THE IMPACT THAT SELECTED NATIONAL LABOR RELATIONS BOARD DECISIONS HAVE HAD ON CERTAIN ASPECTS OF ACADEMIC ADMINISTRATION AT PRIVATE COLLEGES AND UNIVERSITIES

by

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Dissertation submitted to the Graduate Faculty of the

Viginia Polytechnic Institute and State University

in partial fulfillment of the requirements for the degree of

DOCTOR OF EDUCATION

in

Educational Administration

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PREFACE

The organization of this dissertation is a topical one, thereby permitting the reader to locate the information relevant to a specific academic bargaining issue in a single chapter. Chapters one and two contain respectively an introduction to the problem and a review of the literature of academic collective bargaining. Chapters three through seven deal separately and sequentially with the following topics: jurisdiction, bargaining unit scope, bargaining unit determinations, ancillary support personnel and unfair labor practices. Each of these chapters begins with a short introduction to the subject area followed by descriptive briefs of the related, landmark cases heard by the National Labor Relations Board. Following the briefs, there is an analysis that examines the ramifications of each specific case and attemps to relate the cases to each other and detail the parallels and paradoxes between them. The short chapter summaries reiterate and clarify the questions raised by the research. Chapter eight contains a final summary that attempts to synthesize the findings of the research and provide some insights into the impact that academic collective bargaining has had upon the administration of private colleges and universities. This chapter also contains nine charts

which condense the results of the dissertation research into an abbreviated graphic format and hopefully provide the reader with a guide, albeit a skeletal one, to National Labor Relations Board decisions in the arena of higher education.

I wish to express my sincere gratitude to Dr. David Alexander, Dissertation Committee Chairman, for his major contributions to the successful completion of this dissertation. His advice and counsel have been invaluable. I also appreciate the assistance provided by members of the committee, Drs. White, Underwood, Fortune, and Robertson.

An encompassing debt is owed to three very good friends Ms. Patricia Potter, Ms. Irene Pruitt, and Mr. James E. Brammer, Esquire for their assistance from the inception to the completion of this study. The commitment and sacrifices they have so freely made on my behalf towards this project will always be remembered and greatly appreciated.

I also wish to acknowledge my son Jeffrey because of what he means to me and because of the patience and tolerance he has demonstrated throughout my postgraduate work.

LM/MRJ 6/3/77

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Chapter 1

INTRODUCTION

In 1970, upon petition by the administrations of Cornell and Syracuse universities, the National Labor Relations Board (NLRB) assumed jurisdiction over faculties of private colleges and universities. This decision guaranteed the right of a faculty majority to select a bargaining agent and obligated the employer to recognize the bargaining agent and negotiate with it as the exclusive representative of all employees in the designated bargaining unit. It also granted faculty the legal right to use a strike as a means of inducing the employer to grant concessions. When faculty collective bargaining arrived on the private campus, a new influence in academic administration, the NLRB, accompanied it.

It is the intent of this dissertation to provide visibility into the nature and relationship of NLRB decisions concerning academic collective bargaining on the private college and university campus. The research will attempt to discern a pattern of Board decisions and identify the impact these decisions have had and will continue to have upon private higher educational institutions. Finally the dissertation will provide a decision-making model for determining probable

future NLRB decisions based upon the precedents established thus far.

Faculty unionization is a recent development in American labor history, despite the professoriate's generally liberal ideological orientation and traditional support of trade unionism. "Academics have long been distinguished by a strong commitment to liberal-left politics, and this has deepened during the recent period of antiwar protest and student activism."[1] However, despite the liberal orientation, college and university faculty resisted self unionization until 1969. Unions have been historically equated with blue collar workers and while many laborers may earn more than teaching professors they, "like nurses and others in highly skilled but relatively low-paid occupations, tenaciously adhere to a professional self identity which obscures the true nature of the employment relationship between the institution and the individual."[2]

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[1]In a detailed statistical analysis of the ideological attitudes of American academics toward faculty unionization Ladd and Lipset convincingly document the patterns of faculty support for unionism and the liberalism of the professoriate vis-a-vis the general populace, see especially Chapters 1 - 3, Ladd and Lipset, Professors, Unions and American Higher Education (1973).

[2]Schramm, "Union Organizing at Private Colleges and Universities: A Prognosis Revisited," 26 Labor L. J. 728 (1975).

The unionization of professional, white-collar workers is an occurrence of the sixties and represents a new class of American employees which has emerged and come to numerical predominance since World War II. "This class was sired by a service economy with its need for white-collar, professional, non-profit and mainly public employees."[3] Professors have resisted unionization, in part, because they consider themselves professionals with an independent working relationship. The teaching profession has considered itself autonomous possessing the freedom of action and decision making accorded other professionals in society.[4]

Faculty members have come to embrace collective bargaining for a variety of reasons: the campus turmoil of the sixties; the reluctance of the public to provide continued unquestioned financial support to higher education; the realization that academia could no longer employ a majority of the Ph. D's it produced nor could it guarantee the economic future of those it did employ.

Joseph Garbarino, a leading authority on academic collective bargaining, has attributed much of the cause for the rise in faculty unionization to the institutional changes that have occurred on

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[3]Tyler, "The Faculty Joins the Proletariat," 3 Change 41 (1971-72).

[4]Ladd and Lipset at 39.

campuses since the sixties. Essentially, these are changes in size, structure and function coupled with an increasing demand for accountability and a legal environment that has encouraged or permitted faculty unionization. "At the beginning of the 1970s the typical faculty member was teaching in a large public institution, one that was about twice as large as it had been a decade earlier. He was a member of a very large professional group that had doubled in total size under very favorable conditions in 10 years and was working in a faculty unit of more than 500 members." Further, faculties have had to become more accountable for their performance as professors and they are no longer evaluated solely by their professional peers. "Over the years faculties have developed a set of defenses in depth to protect their positions. The principal bastions are the tradition of academic freedom, the prerogative of professionalism and the institution of academic tenure." The current demands of accountability placed upon professors have neutralized and eroded all of these defenses in one degree or another.[5] Other factors which have boosted faculty interest in collective bargaining are the economic recession of the seventies, the desire for increased wages, benefits

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[5]Garbarino, Faculty Bargaining: Change and Conflict: A Report prepared for the Carnegie Commission on Higher Education and the Ford Foundation at 6-13, 14-16 (1975).

and job security, the centralization of campus administrative functions and the nonparticipation of faculty members in the administrative decision process. The following chart illustrates the degree of emphasis placed upon particular causes for faculty unionization by institution presidents and union chairpersons.

