other employees in the unit.²¹⁰ The existence of similar benefits has also been determinative in the case of research assistants.²¹¹

Those personnel who perform administrative as well as teaching functions have also been included in the unit. In *Florida Southern College*,²¹² for example, such personnel as the college chaplain, the assistant dean of academic affairs, the publications editor, and the director of athletics were included in the unit. The Board indicated that these administrative personnel enjoyed faculty status and spent a substantial portion of their time as professionals performing functions similar to those of the full-time faculty.²¹³ Thus, in dealing with the question of the inclusion of non-teaching personnel in the full-time faculty unit, the Board has focused primarily on the existence of a community of interest among the non-teachers and the faculty. Furthermore, it would seem that, in finding a community of interest, the Board has relied heavily on the existence of similar benefits or the availability of similar promotions such as tenure.

(3) *Further Distinctions Among Faculty*

In *University of Miami*, the Board noted that full-time faculty included those with regular, term and indefinite appointments. In that case, the Board found the differences between the three groups to be: regular appointments are all to tenured or tenure-earning positions, while term appointments are made for a specific period and generally are not tenure-earning. Indefinite appointments continue from year to year, and also provide no opportunity for tenure. The Board, how-

²⁰⁸ 205 N.L.R.B. at 8, 83 L.R.R.M. at 1553.

²⁰⁹ *Id.*

²¹⁰ *Manhattan College*, 195 N.L.R.B. at 66, 79 L.R.R.M. at 1255.

²¹¹ *Northeastern Univ.*, 218 N.L.R.B. at , 89 L.R.R.M. at 1871. The Board has, however, included these assistants merely on the basis of their eligibility for tenure, *C.W. Post*, 189 N.L.R.B. at 907, 77 L.R.R.M. at 1004, and even on the basis of a felt community of interest. *Rensselaer*, 218 N.L.R.B. at , 89 L.R.R.M. at 1848.

²¹² 196 N.L.R.B. 888, 80 L.R.R.M. 1160 (1972).

²¹³ *Id.* at 890, 80 L.R.R.M. at 1164.

ever, noted that except for tenure, the functions, responsibilities, and benefits of the three classes were very similar.²¹⁴ As such, the Board found that the similarities represented a sufficient basis for finding a community of interest among the three groups, and, therefore, in spite of their differences the Board placed all full-time faculty in the same unit.²¹⁵

Although the community of interest concept has provided the basis for including in the full-time faculty unit not only non-teaching personnel but also term and indefinite appointed faculty, this rationale has not controlled when the Board has confronted the question of including visiting faculty. The Board in *Goddard College*²¹⁶ excluded visiting faculty from the full-time faculty unit even though the visiting faculty worked a full-time load, received the same pay and benefits, and were entitled to full participation in governance, including voting privileges. The Board based its decision on the ground that the visiting faculty had no reasonable expectancy of reemployment, in that they only occasionally stayed more than one year and only five to ten percent were offered permanent faculty positions.²¹⁷ This treatment of visiting faculty is seemingly inconsistent with the Board's position that terminal contract faculty members should be included in the unit. Terminal contract faculty are employees who, at the time of the election, have been notified that they will not be rehired at the expiration of their contracts.²¹⁸ Concerning terminal contract faculty, the Board has stated that it will not inquire into their expectancy of employment beyond the date of the election. The Board has therefore included these terminal faculty in units of full-time faculty based on a finding of a substantial community of interest.²¹⁹ As defined above, however, terminal contract faculty members have a status strikingly similar to that of visiting faculty. Therefore, the inconsistent treatment of visiting faculty and terminal contract faculty is suspect.

²¹⁴ 213 N.L.R.B. at 638, 87 L.R.R.M. at 1640.

²¹⁵ *Id.*, 87 L.R.R.M. at 1641. Faculty are also ranked according to their qualifications, and salaries are scaled according to rank. Quite commonly, there are four ranks: full professor, associate professor, assistant professor, and instructor. See, for example, *Adelphi Univ.*, 195 N.L.R.B. at 639, 79 L.R.R.M. at 1547; *C.W. Post*, 189 N.L.R.B. at 905, 77 L.R.R.M. at 1002.

²¹⁶ 216 N.L.R.B. No. 81, 88 L.R.R.M. 1228 (1975).

²¹⁷ 216 N.L.R.B. at , 88 L.R.R.M. at 1229. The Board relied on *General American Transp. Corp.*, 187 N.L.R.B. 120, 75 L.R.R.M. 1531 (1970), which involved a challenge to the ballot of an employee who had taken a leave of absence from his job in order to obtain a teaching degree. The leave was granted on condition he return as a temporary employee. Shortly before the election, the employee gave several months' notice of his intent to terminate employment. The Board held he did not share a sufficient community of interest with the voting group, in that he was a temporary employee without a reasonable expectancy of future employment in the voting group. *Id.* at 120-21, 75 L.R.R.M. at 1532.

Citing *Goddard*, the Regional Director for Region One excluded visiting faculty from the unit in *Trustees of Boston Univ.*, Case No. 1-RC-13,564 (April 17, 1975).

²¹⁸ *Manhattan College*, 195 N.L.R.B. at 66, 79 L.R.R.M. at 1253.

²¹⁹ *E.g.*, *Manhattan College*, 195 N.L.R.B. at 66, 79 L.R.R.M. at 1253.

(4) *Faculty As Individual Supervisors*

Although the Board has held that the faculty collectively cannot be found to assume supervisory status,²²⁰ there remains the question of whether individual faculty who direct the work of graduate assistants or who direct research projects should be found to be supervisors. The Board has held that faculty who direct the work of graduate assistants are not, as a result, imbued with supervisory status.²²¹ The Board's position on this issue stems from its belief that the faculty and graduate assistants maintain a teacher-student rather than an employer-employee relationship, since the faculty member who directs a particular graduate assistant in his work also is usually directing that graduate student's studies.²²²

Of some interest is the Board's handling of so-called principal investigators—those faculty who are working on and directing research projects. In making the determination whether to exclude principal investigators from the faculty unit based on the existence of supervisory authority, the Board has focused on the status of the research assistants that these investigators direct. Thus, when the Board has ruled that the research assistants were not employees of the university, it has, accordingly, rejected the argument that the investigators are supervisors.²²³ However, when the Board has found the research assistants to be employees of the university²²⁴ the Board, without even applying the "50%" rule, has found the investigators to be supervisors, and has thereby excluded them not only when the research assistants were included in the faculty unit²²⁵ but also when the assistants were excluded from the unit.²²⁶ Finally, since most of the research projects involving faculty members as principal investigators continue usually for only one or two years, the Board's exclusion of these faculty members during the pendency of their research results in a situation where various faculty members pop in and out of the bargaining unit as their grants issue or expire. Thus, the Board's exclusion of principal investigators as supervisors during the research periods has given rise to the phrase "popcorn unit."²²⁷

²²⁰ See discussion of Collective Authority, text at notes 145-51 *supra*.