Table 1
CAUSES OF FACULTY UNIONIZATION NATIONALLY[6]

	External Pressures			Tenure and Job Security		Government Issues			Strength of Unionism	Professionalism
	Desire for Higher Wages and Benefits	Fear of Budget Cuts	Fear of Teacher Surplus	Desire for Job Security	Desire for Fairer Grievance Procedures	Desire for More Influence in Campus Governance	Weakness of Existing Faculty Governance Structures	Permissive Government Legislation	Presence of Experienced Bargaining Groups	Desire for More Professional Standing
Presidents of Nonunion Institutions (N=124)	3.3	3.0	2.8	3.3	2.5	2.7	2.3	2.0	2.3	1.7
Presidents of Union Institutions (N=205)	3.6	3.0	2.9	3.6	3.2	3.2	2.5	2.5	2.6	1.9
Chairpersons of Unions (N-193)	3.7	3.0	3.0	3.6	3.4	3.2	3.0	2.8	2.8	2.7

Note: The question asked was "Regardless of whether you have faculty collective bargaining on your campus, please give your opinion about the importance of the following factors for promoting it." The responses are on a four-point scale, with "1" indicating very little or no importance and "4" indicating great importance.

[6] Kemerer and Baldridge, Unions on Campus at 40 (1975).

Faculty collective bargaining in the private sector of the education industry is unique not only because the regulatory forces are different but also because the educational financial squeeze of the seventies--less money, more faculty and more strident salary demands by the faculty--is magnified on the private campus. "The institutions now in the greatest financial difficulty are (a) the great research universities, (b) the lesser-known private liberal arts colleges and (c) the large, private comprehensive colleges and universities."[7]

Private institutions have not undergone the degree of size or structural change which has occurred in public higher education, however, these institutions did experience and react to the prosperity of the sixties and many increased the nature and kind of course and program offerings to accommodate the influx of students. Additionally, the erosion of faculty power in the face of a more centralized administrative, student and governing board authority created a sense of impotence among the faculty over their ability to maintain control with traditional governance methods.

The regulation of collective bargaining on the private campus is unique because it is subject to the jurisdiction of the

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[7]Carnegie Commission on Higher Education, Priorities for Action: Final Report at 88 (1973).

National Labor Relations Board and the NLRB's administrative and enforcement responsibilities in the educational sector do not differ from its administrative and enforcement responsibilities in the industrial sector. "The term [collective bargaining] has been changed and massaged with various euphemisms, such as professional negotiation, collective negotiation, professional persuasion, professional involvement and academic amelioration, in order to create a term which causes less discord among the professional ranks."[8] However, the result is still a system of formalized rules and regulations designed to insure employees and employers the rights delineated by the National Labor Relations Act of 1935 (Wagner Act) and its subsequent amendments (the Taft-Hartley and Landrum-Griffin Acts).

It is the purpose of this dissertation to examine the higher education decisions of the National Labor Relations Board in the areas of jurisdiction, unit scope, bargaining unit determination, ancillary support personnel and unfair labor practices and assess the impact of these decisions upon private educational institutions.

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[8]Coleman, "The Evolution of Collective Bargaining as it Relates to Higher Education in America," 23 J. C. Univ. Personnel A. 51 (1972).

RATIONALE

The significance of this study becomes obvious when the following facts are recognized:

1. the importance of private educational institutions as a major contributor to the American economy. More than half, 55.9 percent, of all the colleges and universities in the United States are private and of the approximately $44.9 billion total educational expenditures for the academic year 1975-76, $14.8 billion, or thirty-three percent, was expended by private institutions of higher education.[9] Private education is big business and represents a considerable segment of the total education industry, and although private institutions enroll only one quarter of the student population, educators and administrators can no longer afford to ignore collective bargaining on the private campus.

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[9]These statistics were obtained from forthcoming editions of The Digest of Educational Statistics and Projections for Educational Statistics to 1984-1985 furnished by Dr. Vance Grant of the National Center for Educational Statistics, Washington, D.C., July 1976.

2. the significant growth of faculty collective bargaining on campuses in the past six years. "The 1970s may belong to faculty activism as the 1960s did to student activism" and the final report on the Carnegie Commission on Higher Education predicts that of the potential new initiatives in higher education in this country "those originating with faculties, and particularly collective bargaining, may be the dominate ones in the near future."[10] In 1966 only eleven campuses in the nation had collective bargaining agents; by early 1976 that number had grown to 482. In the one-year period from February 1975 to February 1976, the total number of public and private institution bargaining agents had grown from 243 institutions with 357 campuses to 289 institutions with 482 campuses, an annual growth rate of 8.4 percent.[11] In the private sector of higher education, the growth rate of collective bargaining agents in the one-year

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[10] Carnegie Commission at 56.

[11] Kelley, Jr., "243 Institutions, with 357 Campuses, that have Collective Bargaining Agents, An Update," Special Report #12, Academic Collective Bargaining Information Service (1975). February 1976 figures were obtained via telephone from the Academic Collective Bargaining Information Service. Percentages were calculated by the author.

period from April 1975 to April 1976 was 7.8 percent, not significantly lower than the national rate. Presently, there are fifty-five private, four-year colleges with faculty bargaining agents, eleven private two-year colleges with agents and a total of thirty-eight contracts in force on these campuses.[12] According to Kemerer and Baldridge "nearly one-eighth of the 3,038 colleges universities in the country have faculty bargaining agents. Nearly twelve percent of all professional staff and over twenty percent of the full-time teaching faculty in American higher education are now represented by unions."[13] Although there have been periods of slower union growth, notably 1973,[14] the overwhelming evidence indicates that the initial trend toward faculty unionization has become a firmly established pattern in American higher education.

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[12]National Center for the Study of Collective Bargaining in In Higher Education, Directory of Contracts and Bargaining Agents in Institutions of Higher Education, April 1976 at 2 (1976); Schedule of Institutions with Bargaining Agents and Contracts at 2 (1975). Percentages were calculated by the author.

[13]Kemerer and Baldridge at 1.

[14]See especially Begin, "Faculty Bargaining in 1973: A Loss of Momentum," 25 J.C. Univ. Personnel A. 74 (1974).

3. the third-party involvement of the NLRB in academic administrative matters. Since 1970 the NLRB has heard over 100 cases involving private educational institutions and the Board's decisions have had a major impact upon the governance and administration of the private college and university. Although Board determinations of faculty issues are separate and differentiated from non-faculty collective bargaining questions, these decisions still have significant implications for professional and nonprofessional staff personnel, students, administrators, department heads and the members of institutional governing boards. NLRB rulings effect such diverse academic areas and issues as tenure, faculty-student ratios, university governance and faculty senates.

Faculty unions have arrived on the campus and all informed predictions indicate that they will remain there for a long time to come. Faculty and administrators realize the necessity for long-range financial planning and resource allocation, however, despite the fact that academic collective bargaining affects virtually every area of campus activity, there is a noticeable absence of research and exploration of faculty unionization at the private institution.

With the exception of a few specialized studies that deal primarily with the legal basis for the developing labor law created by NLRB higher education decisions, there has been no previous attempt to bring all these related Board decisions together for comparison, scrutiny and analysis. The information is scattered in voluminous legal reports, journals and reviews and has not been collected in any format that can be utilized easily by educational administrators. This study will gather these materials together so that they can be examined and analyzed as a single, related entity. The NLRB has traditionally used private industry employer-employee models as guides for its decisions in the area of higher education. Recently, however, the Board has begun to attempt to create new models based upon the realities of the college and university environment.

This dissertation will attempt to fulfill the need for a careful study of NLRB decisions so that all parties involved in academic collective bargaining can be assisted in determining and preparing for possible NLRB rulings involving their instutions.