²²¹ *Fordham I*, 193 N.L.R.B. at 135-36, 78 L.R.R.M. at 1180.

²²² *Id.* See also *New York Univ.*, 205 N.L.R.B. at 8, 83 L.R.R.M. at 1554 (where the Board found the directing faculty not to be supervisors and was also able to rely on the "50%" rule to find similarly that the challenged faculty should be included).

²²³ *Fordham I*, 193 N.L.R.B. at 136, 78 L.R.R.M. at 1180. The basis for determining that the research assistants were not employees of the University in *Fordham I* was that the grant funds were administered directly by the granting agency. *Id.* To the same effect, see *New York Univ.*, 205 N.L.R.B. at 9, 83 L.R.R.M. at 1554.

²²⁴ *E.g.*, *Northeastern*, 218 N.L.R.B. at , 89 L.R.R.M. at 1870; *Rensselaer*, 218 N.L.R.B. at , 89 L.R.R.M. at 1848. The basis for finding the research assistants to be employees of the university was that the university administered the grant funds.

²²⁵ *Northeastern*, 218 N.L.R.B. at , 89 L.R.R.M. at 1870; *Rensselaer*, 218 N.L.R.B. at , 89 L.R.R.M. at 1848.

²²⁶ *Yeshiva Univ.*, 221 N.L.R.B. No. 169, 91 L.R.R.M. 1017, 1021 (1975).

²²⁷ *Northeastern*, 218 N.L.R.B. at , 89 L.R.R.M. at 1870.

Commentary

The above examination of some of the Board's unit determinations in the university sector indicates that the Board may have abandoned a functional approach to unit placement in higher education, resulting in an overfragmentation of bargaining units in the university structure. Part-time faculty are excluded, for example, even though their function, teaching, is the same as that of full-time faculty. Law faculty are permitted to vote for separate non-representation even though they are employed as teachers, not as lawyers. Graduate students are excluded because theirs is primarily a student-teacher rather than an employment relationship. Ironically, librarians and counselors are included because their ultimate function, (i.e. education) converges with that of full-time faculty. These results reveal a type of inconsistency on the part of the Board which is even more troublesome than that which arises from the Board's application of the traditional "community of interest" rationale.

In light of the inconsistencies, it may well be asked whether the Board has performed its function of establishing units "directly relevant to the circumstances of collective bargaining."²²⁸ On one hand, the Board appears to be seeking to avoid fragmentation, with the resulting instability and inefficiency in collective bargaining, by including non-teaching professionals in the unit. Yet, on the other hand, its policy in regard to part-time faculty and graduate professional schools has evoked sharp criticism that it is over-fragmenting the unit to the detriment of employee bargaining power.²²⁹ This difficulty arises primarily from the Board's failure to articulate a reliable "community of interest" test, which in turn stems, at least in part, from the lack of certainty regarding what will be deemed mandatory subjects of bargaining.²³⁰

The Board's treatment of clinical and teaching psychiatrists in *New York University Medical Center* provides an interesting comparison to the Board's decision, in the university area and at the same time, perhaps provides a basis from which to construct a response to the danger of weakening employee bargaining power. In *New York University Medical Center*, the Board, while utilizing the jurisdictional standard established for a college, applied the policy against fragmenta-

²²⁸ See note 72 *supra*.

²²⁹ Arguably, by the Board's rationale in the law school cases, separate units for every school at a college or university could be appropriate, since each school's faculty no doubt has a "special allegiance" to their particular discipline which transcend, at least to some degree, their community of interest with the university faculty as a whole. For a discussion of the law school cases, see text at notes 163-72 *supra*.

²³⁰ For example, if the law faculty is to be able to bargain for a separate facility—an interest perhaps inconsistent with those of the general university faculty—then perhaps a separate unit would be appropriate. Similarly, if part-time faculty are allowed to bargain for participation in tenure or government—an interest more than likely inconsistent with that of the full-time faculty—then perhaps, here again, a separate unit would be appropriate.

tion mandated by Congress in the health care industry, and concluded that any separate community of interest which the psychiatrists enjoyed was largely submerged in a broader community of interests that they shared with other physicians and (possibly) other "allied" professionals in the health care industry.²³¹ In the university area, the Board's inclusion of librarians and other non-teaching professionals in a unit with faculty is strikingly similar to its predilection for an all-professional unit in the health care industry.²³² The Board's treatment of law school, part-time, and visiting faculty, however, is basically inconsistent with its treatment of the various personnel in the health care industry. Thus, in the area of university bargaining units, the Board, acting without the guidance of an expressed congressional policy, seems to be unsure as to what its overriding concern should be. Because of this, the Board, while paying lip-service to the principles of collective bargaining stability and efficiency, has opted to fragment the university faculty unit based on what seems to be rather superficial differences in interests.

It is submitted that the Board should pay more heed to the true nature of a university and less to surface aspects of form. A college or university is a broad-based community of scholars, each with his or her own area of expertise in a particular subject. Further, each scholar has his own style; some are noted for research, some for a particular classroom method, others for success with grants. None can be said to be more of a faculty member than another. Many of the fields of teaching have special overview or certification requirements, such as nursing, physical therapy or education; others do not. Some professors spend a great deal of time in the classroom; others rely heavily on teaching assistants. It would appear that when the university or college is viewed as a collection of highly individualistic professionals who have in common one overriding goal, the education of students, many of the Board's criteria for unit exclusion of part-time faculty, law faculty or principal investigators become unpersuasive in the perspective of a scholarly, rather than an industrial, "community".

III. COLLECTIVE BARGAINING ISSUES

While there is now a body of case-law on unit-determination in the university sector, few of the issues "lurking" in the area of university collective bargaining have as yet been litigated. The question of what issues within the university sector should be considered mandatory subjects of bargaining may become an area of conflict and confusion especially in light of the prominent role faculty senates and

²³¹ 217 N.L.R.B. at , 89 L.R.R.M. at 1049.

²³² See Kaiser Foundation Hospitals, Inc., 219 N.L.R.B. No. 22, 89 L.R.R.M. 1667, 1668 (1975); Mt. Airy Foundation, 217 N.L.R.B. No. 137, 89 L.R.R.M. 1067, 1068 (1975); see generally Nathan and Miriam Barnert Memorial Hospital Center, 217 N.L.R.B. No. 132, 89 L.R.R.M. 1083 (1975).

committees presently play in the development of university policy and procedure.

A. *Mandatory Subjects of Bargaining*

The distinction between mandatory and permissive subjects of bargaining is too well understood to require extensive review here.²³³ To the extent that faculty have in the past participated in decisions concerning non-mandatory subjects, the distinction between mandatory and permissive subjects of bargaining is important only insofar as the relationship between faculty and administration becomes more adversarial and less cooperative or "collegial." If the relationship between the faculty, as represented by their bargaining representative, and the University becomes adversarial, the University could develop a hard-line approach and curtail faculty input on all non-mandatory subjects of bargaining. This would allow the faculty to provide input only on the mandatory subjects of bargaining—"wages, hours, and other terms and conditions of employment."²³⁴

(1) *Wages and Hours*

The scope of faculty bargaining over wages and hours should not prove too difficult from a definitional standpoint in light of the precedent which has evolved in the industrial sector. For example, the Board has rejected the argument that merit increases are not mandatory subjects of bargaining simply because they are dependent upon the employer's assessment of the individual employees.²³⁵ Similarly, tuition remission may be likened to discounts on company products or services—also held to be within the term "wages."²³⁶ Other fringe benefits, such as pension plans and insurance have long been considered "wages" for purposes of bargaining.²³⁷

The same may be said of the factor of "hours." In the industrial

²³³ See generally, *Seattle First Nat'l Bank v. NLRB*, 444 F.2d 30, 77 L.R.R.M. 2634 (9th Cir. 1971); *United Electric, Radio and Machine Workers v. NLRB*, 409 F.2d 150, 70 L.R.R.M. 2529 (D.C. Cir. 1969). See also note 234 *infra*.

²³⁴ Section 8(d) of the Act, 29 U.S.C. § 158 (d) provides in part:

For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment

²³⁵ *E.W. Scripps Co.*, 94 N.L.R.B. 227, 228, 28 L.R.R.M. 1033, 1034 (1951); see also *NLRB v. Katz*, 369 U.S. 736, 745-46 (1962).

²³⁶ See, for example, *NLRB v. Central Ill. Public Service Co.*, 324 F.2d 916, 918-20, 54 L.R.R.M. 2586, 2588-89 (7th Cir. 1963).

²³⁷ *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251, 22 L.R.R.M. 2506, 2510 (7th Cir. 1948), *cert. den.*, 336 U.S. 960 (1949).

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sector, work schedules,²³⁸ the length of the work day,²³⁹ and the days of the week an employee must work²⁴⁰ have all been found to be mandatory bargaining subjects. These subjects should remain mandatory within the university bargaining structure, since they are basic to any employer/employee relationship.

(2) *Other Terms and Conditions of Employment*

"Other terms and conditions of employment" is the area of mandatory bargaining subjects most likely to spawn litigation. The scope of this phrase is potentially so enormous that its boundaries are most easily marked by outlining those subjects which are excluded as management prerogatives. For example, in the industrial sector, an employer cannot be required to bargain over its selection of supervisory or management personnel.²⁴¹ Another subject long considered the prerogative of the employer is the nature of the product to be manufactured, and the manner, means and processes of production.²⁴² While the boundaries of management prerogatives are fairly well defined in the industrial sector, the question arises of whether these or similar boundaries will serve to define "other terms and conditions of employment" as applied to the university sector.

If unionism is to supplant the existing faculty government system and provide the medium for faculty input into the administrative process, the result may be that certain subjects on which the faculty presently provide input through the faculty government structure, may be found to be outside the scope of the phrase "conditions of employment." Therefore, at some universities the influx of unionism could result in a decrease in faculty input into the educational and administrative process. Every institution, from the smallest of junior colleges to the largest of multi-campus universities, has traditionally functioned through relatively elaborate and complex governance systems. Committees upon committees serve to support these institutions, providing vehicles to move the institutions along, forming the means by which grievances are heard, identifying staffing needs, and developing curriculum. The coverage of such committees can touch every phase of the life of a faculty member, a student, or an administrator. Permanent and *ad hoc* committees are formed for a vast array of purposes—some clearly falling within the traditional parameters of

²³⁸ *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 504, 18 L.R.R.M. 1370 (1946), *enf. den. on other grounds*, 161 F.2d 949, 20 L.R.R.M. 2204 (6th Cir. 1947).

²³⁹ *Weston & Brooker Co.*, 154 N.L.R.B. 747, 763, 60 L.R.R.M. 1015, 1018, (1965), *enf'd*, 373 F.2d 741, 64 L.R.R.M. 2736 (4th Cir. 1967).

²⁴⁰ *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 519-21, 18 L.R.R.M. 1370 (1946).

²⁴¹ *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 463, 42 L.R.R.M. 2620, 2624, (2d Cir. 1958).

²⁴² See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

the phrase "conditions of employment,"²⁴³ but many clearly beyond that border. For example, faculty have traditionally been involved in the selection of administrators—department chairmen, deans, presidents; they have been part of budget committees advising boards of trustees; they have formed hiring committees which identify staffing needs, set job qualifications or, at the very least, interview and recommend new faculty members.

Technically, many of these areas—for example, selection of administrators and determination of hiring needs and procedures—have certainly never been considered by the Board as mandatory subjects of bargaining.²⁴⁴ The university sector is unique in that a successful faculty department largely depends upon obtaining compatible faculty while still maintaining overall philosophical balance. Thus, the hiring of new faculty who will work closely with the existing faculty in trying to create a suitable learning environment is arguably a condition of employment. However, if unionism replaces faculty government as the primary medium of faculty input, then the Board will face both difficult definitional problems, and the possibility of arriving at results inconsistent with those reached in the industrial sector.

How will the Board treat such problems? At St. John's University last year, a definitional problem arose where the school administration refused to discuss a faculty union proposal on "governance" which included a proposal on selection procedures for various administrators. An unfair labor charge resulted alleging refusal to bargain over a mandatory subject of bargaining. The charge was dismissed and an appeal denied, on the grounds that such an area was clearly not a mandatory subject of bargaining. Thus, the University consequently did not have to discuss the proposal with the union.²⁴⁵ Further guidance from the Board is needed before it will be possible to predict how the Board will define the parameters of mandatory bargaining subjects within the university sector. However, with many more institutions unionizing, decisions should be expected. One example of a possible disputed subject could be the faculty's role in the budget preparation process. Employees in a factory have nothing to do with establishing a management's budget priorities, whereas faculty departmental budget committees often assist not only the chairman but the dean and other administrators in establishing the budget. The issue here is whether a faculty union may insist on bargaining over

²⁴³ The Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), set the traditional parameters by elaborating on what fell outside of "conditions of employment."