STATEMENT OF THE PROBLEM

In order to understand the impact that NLRB decisions have had upon particular aspects of academic administration, the study

will review the NLRB decisions dealing with private colleges and universities from January 1970 through December 1976.

The National Labor Relations Board, an independent, quasi-judicial agency of the federal government, was created to administer and enforce the National Labor Relations Act. The Act empowered the Board to prevent and remedy statutorily defined unfair labor practices on the part of employers and labor organizations or their agents and to "conduct secret ballot elections among employees in appropriate collective bargaining units to determine whether or not they desire to be represented by a labor organization. In jurisdictional disputes the Board is further empowered to determine "which of the competing groups of workers is to be assigned to the work task involved."[15]

The Board's principal function is to decide cases that arise under the National Labor Relations Act. It conducts representation elections and certifies the union representing the majority of the employees as the exclusive representative of all the employees in an

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[15]Belcher, "NLRB Asserts Jurisdiction Over Private Colleges and Universities," 21 J. C. Univ. Personnel A. 3 (1970).

appropriate unit; it investigates unfair labor practice charges and orders guilty parties to cease and desist. The Board's orders can be enforced by appeal to the appropriate United States Circuit Court of Appeals.[16]

Specific areas to be analyzed include jurisdiction, unit scope, bargaining unit determinations, ancillary support personnel and unfair labor practice cases. Questions to be examined in subsequent chapters include:

1. How actively has the NLRB been involved in administrative matters, i.e., determining supervisory versus nonsupervisory status and personnel management practices, at private colleges and universities?
2. In what specific administrative matters has the NLRB involved itself?
3. What type of unfair labor practice disputes has the NLRB heard?
4. What criteria has the NLRB used in determining appropriate bargaining units? Has the NLRB been

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[16]For additional information on relevant labor legislation see Primer of Labor Relations: A Guide to Employer-Employee Conduct (19th ed. 1973).

consistent in these determinations? If not, why not and how has this affected administrative policies?

5. How has the NLRB defined supervisor or manager and employee?

6. How has the NLRB treated campus-wide bargaining units: Have they differentiated between professional or undergraduate and other school faculties and what are the effects of such differences?

In order to answer these questions, a case-by-case inspection of all applicable NLRB rulings will be completed. The source for the review will be the Decisions and Orders of the National Labor Relations Board prepared by the NLRB. Over 100 Board cases concerning collective bargaining activities at private institutions will be examined and analyzed to ascertain the impact these NLRB decisions have had upon certain aspects of private college and university administration. The study will encompass a historical review of all NLRB rulings from 1970 to the present and include interviews with legal scholars and administrators who have been directly involved in the landmark NLRB cases to date.

In 1935 the passage of the National Labor Relations Act established the principle that employees should be protected in their rights to organize into labor organizations and bargain collectively concerning their wages, hours and working conditions. The Act's definition of collective bargaining, which has also served as the model for many state labor relations statutes, is:

> For the purpose 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, or the negotiations of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligations do not compel either party to agree to a proposal or require the making of a concession. [17]

From its creation in 1935 until 1970, the Board declined to assert jurisdiction over private colleges and universities. Private institutions were shielded from "jurisdiction under the National Labor Relations Act on the basis that neither such organizations nor their employees were considered sufficiently affecting commerce so as to bring them within the scope of the Act. Most universities were simply considered institutions engaged primarily in educational

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[17] Section 8(d), National Labor Relations Act, 49 Stat. 449 as amended by Pub. L. No. 101 (1947) and Pub. L. No. 257 (1959); 29 U.S.C., sec. 151-68.

activity of a nonprofit nature as opposed to commercial activity."[18] In 1951 the Board declined jurisdiction over Columbia University, a nonprofit educational institution, stating:

> Regardless of whether or not the conference report [House Report No. 510, 80th Congress] literally recites the Board's practice prior to the amendment of the Act, it does indicate approval of and reliance upon the Board's asserting jurisdiction over nonprofit organizations "only in exceptional circumstances and in connection with purely commercial activities of such organizations." Whether or not this language provides a mandate, it certainly provides a guide.
>
> Under all the circumstances, we do not believe that it would effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution. Accordingly, we shall dismiss the petition.[19]

However, the June 1970 announcement of the NLRB clearly and decisively reversed this earlier decision and assumed jurisdiction over private colleges and universities. Five months later the Board "enunciated its 'Million Dollar Rule' in which it applied the standard of $1 million annual gross revenue as a minimum to make the Board's jurisdiction coextensive with the Commerce Clause of the U.S. Constitution. The Board calculated that this standard would

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[18]Williams, "Faculty Bargaining: Exclusive Representation and the Faculty Senate," 24 J.C. Univ. Personnel A. 46 (1973).

[19]Columbia University, 97 NLRB 424 (1951) at 427.

bring approximately 80 percent of private colleges and universities and 95 percent of all employees under coverage of the Act."[20] The circumstances surrounding this landmark decision involved various groups of non-faculty employees at Cornell University who were seeking recognition for collective bargaining purposes under New York State labor relations statutes. This action prompted Cornell to petition the NLRB for jurisdiction over the employee organizations because the University believed that the provisions of the National Labor Relations Act offered more protection than the state statutes particularly with regard to unfair labor practices by unions. "The Cornell case turned on the Board's conviction that the operations of such private colleges and universities (at that time) did have a substantial effect on commerce. The Board took cognizance of two decades of change in large academic institutions since the Columbia decision"[21] and articulated its decision thusly:

> We adhere to the view that the Board has statutory jurisdiction over nonprofit educational institutions whose operations affect commerce. But we shall no longer decline to assert jurisdiction over such institutions as a class.

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[20] Doherty, "The National Labor Relations Act and Higher Education: Prospects and Problems," 4 NACUBO Professional File 3 (1973).

[21] Williams at 47.

> In the intervening two decades since Columbia University was decided, the Board has declined to assert jurisdiction over nonprofit universities if the activity involved was non-commercial and intimately connected with the school's educational purpose. However, an analysis of the cases reveals that the dividing line separating purely commercial from non-commercial activity has not been easily defined.
>
> While 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.[22]

But the Board had not yet addressed the question of whether faculties were to be included under its jurisdictional cloak. In 1971 in a case involving Fordham University, the argument of whether faculty members were eligible to be covered by the National Labor Relations Act was heard by the Board.

Fordham University, the employer, maintained that all faculty members were supervisors, therefore, no bargaining unit containing faculty members would be appropriate. Further, the University argued "since Section 2(II) of the NLRA excluded from coverage those employees who had authority to effectively recommend other employees for promotion, transfer and discharge, most Fordham faculty should likewise be excluded."[23] The Board

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[22] Cornell University, 183 NLRB, No. 41, 74 LRRM 1269 (1970) 331-332.

[23] Doherty at 3.

however, was not persuaded by the argument and did extend its jurisdiction to faculty organizations. Thus the legal basis for faculty unionization on the private college and university campus was established. The reversal of the NLRB's decision from 1951 to 1970 is an accurate reflection of the social and philosophical changes which occurred generally in the area of white-collar unionization during that twenty-year period.