If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area. *Id.* at 223 (Stewart, J., concurring).

²⁴⁴ See text and notes at notes 241-42 *supra*.

²⁴⁵ See *CHRONICLE OF HIGHER EDUCATION*, Vol. X, No. 4, at 1 (March 17, 1975).

budget procedure. A second possible area of dispute could be the faculty's relationship with the board of trustees. Faculty occasionally serve on boards of trustees, have access to board minutes and agenda, receive periodic reports from the board, or are allowed to submit proposals and appear before the board. Whether a faculty union, however, can insist upon bargaining over similar treatment remains to be seen.²⁴⁶

Commentary

"Wages, hours and other terms and conditions of employment" are words of limitation.²⁴⁷ Thus, the fact that faculty have traditionally provided input in certain areas does not automatically place those areas within the scope of mandatory bargaining, since the Supreme Court has held that common practice is not dispositive on the issue of mandatory bargaining subjects but only reflects the interests of the

²⁴⁶ Where will other battle lines be drawn? Some topic areas suggest themselves:

1. **Hiring.** Traditionally faculty have had key roles in identifying the need for new faculty within their departments and, then, varying roles in the hiring procedure from drafting the qualifications for the position to actually making formal hiring recommendations.

2. **Selection and Removal of Administrators.** Again, faculty have frequently been involved in search committees for department chairmen, deans and presidents. They have also frequently been able to "recall" their chairmen or petition for removal of the dean or president to the Board of Trustees. Faculty input into this area and faculty hiring is a clear example of the concept of a "community of scholars." The dichotomies which automatically become imposed in a union setting seem particularly alien to the "community of scholars" concept.

3. **Student Affairs.** Faculty unions do not represent students. But, can the argument be made that student admissions, standards and conduct are mandatory areas of bargaining? Presumably the argument would have to rest on the fact that faculty do most of their work with students. Yet, to put the question crudely, how is this different from an industrial employee claiming the right to bargain over the type of machinery he must work with?

4. **Retrenchment Decisions.** While it is clear that a faculty union can bargain over retrenchment (layoff) procedures, can it also insist on bargaining over the basic decision to retrench faculty (as opposed to saving money in some other way)? May it bargain over the particular areas to be retrenched? While such decisions clearly affect the faculty working conditions, will the NLRB consider it a sufficiently protected managerial prerogative?

5. **Tenure.** There seems little doubt that tenure will be considered to be a mandatory subject of bargaining.

6. **Peer Evaluation.** Must the right of one faculty member to judge another be negotiated in the context of bargainable areas like promotion, reappointment and tenure?

7. **Academic Freedom.** The area of concern most unique to faculty members as compared to employees in other industries is "academic freedom." This concept is a rallying cry for oppressed professors everywhere on issues which range from denial of tenure to treatment of students in class. But is it a "condition of employment"? Do the parameters of academic freedom extend too far, impinging upon the right of "management" to determine the governing philosophies of the institution and its basic right to "direct the work force"? Such questions have yet to be answered.

²⁴⁷ *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (Stewart, J., concurring).

employers and the employees in the subject matter.²⁴⁸ It is possible, however, that the Board will conclude that areas of traditional faculty involvement are "terms and conditions of employment." The Board has already taken the first step in this direction by basing its exclusion of part-time faculty from the full-time faculty unit on their lack of participation in governance. By reasoning that governance affects membership in the bargaining unit, the Board has implied that governance is a term and condition of employment, since the idea of forming bargaining units on the basis of community of interest assumes that the members of the unit have similar stakes in the terms and conditions of employment.

Of potentially greater significance than the Board's exclusion of part-timers is the Board's use of the concept of collegiality in denying department chairmen supervisory status, since by applying this concept to find that department chairmen are not supervisors,²⁴⁹ the Board has acknowledged the role that faculty input plays in policy and personnel decisions within the university structure. This acknowledgement could be interpreted to indicate that policy and personnel matters are not managerial prerogatives implemented by supervisors, but are instead terms and conditions of employment. In view of the above, the Board may have committed a fundamental error when it decided to enter the area of higher education through *ad hoc* adjudication rather than through rulemaking. Through the adjudicative process, the Board was forced to confront unit determination issues before it dealt with the basic questions of distinguishing which policy and personnel matters were within the discretion of management and which areas were mandatory subjects of bargaining. This use of the adjudication process may lead to such anomalous results as excluding part-time faculty from the full-time faculty unit based, at least in part, on the part-time faculty's non-participation in university governance—a matter that is arguably within the purview of management discretion.

It is submitted that regardless of the method chosen by the Board to enter the area of university collective bargaining, the Board should develop regulations in that area which are distinct from the parallel regulations applied to the industrial sector. In the industrial sector, the goal is production that ultimately will return a profit. The control of and responsibility for implementing this goal rests with the executives and, to some extent, lesser management personnel. By contrast, in the university setting, the product—education—is controlled primarily by the production workers—the faculty. The administration does not control the final product, but instead attempts to provide the natural resources needed by the faculty to perform their basic educational function. Consequently, the university decision-making struc-

²⁴⁸ Local 1, Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176 (1971).

²⁴⁹ See text at notes 108-10 *supra*.

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ture is set up to allow the faculty to have significant input on all questions involving the product—education. Given the significant control over the educational product exercised by the faculty, there exists an employer/employee relationship which is sufficiently distinct from the one existing in the industrial sector to warrant regulations which are different from those applied in the industrial sector.²⁵⁰ Furthermore, when faculties organize, the motive is not always economic. Such organization may stem primarily from a desire to increase faculty participation in the decision-making process, or to preserve the faculty against encroachment from the administration or student body. Moreover, the Board has given some indication that it considers faculty participation in certain of these areas to be concomitant of their professional status.

Despite the probable confusion arising out of the creation of a dual standard, a strict application of the industrial model of collective bargaining to higher education could lead to some very undesirable results. For example, by strictly applying the industrial model, the Board would impose an adversarial structure on what is, hopefully, a generally collegial atmosphere. This could well result in the replacement of the collegial atmosphere with one of suspicion and animosity. In light of the fundamental differences between the industrial and university sectors, the Board should consider the ramifications of applying industrial standards of collective bargaining to the university sector.²⁵¹

B. *Traditional Subjects of Bargaining in the University Setting*

Irrespective of the distinction between mandatory and permissive subjects of collective bargaining, it is apparent that existing college contracts have covered an enormous number of topics. Three areas of non-mandatory bargaining which have traditionally been included in university contracts are academic freedom, hiring, and governance. First, with respect to academic freedom, the vast majority of all higher education collective bargaining agreements include some type of clause on this subject. The typical provision reiterates or paraphrases the provisions in the American Association of University Professors' 1940 Statement, which generally provides for freedom of research, freedom of classroom discussion, and freedom of speech and publication.²⁵² However, some contracts enlarge on the AAUP

²⁵⁰ Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63, 67 n.5 (1973).

²⁵¹ See generally, Pauley, *Collective Bargaining on Campus: Reflections on The U.R.I. Experience* (Address given at University of Vermont, Stowe, Vt., August 21, 1975); Comment, *Collective Bargaining By University and College Faculties Under the NLRA*, 36 OHIO ST. L.J. 71 (1975).

²⁵² The AAUP's 1940 statement provides in part: Academic Freedom
“(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

Statement and apply the academic freedom concept to such factors as speakers on campus and political activities of faculty,²⁵³ and campus disorders.²⁵⁴ Second, while the dispute may continue about whether

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Statement of Principles of Academic Freedom, taken from *Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education*, 249 (1973).

²⁵³ Agreement between Rhode Island Board of Regents and Rhode Island College Chapter, American Federation of Teachers, AFL-CIO, Local #1819, 1975-77

ARTICLE III: ACADEMIC FREEDOM

A. Academic Freedom

* * *

3.3 Faculty may freely select the persons they wish to invite to the campus as guest speakers. There shall be no restrictions to control the views expressed by speakers other than those imposed by state and national law. . . .

* * *

B. Political Activity

3.5 The College faculty member is a citizen and, like other citizens, should be free to engage in political activities so far as he/she is able to do so consistently with his/her obligations as a faculty member.

3.6 Many kinds of political activity (e.g., holding part-time office in a political party, seeking election to any office under circumstances that do not require extensive campaigning, or serving by appointment or election in a part-time political office) are consistent with effective service as a member of a faculty. Other kinds of political activity (e.g., intensive campaigning for elective office, serving in a state legislature, or serving a limited term in a full-time position) will often require that the faculty member seek a leave of absence from the College.

3.7 A leave of absence incident to political activity should, when practicable, come under the College's normal rules and regulations for leaves of absence without pay.

²⁵⁴ Agreement between the Board of Trustees of State Colleges and The Worcester State College Faculty Federation Local 2070, American Federation of Teachers, AFL-CIO (September 28, 1972)

ARTICLE V: STATEMENT ON ACADEMIC FREEDOM AND RESPONSIBILITY

. . . Institutions of higher education are committed to the solution of problems and controversies by the method of rational discussion. Acts of physical force or disruptive acts which interfere with college activities, freedom of movement on the campus, or freedom for students to pursue their

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faculty hiring is a mandatory subject of bargaining, many contracts already reflect the fact that bargaining takes place in this area. The primary concern of the faculty in the hiring area, as reflected by the provisions in various contracts, seems to be that appointments be made primarily on the basis of recommendations submitted to the dean by the faculty.²⁵⁵ Third, the term "governance" can assume many meanings in the academic milieu. Most contracts do not have a specific "governance" provision; however, "governance" defined in terms of faculty involvement in running the institution and providing input on personnel decisions can be found in various sections of virtually all contracts. While some contracts are very specific about the governance process and set out not only the structure of the government but also the scope of that government's function,²⁵⁶ others do

studies are the antithesis of academic freedom and responsibility as are acts which in effect deny freedom of speech, freedom to be heard and freedom to pursue research of their own choosing to members of the academic community or to invited visitors to that community

²⁵⁵ The Roger Williams College Faculty Association 1973-1975 Contract with the Board of Trustees:

ARTICLE VIII

APPOINTMENT AND EVALUATION

A. *Appointment*—Initial faculty contracts shall be issued by the Academic Dean from recommendations submitted by members of the academic area and the Division through the Division coordinators to whose division the appointment will be made. Initial contracts for librarians, counselors and Directors of Learning Laboratories shall be issued by the Academic Dean based upon the recommendations of the existing professional staff.

²⁵⁶ Agreement between The Board of Trustees of State Colleges and The Worcester State College Faculty Federation Local 2070, American Federation of Teachers, AFL-CIO (September 28, 1972)

ARTICLE VII

PARTICIPATION IN DECISION MAKING

A. *The All College Council: Membership and Responsibility*

* * *

2. Responsibilities of the All College Council

The Council shall be the primary agency for coordinating and implementing the system of the tripartite governance set forth in the provisions of this Agreement. Accordingly, the Council shall encourage the participation of all members of the College faculty and student body in the processes of decision making.

The Council shall (a) receive from its Standing or Ad-hoc Committees all reports and recommendations for review by the Council; and, within thirty (30) days of the receipt of any such reports or recommendations from any of its Committees, the Council shall, without exception, transmit such reports or recommendations to the Academic Dean and to the President of the College, together with any comment or recommendations of its own. Accordingly, all recommendations from the Committees

little more than state the problem.²⁵⁷

One possible explanation for this extensive coverage of non-mandatory subjects of bargaining in collective bargaining contracts is that some institutions, particularly small colleges and junior colleges, leap into collective bargaining without experienced counsel. Certainly a small school whose twenty or thirty faculty members form a local unaffiliated union may feel little need to expend money on labor relations counsel. Indeed, the attitude may be that the faculty have simply opted for a new governance format. Such institutions, obviously, are not aware of their rights to refuse to discuss certain topic areas with their unionized faculty. Where there is a tendency before unionization to treat faculty as part of the governing group of the college, the tendency will likely remain after unionization, thus leading to a type of bargaining which is unmindful of the distinctions between mandat-

of the Council shall be made to the Council through the appropriate administrative officer as set forth in this Agreement. The Council shall review all such recommendations and shall make every effort to resolve any conflicts and differences in Committee recommendations prior to transmitting such Committee recommendations to the Dean and the President within the thirty (30) day period aforesaid; (b) prepare and develop by May 1, 1973, for use within each department, new procedures and forms, including any appropriate questionnaire, for obtaining student evaluation of both the teaching performance of faculty members and of the courses taught by faculty; (c) make any assignment to any of its Committees consistent with the duties of such Committee as set forth hereafter in this Agreement; (d) review and study education matters relating to the interests and objectives of the College and make proposals thereon to the President of the College; and (e) accept for study any matter submitted to it by the President of the College.