Since these early landmark decisions, the Board has heard numerous cases involving both faculty and staff unions at private colleges and universities and these decisions have been made on a case-by-case basis. To date, the NLRB has refrained from using its rule-making authority with regard to labor questions in higher education and has relied instead upon an individual adjudication of each issue.

Because of this lack of rule-making and because the Board has reversed itself several times on major issues and has had difficulty applying what is an industrially oriented labor law to the realities of university life, educational administrators have charged that the NLRB is unfamiliar with the unique aspects of labor relations in higher education. Scholarly legal opinion on the subject of NLRB rule-making versus adjudication seems equally divided.

Kenneth Kahn, in a lengthy article on the NLRB and higher education, contends that:

> The NLRB has had great difficulty in trying to apply the guidelines of the National Labor Relations Act to the college and university setting. The Board has not been able fully to understand the problems of university professionals, so unlike those of the blue collar workers with whom it traditionally has dealt.
>
> The rulings to date have been far from acceptable to any of the parties involved.... The ultimate effect of the NLRB's present policies in the faculty area has been to hamper the ability of American colleges and universities to incorporate new ideas, new groups and change.[24]

Other scholars contend that the Board has, in fact, "gone far to accommodate the academic milieu in keeping with the Act" and though it could proceed more responsibly and efficiently, it has exercised its powers as fairly and consistently as possible.[25] Perhaps one of the primary reasons why the NLRB "has not given recognition to the unique problems of collective bargaining in higher education...is because many of the parties in cases involving colleges and universities have not compiled a complete record which is essential in convincing the Board to depart from its normal policies

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[24]Kahn, "The NLRB and Higher Education: The Failure of Policymaking through Adjudication," 21 UCLA L. Rev. 179-180 (1975)

[25]Finkin, "The NLRB in Higher Education," 5 Toledo L. Rev. 658 (1974).

is essential in convincing the Board to depart from its normal policies in the private sector."[26] Educators have failed to develop a model for collective bargaining that meets the unique needs of education. Therefore, it is important to study the effect that NLRB rulings have had on the academic administration process and attempt to identify the appropriate administrative guidelines that are contained in these rulings.

This review and analysis will permit the discovery, identification and explanation of the legal principles and precedents which have formed pertinent NLRB decisions. Once these factors are culled from the research, it will be possible to discern and describe patterns of NLRB decision-making and the specific criteria that have formed these patterns.

The intent of the research is the identification and explanation of the basic legal contours that have shaped NLRB higher education rulings over the past six years so that administrators may be able to more easily understand the past and future direction of Board decisions. By isolating and delineating these patterns and precedents, educational administrators, if they choose, will be able

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[26]Kahn, "Current and Emerging Labor Relations Issues in Higher Education," 2 J.C. Univ. L. 123 (1974-1975).

to use the NLRB/academic collective bargaining decision-making model presented in Chapter 8 to assist them in complying with the applicable labor law. The legal guidelines established by this research will help them in their collective bargaining decision processes.

This study will be limited to NLRB cases involving private institutions that have experienced faculty collective bargaining activities and will not attempt to analyze academic collective bargaining developments that are beyond the jurisdiction of the NLRB.

SUMMARY AND ORGANIZATION

This dissertation will review the cases that have come before the National Labor Relations Board from 1970 to 1976 concerning collective bargaining activities in private higher education. The study will attempt to discern the effects of these decisions on specific elements of academic administration and identify and describe NLRB decision criteria guidelines so that these guidelines may be utilized by educational administrators as they design collective bargaining decision-making models for their own institutions.

Chapter 1 has provided an introductory statement, detailed rationale for conducting the study, a statement of the problem and a review of the method by which the research will be conducted.

Chapter 2 will review the books, journals, reports, private studies, bulletins and other relevant literature. A complete review of the major legal periodical articles which touch on the subject will be included in the literature review together with pertinent educational publications such as the Chronicle of Higher Education, the Higher Education Contract Clause Finder published by the Industrial Relations Center at the University of Hawaii, the specialized reports and documents published by such research institutions as the National Center for the Study of Collective Bargaining, the Academic Collective Bargaining Information Service and the Association of Governing Boards of Universities and Colleges. The discussion of the literature will be divided into a consideration of the general literature that specifically relates to the National Labor Relations Board and its involvement in higher education.

Chapter 3 will be a review of the cases and decisions arising out of jurisdictional disputes involving the NLRB and private institutions.

Chapter 4 will deal with unit scope as determined by the NLRB and will include a discussion of multi-campus units, non-professional department units, professional schools, and part-time faculty members.

Chapter 5 will deal with bargaining unit determinations made by the NLRB and will specifically discuss the status of faculty collectively, the status of administrative officials, department chairman and miscellaneous supervisors.

Chapter 6 will deal with ancillary support personnel and will consider research associates, laboratory technicians, students, librarians, and other miscellaneous classifications.

Chapter 7 will deal with disputes arising from unfair labor practice cases.

Chapter 8 will set forth a summary and conclusions of the research, identify National Labor Relations Board decision-making patterns, the criteria which shape those patterns and delineate interpretive guidelines that may assist in understanding, anticipating and preparing for future NLRB rulings. The chapter will present a NLRB/Academic Collective Bargaining decision making model that can be used by private college and university administrators who

desire to prepare for union and NLRB involvement and/or those who wish to prepare for NLRB proceedings.

An extensive bibliography will follow Chapter 8.

Chapter 2

REVIEW OF THE LITERATURE

This review of the literature is divided into two broad categories: general literature related to academic collective bargaining and the literature specifically related to the NLRB and faculty unionization at the private college and university. Because the decisions of the NLRB are the basis for the research in later chapters and are examined in detail there, these decisions are not included in this review.

The amount of general literature related to academic collective bargaining is voluminous considering the fact that most of it has appeared since 1969. Although the number and quality of the books on the subject of faculty bargaining is limited, the periodic literature contains much of the most perceptive analyses of academic collective bargaining. The most comprehensive topical bibliographies currently available are those published by the National Center for the Study of Collective Bargaining in Higher Education. Because it is essential to understand the prinicpal reasons for and results of faculty shifts to unionization in order to comprehend the specifics of faculty collective bargaining on the private campus, the major works on the subject are reviewed in this chapter.

General Literature Related to Academic Collective Bargaining

The literature of academic collective bargaining is extensive in view of its relatively short history. However, it must be noted that much of this literature presents detailed case studies of faculty collective bargaining experiences at particular institutions and, for the purposes of this study, is of little value beyond that of contrast and comparison. This review of the literature, therefore, will focus on the analytic rather than the descriptive literature of academic collective bargaining, that is, the research that has attempted to identify and define the causes and consequences of collective bargaining on the college campus and describe and document the major trends in academic labor relations. Virtually all of the relevant literature has appeared since 1969 and can be discussed in terms of the following broad categories:

1. reasons for the development and growth of faculty unionization.
2. the effects of faculty unionization on college and university governance.

The literature related to the content of this study will be divided into these categories and will be limited to a review of those publications which have significantly influenced scholarly thinking in

the area of academic collective bargaining. A complete listing of the sources used in the preparation of this research is contained in the Bibliography.