²⁵⁷ Agreement between Long Island University and the United Federation of College Teachers Local 1460-American Federation of Teachers-AFL-CIO, The Brooklyn Center (September 1974).

ARTICLE IV

GOVERNANCE

The Union and the Employer understand that, except for collective bargaining regarding terms and conditions of employment which is within the exclusive purview of the Brooklyn Center Chapter of the United Federation of College Teachers (UFCT), the governance of the Brooklyn Center may involve other constituencies and modes of consultation and decision-making in addition to those cited in this Agreement.

Both parties will encourage the pluralism in governance represented by bodies appointed by the Administration, or elected from the Faculty, Students and Alumni, and will support cooperative interaction of such groups to aid in the effective functioning of the Brooklyn Center. The Union may petition any such body for the privilege of observing and presenting matters for consideration.

Both parties will especially consider the inherent interests of students, alumni, and community; furthermore, both parties will use their best efforts to maintain and foster their participation in the conduct of the affairs of the Brooklyn Center.

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ory and permissive subjects of bargaining which are applied in the industrial sector.

A second possible explanation for the broad scope of faculty bargaining lies in university administration decisions to treat all dealings with the faculty under one umbrella. Trying to separate mandatory from non-mandatory topic areas may seem a waste of time to an institution that intends to deal with the faculty in all areas of college life. Yet another reason for this broad scope is simply union pressure. An administration faced with a strong, united faculty union which proposes discussions at the table on a wide range of topics may scarcely be in a position to insist on its right to refuse to bargain over what it considers "non-mandatory areas" but which the faculty view as falling within their traditional rights. In any event, it seems likely that faculty contracts will continue to reflect this expansive approach to bargaining—at least until some decisions are made by the Board "officially" delineating the range of mandatory subjects.

IV. OTHER ISSUES

A. Labor Organizations

(1) *Faculty Senates As Labor Organizations*

One of several as yet unexamined problems in the area of higher education is the status of faculty senates and committees under Section 2(5) of the Act.²⁵⁸ Section 8(a)(2) makes it an unfair labor practice for an employer: "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."²⁵⁹ In Section 2(5) a "labor organization" is defined to include any organization or employee representation committee which is created, at least in part, to deal with employee "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."²⁶⁰ As construed by the Board and courts, this language is sufficiently broad to cover various faculty bodies.²⁶¹ If a group of employees deals with the employer on any one of the topics listed in Section 2(5), the group is likely to be considered a labor organization.²⁶² It must be noted, of course, that "dealing with" is

²⁵⁸ 29 U.S.C. § 152(5) (1970).

²⁵⁹ 29 U.S.C. § 158(a) (2) (1970).

²⁶⁰ Section 2(5) of the Act, 29 U.S.C. § 152(5) (1970) defines a labor organization as:

[A]ny organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

²⁶¹ For an argument to the contrary, see Finkin, *The NLRB in Higher Education*, 5 U. Tol. L. Rev. 608, 645 (1974).

²⁶² *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210-14 (1959).

broader than "bargaining with."²⁶³ An employee organization "deals with" management when it makes recommendations, or even when it submits an opinion without specific recommendations.²⁶⁴ Thus, since a faculty senate clearly has "dealings with" the university concerning conditions of employment, the Board could find it to be a labor organization. However, due to the virtual identity of the topics listed in Section 2(5) with those within the scope of mandatory bargaining under the Act, it is possible to argue that an organization which deals with the employer *only* on non-mandatory subjects would not qualify as a "labor organization."²⁶⁵ The only representation case in which the issue of a faculty body as a labor organization has been raised is *Northeastern University*.²⁶⁶ In that case the Board held that the faculty senate was not a labor organization, since it functioned only as an advisory committee, making recommendations, which the Board found were totally different from bargaining demands made by a union during contract negotiations.²⁶⁷ Such a result is startling in the face of a massive body of the Board's own precedent to the contrary, which provides that the statutory definition of a labor organization is met even if the organization at issue only submits recommendations.²⁶⁸

²⁶³ *Id.*

²⁶⁴ *NLRB v. Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807, 810, 50 L.R.R.M. 2759, 2761 (7th Cir. 1962); *NLRB v. J.H. Matthews & Co.*, 156 F.2d 706, 707-08, 18 L.R.R.M. 2264, 2266 (3d Cir. 1946).

²⁶⁵ This position finds support in a statement by the Board in *Wrought Iron Range Co.*, 77 N.L.R.B. 487, 22 L.R.R.M. 1050 (1948):

Moreover, while the Board will not interfere with the legitimate functions of bona fide committees devoted exclusively to management objectives, it has held that organizations established ostensibly for such purposes may, nevertheless, be found to be labor organizations. *Id.* at 489, 22 L.R.R.M. at 1051.

²⁶⁶ 218 N.L.R.B. No. 40, 89 L.R.R.M. 1862 (1975). The employer challenged the union's petition asserting that the faculty senate already represented a labor organization. *Id.* at , 89 L.R.R.M. at 1865.

²⁶⁷ *Id.* at , 89 L.R.R.M. at 1865. The Board found that the faculty senate had the following functions:

"1. To act as a co-ordinating body to establish mutually satisfactory academic goals and standards among various Colleges and Division.

2. To be consulted either as a whole body or in appropriate committee on all policies, proposals, and problems of faculty concern, including such matters as the creation of new colleges, new campuses and new departments.

3. To initiate consideration and recommendation on any matter of faculty concern.

4. To undertake such legislative and advisory functions in connection with the work of the University as may be referred to it by the President and Board of Trustees.

5. To provide communication between the Administration and University Faculty."

Id.

²⁶⁸ *E.g.*, *Clapper's Mfg., Inc.*, 186 N.L.R.B. 324, 75 L.R.R.M. 1349 (1970), where the Board, prior to ruling on the issue of employer domination of an employee committee, found that committee to be a "labor organization":

Although it is true the Committee did not bargain with the Respondent in the usual concept of collective bargaining and the proposals made by The Committee possibly amounted only to recommendations, the fact

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The decision merits prompt speculation whether the Board will adhere to its prior decisions in cases arising in the industrial sector, while it follows *Northeastern* in college cases.