Literature Related to the Content of the Study

The investigative literature, or that material which attempts to isolate and analyze the reasons for the advent and continuing development of academic collective bargaining, represents the bulk of the material in the field. These examinations into the causes of faculty unionization have intrigued labor scholars and thus far produced a panoply of explanations for this phenomenon.

Joseph W. Garbarino, in his major study Faculty Bargaining: Change and Conflict, contends that faculty unionization occurs as a response to changes in the environment of higher education as a whole and in the structure and function of individual institutions and systems of institutions. He identifies these environmental changes as (1) the faculty expansion of the 1960s, (2) the disruption of traditional governance structures, (3) the depersonalization of the academic setting, (4) student challenges to existing structures and methods and (5) the financial squeeze which has occurred in American higher education. Garbarino maintains that these factors contribute significantly to the impetus for unionization on campus. The changes produce conflict and conflict, in turn, magnifies and precipitates

further change. Unions, writes Garbarino, merely institutionalize the management of discontent. Garbarino's hypotheses regarding the growth of faculty unionism are supported by voluminous statistical documentation (Garbarino 1975).

In an 1970 article prepared while he was president of the AAUP, Ralph Brown attributed the growth of interest in collective bargaining on American campuses to a clash between the old patterns of authority and contemporary demands for participatory democracy. Faculty who viewed themselves locked in a struggle for power or decision-making authority on campus developed the desire to organize either offensively or defensively and unionization was the logical result (Brown and Kugler 1970).

Israel Kugler, a faculty union president, writes that union interest among faculty began to develop as a result of the end of an age of elitism on campus. As it became clear, continues Kugler, that the older attitudes and traditions of academia could not adequately meet the new demands placed upon higher education, there was upheaval and rebelliousness within the university. Faculty began to realize that their powers of influence within the university were largely illusionary and it was this realization that permitted faculties to turn to bargaining and demands for change (Brown and Kugler 1970).

Four years later, describing the specifics of unionization among the faculty at the University of Delaware, Sawicki writes that the deterioration of conditions in the academic job market constituted a direct threat to the faculty. Realizing that economic pressure and increased availability of Ph. D's had wiped out the job mobility, security and leverage of previous times, a nascent interest in unionization mushroomed. He contends that although there was a substantial dissatisfaction with salaries and a common belief that some kind of collective action would be needed to bargain effectively for increases, these factors were not strong enough to precipitate union victories. Instead the desire for job security enhanced the recognition that the opportunities for professional mobility had been severely curtailed and these two influences were the major contributory factors in faculty unionization (Sawicki 1974).

Two college presidents, Boyd and Bloustein, share the view that the underlying cause for the beginnings of faculty bargaining can be attributed to the basic failure of pre-union university government and management structures. William B. Boyd maintains that collective bargaining on campus began at a time of economic affluence and predates the economic depression of the 1970s. Rectifying these deficiencies in existing university governance structures were often more significant goals for many early union supporters than the

accomplishment of economic gains. Other factors which Boyd cites as causes for the developing interest in collective bargaining among the faculty are the following: discontent with the faculty star system which fosters super professors and high salary disparities; the demands of younger faculty for increased benefits and promotions sooner and the contempt of these faculty for the seeming impotence of faculty senates; the sense that collective bargaining is a means of asserting professional power in areas where faculty tend to be losing ground to outside forces; growing opposition to the merit pay systems because faculty do not believe that administrators are capable of accurately evaluating their professional performance; the inferiority complexes that exist in certain areas of higher education especially at the community college and former teacher college levels; the lack of opposition to unionization encountered on campuses; increased statutory support for bargaining; and the general authority crisis that exists on many campuses as old academic governance traditions dissolve (Boyd 1971).

Edward Bloustein supports Boyd's contentions although he takes another route to reach the same conclusions. It is his contention that administrators, academicians and governing board members paid lip-service to the concepts of shared governance, the importance of the faculty senate, and the mutual management of the

institutions of higher education, however, the facts were that colleges and universities were badly managed or not managed at all and it was exactly this circumstance that contributed so significantly to the developing faculty support for unionization (Bloustein 1973).

Tyler, writing in late 1971, describes the interest of faculty in unionization in Marxist terms. He sees the faculties push toward unionization as a class struggle which began when faculties started to view themselves as an emerging white collar class. This new class, pressured from above by the increased depersonalization of their working environments and the sense that they no longer exerted any control over those environments and squeezed from below by decreasing job security, salaries eroded by rising inflation, intense student demands and increased accountability, naturally turned to collective bargaining as a remedy for all of these ills (Tyler 1971).

Daniel R. Coleman finds supporting evidence for many of Tyler's conclusions. The desire for job security and the loss of professorial and campus individuality are two contributory factors to unionization in Coleman's view. He contends that although the tangible rewards of the teaching profession had never been immense, job security had been an asset and a relatively stable one until the early 1970s. Further, he finds evidence that faculty wanted to be assured

a continued involvement in the decision-making processes on their campuses (Coleman 1972).

Much of the early literature describing the causes for collective bargaining was speculative, based on perceptive observation and documentation but statistically untested. Ladd and Lipset, two leading collective bargaining researchers, have concretized with figures the early speculation in numerous polls and surveys of faculty attitudes and opinions. The results of their questionnaires provide statistical support for virtually all of the later explanations for the development of faculty collective bargaining contained in the literature examined thus far. A 1971 article by Ladd and Lipset supported Tyler's contention that faculty had begun to view themselves as a new class; however, they found that the level of support for unionism depended upon the particular class interests with which the faculty identified. Professors with fewer scholarly achievements support collective bargaining more consistently than faculty members with outstanding records of scholarly achievement; untenured faculty favor unions more than tenured professors; faculty at the more prestigious educational institutions are less interested in faculty unionization than professors at institutions with less prestige. As a general matter, however, the researchers found that there was a strong relationship between faculty liberalism and support for the

principles of collective bargaining at all institutions whether unionization activities occurred at the institutions or not (Ladd and Lipset 1971).

A 1976 Ladd and Lipset article in the Chronicle of Higher Education indicates that the percentage of faculty members favorable to bargaining has been growing steadily and this number is more disposed to accept collective bargaining than the number of institutions now covered by contracts would indicate. In the six year period between 1969 and 1976 the percentage of faculty who rejected the statement that "collective bargaining by faculty has no place on a college or university" increased from sixty percent to sixty-nine percent (Ladd and Lipset 1976).

Kemerer and Baldridge's book, Unions on Campus, analyzed the causes for faculty unionization and found the most significant reason for organization to be the desire for higher wages and benefits. Ranking second behind this economic cause was the desire for more influence in campus governance. Kemerer and Baldridge contend that the drive to form unions seems to be a protective reaction against external economic and social pressures on the one hand and a reflection of deep concern over internal issues of governance and the desire to have a voice in the decision-making process on the other. These forces coupled with the presence of strong national unions who

are actively attempting to organize college and university campuses and the passage of legislation favorable to collective bargaining have created the climate necessary for substantial growth of faculty unionism (Kemerer and Baldridge 1975).

Another of the central issues in academic collective bargaining is the question of college and university governance. Much of the early literature of collective bargaining on the campus would affect the rapid and regretful deterioration of traditional modes of college and university governance and destroy the sense of community that existed between the administrators and faculty. It was not until the early 1970s however, that educators began to seriously examine their beliefs about governance and attempt to describe the extent to which the appearance of bargaining actually affected those modes of governance. Since the scholarly literature that examines the causes of faculty unionization consistently points to the failure of the traditional governance processes as a contributory factor in increased faculty interest in unionization, there appears to be a gap between the realities of the college and university environment and some authors' perceptions of that environment.

Harold Hodgkinson was one of the first researchers to seriously question the basic assumptions about the nature of academic governance. In an early report entitled "College Governance: The

Amazing Thing Is That It Works At All," Hodgkinson reviewed the literature of governance from 1965 to 1970 and discovered that (1) there was very little research or even scholarly concern with the subject and (2) that neither educators nor administrators understood the process. Rather it seemed to creep along resting only on a foundation of traditionally revered ideals that no longer had a basis in fact. It is his contention that colleges are developing two distinct sets of employees--the budgeting and management information systems people and the faculty--and that these groups are unable to understand each other. Systems people and faculty confront each other across a void of misunderstanding and unless colleges can train people who understand the values of both the technical and human aspects of governance, the problem of miscommunication and misunderstanding will remain. According to Hodgkinson, one of the contributory factors to unionization is the fact that collegial governance is not working. He outlines the following contributory factors in the failure of academic governance: declining interest in the concept of representation; decentralization of college and university campuses; increasing heterogeneity among groups participating in governance; the changing role of college presidents; the concern for increased accountability; the decline in the separation of faculty, administrative and student power and the impact of early unionization activities. Any

discussion of college governance and faculty unionization which attempts to determine which factor caused the other results in a circular argument. Hodgkinson does not try to separate the two, he merely emphasizes that one pre-existing condition, the woeful state of governance in the 1960s, contributed to the budding of the other--unionization--and that unionization, in turn, reinforced the deterioration of governance (Hodgkinson 1970).

Interestingly, a chronological review of the scholarly literature of governance and collective bargaining indicates consensus on many of Hodgkinson's exploratory opinions. Martha Brown in a 1970 Labor Law Journal article indicated that traditional models of governance would continue to be challenged by faculty who believed that certain trade union concepts, particularly salary bargaining would be more appropriate to their needs and aspirations than the traditional method of individual professors negotiating for themselves (Brown 1970).

Former AAUP president, Matthew Finkin identified the contract factors which could influence the traditional modes of college and university governance and pointed out that collective bargaining agreements can be designed to prevent negative effects on this process. Contracts can, he wrote, guarantee the continuance of internal faculty bodies as well as insure some of the functions

traditionally guaranteed to the faculty, and the type of contract that evolves depends largely upon the composition and goals of the bargaining agent and the nature of the academic community (Finkin 1971).

"Collective Bargaining: A New Myth and Ritual for Academe," by Joseph Dement describes the concept of shared authority that exists on college campuses as a myth and portrays collective bargaining as a revelatory process which demonstrates that shared authority exists only in the minds of educators and administrators. It is Dement's contention that the assumption that shared authority existed led to a loss of faculty influence within the university and was a principal cause for the appalling financial situation of faculty members in comparison to other professional groups in the society. College policy has increasingly been determined at either the crisis level or the financial level but, in any case, it has not been determined by the faculty. An inevitable result of this situation has been faculty unionization and a significant change in the relationship between the faculty and the administration. He believes that this change is most accurately described as a power relationship rather than an adversarial one and acknowledges

that drastic changes may occur in both the responsibilities and the organization of the faculty with the advent of collective bargaining (Dement 1972).

Keck, another proponent of faculty bargaining, believes that academic councils and senates are holdovers from an earlier idyllic age when the faculty was an active participant on governance. However, the mangerial revolution that accompanied the tremendous expansion of colleges and universities over the past twenty-five to thirty years has created a new managerial class to govern or aid in governing universities. Decisions are increasingly made on the basis of management criteria and it is unrealistic of the faculty to think that decentralized, departmental decision making can continue. Because university governance has become a more centralized function, it is necessary for the faculty to create a centralized power base for themselves so that they may continue to provide some substantive input into the decision-making process on campus. Since collective bargaining is a system of shared authority based on a process of bilateral decision making between two agents utilizing established procedures for reaching a mutual agreement, it may be the only alternative left to help college and university faculty establish a foothold in the managerial structure that currently exists on the college campus.

Members of the educational fraternity who continue to predict doom for traditional governance mechanisms because of bargaining are doing academia a disservice according to James Begin. He points out that the one generalization that can be made about the academic collective bargaining system is its variability. In response to variations in labor markets, product markets, organizational structures, rules, traditions, and personalities, a versatile bargaining system has evolved. Since traditional systems of collegiality have been an integral part of many institutions of higher education and of the expectations of the participants, it seems reasonable to expect that the collective bargaining system which develops in higher education will reflect these factors. Begin believes that collective bargaining has supplemented not supplanted traditional mechanisms and that the changes have been evolutionary reflecting particular circumstances and not revolutionary (Begin 1973).

James Olson believes that collective bargaining and student participation in governance represents a departure from the concept that an institution of higher education is a community of scholars with different functional roles but all bound by common objectives. He questions whether the university can continue to function, maintain academic integrity and meet the requirements of the student and the society if the governance of that university is based on a drive for

power by groups or factions who believe that the interests of each are irreconcilable with the interests of the other. This heightened adversarial relationship on campuses has made confrontation a standard operating procedure in many cases and obscured the necessary distinction and separation of power and responsibility (Olson 1974).

It is Donald Wollett's contention that faculty self-governance and collective bargaining cannot co-exist, that they are mutually exclusive and that faculties must decide between the two. Wollett offers several comments relative to the question of preference. First, despite the romantic attachment of many faculty to systems of self-governance, there is a question of whether such systems meet the administrative imperatives of higher education in an era when public support is dwindling. It is his belief that self-governance systems inevitably involve the faculty in the performance of managerial functions that are time consuming, economically unrewarding and energy sapping and divert the faculty from its principal function of teaching and research. Second, he suspects that collective bargaining is more likely to create conditions of efficiency and accountability in the management of educational institutions. Collective bargaining is intolerant of poor administration and exposes the incompetent administrator, the manager who cannot make a decision or the dean

who is indecisive or dilatory. Because collective bargaining requires a strong and efficient management team, the persons ultimately responsible for institution management recognize early that they cannot afford the luxury of incompetent management. The result is an improvement in the efficiency of the institution and in the accountability of the institution to the consumers of its services. Finally, the author contends that collective bargaining forces educational institutions to improve their managerial structures and their managerial personnel (Wollett 1974).