(2) *Employer Domination*

If the faculty senate is classified as a labor organization, then the problems of Section 8(a)(2) employer interference or domination will immediately surface. Domination represents a degree of support and interference sufficient to result in control of the labor organization, while interference is generally viewed as only employer assistance to the labor organization.²⁶⁹ It has been clearly established that both domination and interference are distinct unfair practices;²⁷⁰ however, the distinction between these two practices is an important one, since the remedy for domination is disestablishment²⁷¹ while the remedy for interference is only the withholding of Board recognition until the organization is certified by the Board as the collective bargaining representative of their *employees*.²⁷²

remains that The Committee *dealt with* the Respondent concerning *employee's* complaints. This demonstrates that The Committee was a labor organization within the meaning of the Act . . .

Id. at 334. See also *Sea Life, Inc.*, 175 N.L.R.B. 982, 984-85, 71 L.R.R.M. 1134, 1138 (1969); *Jansen Electronics Mfg., Inc.*, 153 N.L.R.B. 1555, 1556-58, 59 L.R.R.M. 1750 (1965); *Thompson Ramo Wooldridge, Inc.*, 132 N.L.R.B. 993, 995, 48 L.R.R.M. 1470, 1470, (1961).

²⁶⁹ *Hershey Metal Products Co.*, 76 N.L.R.B. 695, 696-97, 21 L.R.R.M. 1237 (1948). This assistance may be found where the acquiescences in the use of his employee lists or allows union organizational activities during the work day without docking the participants for the time involved.

²⁷⁰ *E.g.*, *NLRB v. Dennison Mfg. Co.*, 419 F.2d 1080, 1082, 72 L.R.R.M. 2972, 2974 (1st Cir. 1969); *Hershey Metal Products Co.*, 76 N.L.R.B. 695, 696-98, 21 L.R.R.M. 1237 (1948); *Carpenter Steel Co.*, 76 N.L.R.B. 670, 673, 21 L.R.R.M. 1232, 1233 (1948).

²⁷¹ *Carpenter Steel Co.*, 76 N.L.R.B. 670, 671, 21 L.R.R.M. 1232, 1233 (1948). A disestablished labor organization can never be certified by the Board. *Id.*

²⁷² *Id.* In general, to avoid a charge of interference or domination, an employer must refrain from participation in the formation and administration of the labor organization, so that the organization may be the product of the employees' free choice. See *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630, 87 L.R.R.M. 2503, 2506-07 (9th Cir. 1974); and *Wahlgren Magnetics*, 132 N.L.R.B. 1613, 1619-20, 48 L.R.R.M. 1542 (1961). The employer is entitled, however, both to suggest the formation of an employees' council and to state a preference for dealing with the council rather than an outside union—so long as the form, nature and functions of the council are determined by the employees themselves. *Hertzka & Knowles*, 503 F.2d at 630-31, 87 L.R.R.M. at 2506-07. The Circuit Courts, however, have drawn a distinction between illegal employer assistance and "cooperation." In several cases involving employer assistance, where the organization was independent of employer domination and there was history of anti-union activity on the part of the employer, the courts have refused to enforce Board orders based on Section 8(a) (1) and Section 8(a) (2). See, for example, *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630-31, 87 L.R.R.M. 2503, 2506-07 (9th Cir. 1974); *Coppus Engineering Corp. v. NLRB*, 240 F.2d 564, 39 L.R.R.M. 2315, 2320-21 (1st Cir. 1957); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 169-71, 35 L.R.R.M. 2665, 2666-69 (7th Cir. 1955). The Board has now accepted the distinction, see *Coamo Knit-*

In addition to prohibiting domination and interference, Section 8(a)(2) prohibits direct and indirect financial support of a labor organization by the employer. Evidence of such support can be found in the employer's free allowance of its facilities,²⁷³ including bulletin

ting Mills, 150 N.L.R.B. 579, 582-83, 58 L.R.R.M. 1116, 1117-18 (1964); Manuela Mfg. Co., Inc., 143 N.L.R.B. 379, 385, 53 L.R.R.M. 1337 (1963), although it remains suspicious of employer assistance and still occasionally finds that forms of assistance are violative of Section 8(a) (2). In Duquesne University, 198 N.L.R.B. 891, 81 L.R.R.M. 1091 (1972), the employees, at the employer's suggestion, had formed an "employee committee" which dealt with the employer on specific issues and individual grievances. The committee did not, however, negotiate for a collective bargaining agreement. The committee had no constitution or by-laws, collected no dues, and had no treasury. At the employer's suggestion, the employee committee established a grievance committee. In April 1971, Teamsters Local 249 initiated an organizing campaign at the University. After Local 249 filed election petitions covering two different units of employees, the employer's personnel director suggested that the employee committee needed a lawyer, and proposed a certain attorney. The Committee retained the attorney as its counsel. In May 1971 the employee committee began soliciting authorization cards from employees. Thereupon, unfair labor practice charges were filed against the employer.

The Trial Examiner found for the complainants, basing his findings of unlawful assistance and support on the following: the committee collected no dues and had no treasury; the committee met on University premises; committee members were not docked for time spent at meetings; ballots for committee elections were printed at the University's expense and distributed through the University's mail; elections were conducted on the University's time; and the committee's weekly newspaper was printed at the University's expense and distributed through the University's mail. *Id.* at 891, 81 L.R.R.M. at 1092.

The Board, however, said it would not find such evidence alone to be sufficient to find a violation of Section 8(a) (2). The Board considered the case to present "special circumstances" "... where an employer, here a university, so freely makes available its facilities, time, and services to any desirous organization, including to some extent, other labor organizations." *Id.* Such assistance would be no more than "friendly cooperation" said the Board, were it not for other "unusual indicia of intent:" the personnel director gave advice and counsel to the employee committee, and helped it select a lawyer; a Staff Relations Committee, dissolved at the insistence of the employee committee and the employer's vice-president, had attempted to act as advisor to the employee committee after the Staff Relations Committee had been dissolved. *Id.* at 891-92, 81 L.R.R.M. at 1092-93. Noting that there was no convincing evidence that the Committee involved represented an uncoerced majority of nonexempt employees, the Board found that these "unusual indicia of intent" represented interference within the meaning of Section 8(a) (2) and (1). *Id.* at 892, 81 L.R.R.M. at 1093.

Unlike the Trial Examiner, however, the Board refused to find illegal domination. While the Employer has the implicit power to transfer, promote or discharge the employees' representatives, the Board said, this amounted to no more than a potential for domination, and had been found to be evidence of domination only in those cases, unlike the present case, where the organization had been formulated and structured by the employer. *Id.* at 892-93, 81 L.R.R.M. at 1093-94. Accordingly, the Board ordered the employer to withdraw and withhold recognition of the employee committee until and unless it was certified, and to withhold all unlawful support and assistance and refrain from acting in an advisory capacity to the committee, but refused to order disestablishment. *Id.* at 893, 81 L.R.R.M. at 1094. See also Rensselaer Polytechnic Inst., 219 N.L.R.B. No. 85, 89 L.R.R.M. 1879 (1975), where Members Fanning and Jenkins, dissenting in part, would have ordered disestablishment in that case.