In an exploratory analysis of the consequences of collective bargaining at the State University of New York (SUNY), the results of Hedgepeth's questionnaire demonstrated that collective bargaining had definitely effected many university procedures including the distribution of power, the role of the participants and the structure of internal governance. Hedgepeth believes that all of these effects are presently or potentially damaging. Specifically, he found the following: (1) formalized structures and procedures; (2) procedural grievance standards that closely adhered to and resulted in cumbersome and difficult relationships in the academic setting; (3) salary increases and the accompanying possibility that negotiated salary agreements may eventually have a negative effect upon faculty performance because status quo mediocrity and demonstrated ability are

rewarded equally; (4) less effective or negative communication between all university areas with the arrival of bargaining; (5) the extension and intensification of adversary relations; (6) the feeling by SUNY faculty that the bargaining agent had usurped some of the prerogatives of the faculty and may eventually assume control of internal governance; (7) teaching responsibilities and curriculum decisions are unaffected by collective bargaining and (8) the possibility of rising adversarialism between students and faculty (Hedgepeth 1974).

Taylor Alderman, writing in the ADE Bulletin, shares Hedgepeth's view that a vote for collective bargaining is a vote of no-confidence in university administration and governance. He contends that a major characteristic of the collective bargaining process is its tendency to reduce the faculty-administration relationship to basic economic terms and the eventual possibility that this will result in economic justification for all academic endeavors and the phasing out of those departments which do not attract large numbers of students, and are therefore deemed non-productive. Further, Alderman believes that unionization on the campus means that power becomes largely vested in the union leadership and increasingly slips from the control of the faculty. Academic departments will experience a power redistribution with the advent of unionization and may find themselves

in considerably weakened positions vis-a-vis the union and the administration. Unions depend upon a united front supported by all faculty and must support individual faculty members against departments in formal grievance proceedings. One result of this situation can be a monolithic union bureaucracy and the relative weakening of department power and authority. Finally, the author believes that faculty unionization will create adverse reactions among university students. The interest of students and faculty are not identical and when the faculty seeks higher salaries, students pay higher fees. In this context student unions are as politically feasible as faculty unions, and Alderman hypothesizes that a student boycott which decreased the enrollment at a university by twenty-five percent for one quarter or semester would underscore the reality of student power. He maintains that faculty unionization brings the possibility of all of these occurrences closer (Alderman 1974).

On the other hand, James Begin finds evidence that the patterns which are evolving for faculty participation in decision making under collective bargaining will not necessarily lead to the demise of traditional procedures. Begin contends that collective bargaining has not chipped away at faculty senate jurisdiction, that educational policy continues to be established at the department level or in the faculty senate and has remained intact in the face of collective bargaining.

He is optimistic about campuses' abilities to develop new systems of bargaining that are not based on the industrial model and which will allow interchange between the faculty senate and the faculty bargaining agent. According to Begin, the consensus appears to be that the growing formalization of bargaining agent-senate relationships has enhanced the development of cooperative rather than competitive relationships between these decision-making forums. Developing interactions between bargaining agents, senates and administration indicate that there are a number of patterns evolving for faculty participation in decision making under collective bargaining which will not necessarily lead to the demise of traditional procedures. In the long run what is likely to evolve is some combination of broadly based faculty participation through governance procedures which are established or protected in the agreement and faculty participation through a bargaining agent (Begin 1974).

A 1975 report prepared by Michael Falcone indicates that collective bargaining has become one of the important instruments by which professors may make their influence equal to that of administrators in regard to vital questions of salary, promotion, tenure, academic freedom and other conditions of employment. He states that its very presence is to prevent college administrators from making unilateral decisions about personnel matters. In addition, it

in his opinion that negotiations on bargainable issues of employment generally have led to negotiations of educational policy. Further, he feels that one can conclude that the concept of shared authority has been advanced by collective bargaining, however, to the extent that outside political influences are affecting campus decisions the collegial processes may be endangered. It is apparently a new question as to whether an adversarial relationship promotes or injures collegial governance. It is important for bargaining parties to identify those aspects of campus governance which they wish to strengthen and direct their bargaining toward those ends (Falcone 1975).

The major study of the question of governance is the result of the Stanford Project on Academic Governance which was initiated to determine the impact of unionization on decision making in higher education. Unions on Campus by Kemerer and Baldridge analyzes the results of this study which involved over 500 union and non-union institutions and over 17,000 individuals. Among the major conclusions of the study are the following: (1) on campuses where senates and unions co-exist, unions outperform senates in influencing economic matters, while senates retain influence over academic issues; (2) neither unions or senates influence departmental budgets; (3) collective bargaining was least effective in increasing the

effectiveness of campus governance; (4) among public and private institutions, forty-one percent of the presidents and fifty-six percent of the union chairpersons felt that the power of the administration has decreased as a result of unionization. The authors conclude that for the moment, at least, faculty senates and unions have struck an uneasy alliance. However because it is in the nature of unions to expand their areas of concern, therefore, it is difficult to predict how long this alliance will last. It is possible to broadly group many of the factors influencing faculty unionization into several categories. Perhaps the most succinct analysis of the factors contributing to or hindering unionization on the campus is the following table prepared by Kemerer and Baldridge. The emphasis of the table is neither structural nor statistical but environmental, institutional and individual and the factors included are equally applicable to the private as well as the public institution (Kemerer and Baldridge 1975).

Table 2
Factors Promoting and Hindering Unionism

	Promoting	Hindering
Environmental	Economic Crisis	Federal and State Funding Programs
	Market Conditions	High Priority for Education
	Population Decline	Economic Stabilization
	Egalitarian Revolution	Antiunion Locality
	Increased Cost of Living	Restrictive Legal Climate
	External Controls	
	Legislative Priorities	
	Standardized Management Systems	
Institutional	Large Size	Research Orientation
	Low Salaries	High Salaries
	Less than Baccalaurete Program	Graduate Level Programs
	High Teaching Loads	Job Security
	Low Morale and Satisfaction	High Morale
	Arbitrary Administration	Effective Senates
	Weak Senates and Faculty Committees	High Peer Judgement
		Effective Professionalism
Individual	Low Education	Advanced Education
	Low Rank	High Rank
	Young	Old
	Humanities or Social Science Discipline	Hard Science or Professional Field
	Liberal Ideology	Conservative Ideology
Triggering Events	Specific Problems on Campus	No Triggering Problems
	Changes in Law	No Permissive Legislation
	Help from Organized Labor	No Help from Industrial Labor
	Active Union	No Active Union
Result	Collective Bargaining	No Collective Bargaining

The casual literature of academic collective bargaining indicates a broad scholarly consensus on the idea that the severe and rapid fluctuations and social traumas of the 1960s were the major contributory factors in the advent and development of faculty bargaining. The 1960s can be viewed as both the nadier and the zenith of the traditional university, and the collegiate adjustments required to accommodate this fact revealed the inadequacies of many traditionally accepted management methods including concepts of governance, the extent of faculty participation in financial planning and resource allocation, and a cluster of personnel-related functions encompassing salaries, benefits, hiring and firing policies and tenure.

The primary disagreement among academic labor scholars is whether the introduction of a faculty union on campus helps, hinders or eventually eclipses traditional modes of participatory governance. Enough studies have been completed to convincingly document the extent to which a union impacts collegiate governance, however, it is too soon to objectively assess whether these changes are positive or negative ones.