²⁷³ Tuscarora Plastics Co., 167 N.L.R.B. 1059, 1059-60, 66 L.R.R.M. 1229, 1230 (1967).

boards,²⁷⁴ and company time.²⁷⁵ Thus, if a faculty senate is found to be a labor organization, the Board is again likely to be faced with either seriously crippling the university's collegial atmosphere by placing rigid, formal requirements on the interaction of the faculty senate and the administration, or once again attempting to create a university standard different from the one applied in the industrial sector. However, since the doctrine of domination is statutory, the Board is ultimately left relatively little flexibility or choice if the outside labor organization or any other disgruntled "person" under the Act chooses to assert that illegal assistance has been rendered to the senate or any of its committees. Thus, the Board, in fact, may not be able to create a different standard of domination for the university should it find the faculty senate to be a "labor organization."

B. Exclusivity

Even before *Cornell* was decided commentators, speculating on the ramifications of collective bargaining in higher education, saw the principle of exclusivity as one which posed a serious threat to faculty governance structure.²⁷⁶ The exclusivity principle states that once a bargaining representative has been certified, the employer may not negotiate with its employees other than through that representative.²⁷⁷ "The obligation [to bargain] being exclusive . . . it exacts 'the negative duty to treat with no other.'"²⁷⁸ The question here, as under the previous discussion dealing with Section 8(a)(2), is whether this prohibition is limited to "bargaining" as opposed to "dealing with," and if so, whether the functions of the various faculty bodies fall within the prohibition.

As noted above, the faculty senate and various faculty committees "deal with" the employer on a wide variety of subjects, some of which are clearly mandatory subjects of bargaining and others of which are not. The principle of exclusivity, however, does not depend on the presence of a second labor organization, for an employer violates the Act if he bargains with a single employee rather than the exclusive bargaining agent. The question, therefore, becomes whether exclusivity is violated if an employer "deals with" but does not bargain with someone other than the exclusive bargaining representative. If the resolution of this issue is struck in favor of the broader of the two phrases, there may be significant practical repercussions. Would an

²⁷⁴ *Webb Mfg., Inc.*, 154 N.L.R.B. 827, 832, 60 L.R.R.M. 1041, 1042 (1965).

²⁷⁵ *Kimbrell v. NLRB*, 290 F.2d 799, 802, 48 L.R.R.M. 2310, 2312 (4th Cir. 1961).

²⁷⁶ E.g. *Elam & Moskow Employment Relations in Higher Education*, 81 PHI DELTA KAPPA 67, 134 (1969); *Brown, Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1075-76 (1969).

²⁷⁷ *Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63, 157 (1973).

²⁷⁸ *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683 (1944).

employer, for example, be able to continue to accept recommendations from the faculty once a union has been certified, without falling afoul of the principle of exclusivity?²⁷⁹

The Board, with the exception of Member Kennedy, has remained stubbornly silent on this subject.²⁸⁰ In *Northeastern University*, the issue was raised by the University which contended that the faculty members could not make an informed choice whether to accept the petitioner as bargaining representative unless they were made aware of the effect such representation would have on the continued viability of faculty committees.²⁸¹ Member Kennedy, concurring in part and dissenting in part, stated that, in his view, the Board would be statutorily required to apply the principle of exclusive representation should the issue be raised by the faculty representative and, therefore, there existed the possibility that the existing university government structure would be drastically altered. However, Kennedy noted that the union might be willing to leave certain matters to the existing government structure, but in either case, the issue would have to be resolved at the bargaining table.²⁸²

It is significant that to date only one union has reportedly filed a charge claiming a violation of the principle of exclusivity.²⁸³ It appears from this paucity of complaints that at most institutions, faculty bodies enjoy continuing viability as the result of the permissive attitude of the incumbent labor organization. However, with the continued rise in unionism in the university sector, the possibility of the replacement of the collegial atmosphere with an adversarial one becomes more immediate. If an adversarial atmosphere does evolve from the influence of unionism, then such issues as exclusivity will have to be faced and resolved by the Board. Again, since the doctrine of exclusivity is statutorily mandated, the Board must give full force and effect to a union's certification as representative where the union wishes to assert the full extent of its rights, and where it does not choose to parcel out some of its bargaining authority to the faculty senate or faculty committees.

CONCLUSION

Both the Board and practitioners must still face a myriad of problems in the area of college and university collective bargaining. The basic issue of what jurisdictional standard the Board will apply in

²⁷⁹ See Kahn, *supra*, note 277, at 157.

²⁸⁰ "We have not been asked to pass on these lurking issues and, in any event, would not do so in the context of a representation proceeding." *Adelphi Univ.*, 195 N.L.R.B. at 648 n.31, 79 L.R.R.M. at 1556 n.31. The Board reiterated this position in *Northeastern Univ.*, 218 N.L.R.B. at , 89 L.R.R.M. at 1866.

²⁸¹ 218 N.L.R.B. at , 89 L.R.R.M. at 1873.

²⁸² *Id.*

²⁸³ The AFT leveled such a charge against the University of Vermont for dealing with its Faculty Senate. See Case No. 1-CA-9852 (Oct. 31, 1974). Recently, another union has followed suit. See 91 Labor Relations Reporter 12 (BNA, Jan. 5, 1976).

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deciding whether to assert jurisdiction over colleges and universities remains clouded although the recent decisions of *Howard University* and *University of Vermont* suggest that the Board will apply its *Cornell University* approach in all situations except where state intervention affects the university's handling of its labor relations. The area of unit determinations within the university sector also remains confused as the Board seems unsure of what its overriding concern should be. The result of this uncertainty arguably has been the unwarranted fragmentation of the university faculty unit. Moreover, underlying much of the confusion surrounding university collective bargaining is the Board's failure to provide guidelines as to which policy and personnel matters are within the discretion of management and which are mandatory subjects of bargaining. In light of the fact that the Board has now spent some five years hearing university representation cases, it should at last have the expertise to give clear and consistent guidance; however, the Board, in establishing these much needed guidelines, should remain alert to the possible undesirable results that could occur should the Board attempt strictly to apply the industrial model of collective bargaining to higher education.