Literature Specifically Related to the NLRB and Private Institutions

The dearth of substantive literature dealing with the National Labor Relations Borad and its involvement with collective bargaining on the private campus underscores the purpose of this dissertation.

The only major investigations into the NLRB and private education have been produced by legal scholars who are concerned with the development of the labor law in this new area of NLRB jurisdiction. Their efforts have been especially focused on the question of NLRB bargaining unit determinations in higher education.

The problems of coexistence between traditional forms of governance and the newer influences of collective bargaining are evident at the private institution, however, the major difference between the public and private sector in the area of bargaining is the jurisdiction of the NLRB.

One of the first major publications was Belcher's lengthy article providing a layman's explanation of the background and basis for the NLRB's assumption of jurisdiction over private colleges and universities in 1970. It offers a good beginning point for any investigation into the field because he clearly defined and delineated the legislative mandates of the NLRB and indicated potential areas of involvement (Belcher 1970).

Robert E. Doherty, in a special report prepared for NACUBO, discusses the National Labor Relations Act and its implications for private higher education. Doherty contends that the most important reason faculties are opting to bargain collectively on the private campus is the simple fact that the 1970 reinterpretation of

the National Labor Relations Act by the NLRB allows them to do so. Secondly, the financial difficulty faced by certain institutions has convinced some faculties that a reduction in faculty welfare would be among the first adjustments made as a consequence of financial difficulties. Thirdly, those institutions which lack either the desire or the ability to provide an adequate professional environment are likely to find their faculties organizing to bargain collectively.

The major implications of collective bargaining on the private campus will probably be higher allocations for faculty welfare and lower allocations for the provisions of other educational services; strong egalitarian and majoritarian pressures generated by the union which will reduce salary arrangements based on flexibility and discretion; and as the constituency for academic governance becomes coterminous with the membership in the bargaining unit, the eventual assumption by the union of the power and function of the faculty governing body. Collective bargaining, Doherty contends, will speed the movement toward providing procedural and substantive due process safeguards for probationary teachers thereby making it somewhat more difficult for institutions to dismiss probationaries for reasons other than blatant wrongs, and bargaining will accelerate a demise of faculty professionalism at least as the term professional is generally understood in the academic community (Doherty 1973).

An early discussion of NLRB rulings on department chairman is David W. Leslie's article. Leslie analyzes a few of the early Board decisions regarding the issue of whether chairman should or should not be excluded from bargaining units and further attempts to identify and delineate the criteria which the Board used in its early decisions to determine what constituted supervisory power. Leslie concludes that the NLRB is still educating itself in the area of academic collective bargaining and that parties to a unit determination hearing can play a significant role in this process. The critical position of departments in university organization makes a clarification of the chairman's role a central issue in unit determination. Unrealistic rulings, he continues, can be potentially damaging to departmental governance and institutional stability, therefore, institutions and petitioning faculty should present the chairman's role as thoroughly and realistically as possible (Leslie 1973).

Kenneth Kahn, in a major legal article on the subject, criticizes the NLRB and contends that it has had great difficulty in trying to apply the guidelines of the National Labor Relations Act to the college and university setting. The Board has not been able to fully understand the problems of university professionals whose labor problems are so unlike those of blue collar workers with whom it has traditionally dealt. The problem, as Kahn sees it, centers around the

concept of shared authority which allows the faculty members to participate in forming the rules and regulations that govern their teaching duties.

This problem of misunderstanding is compounded because the National Labor Relations Board has chosen to approach the university bargaining unit issue on a case-by-case basis. The rulings to date have been far from acceptable to any of the parties involved. Often the records are inadequate and too little information has been supplied by the college or university to allow reasonable findings to be made. In addition the NLRB has been unable to conduct research for itself. Only recently through the seldom used oral argument procedure, has informative material been presented thus permitting more comprehensive rulings by the Board.

Kahn maintains that the ultimate effect of the NLRB's present policies in the area of faculty collective bargaining has been to hamper the ability of American colleges and universities to incorporate new ideas, new groups and change. It is Mr. Kahn's contention that this disability could have been avoided if the Board had used a more careful and informed approach to faculty units, and especially if the NLRB would use its rule-making authority in academic collective bargaining decisions rather than case-by-case adjudication which results in contradictory and confusing decisions. Further, Kahn contends that

Congress should amend sections of the National Labor Relations Act, as it has done in other instances, to allow the Act and the Board to meet the special needs of higher education faculties (Kahn 1973).

Matthew Finkin refutes Kahn's argument that the NLRB has been inconsistent and erratic in its rulings involving collective bargaining in higher education. Mr. Finkin admits that the Board could proceed more responsibly and efficiently but contends that it has, nevertheless, proper jurisdiction over private colleges and universities and has gone far to accommodate the peculiarities of the academic milieu when it renders decisions. The Board's decision to rely upon case-by-case adjudication is a good one according to Finkin and allows the NLRB enough latitude to consider the particular merits of each case. Finkin believes that the National Labor Relations Act is expansive enough to accommodate higher education. He addresses the question of faculty status. It is his contention that the Board has relied on two aspects of the faculty's role in determining whether department chairman have managerial or supervisory status: the collective character of departmental judgements and the necessity for independent review by the administration and the Board of Trustees of recommendations emanating from the faculty. Finkin does not feel that the Board has confused the principle of collegiality with the concept of shared authority, rather, he feels that they have considered

each case on its merits relying upon the Act's definition of supervisor as precedent in determining managers.

In bargaining unit determinations, Finkin feels that the Board has adopted a refined analysis of mutual interest groups and is applying a rigorous standard of professionalism that requires that work be related to a discipline or field of science within the scope of the teaching profession for inclusion in the unit. Discussing department chairmen Finkin points out that the Board relies on the chairman's authority to assign and direct departmental support personnel and addresses himself to the issue that department chairmen in some colleges are, in the fullest sense, agents or management while in other institutions they have no authority at all (Finkin 1973).

In a law journal article, Ryan contends that in the early unit determinations involving university faculties, the National Labor Relations Board has faced a labor relations situation unlike any it has dealt with in prior cases. The Board itself has noted the difficulty of applying rules to higher education which were developed to deal with industrial labor relations. In this setting the Board might have been expected to rely heavily on the statutory policies of the National Labor Relations Act and to examine the possible impact of its rulings on the workings of higher education. His analysis of the early cases suggests that the Board should arm itself with more information about the

special needs of higher education and should further study the likely effects of its rulings on colleges and universities. Nearly three years ago the AAUP suggested that rule-making provided the best solution. Foreseeing many of the difficulties the Board later encountered, the AAUP petitioned for a hearing to examine whether specific rules should be developed for faculty bargaining units. The Board denied the petition preferring to proceed case by case. In view of the problems already encountered or implicit in the Board's approach to faculty unit determinations, Ryan believes that the Board should reconsider its position (Ryan 1973).

Ralph Kennedy, a former NLRB member, outlines several areas of concern to college administrators in their relationship with the National Labor Relations Board. Kennedy identifies unit scope and unit composition as two key areas of concern. Unit scope refers to that group of employees who will be included in a bargaining unit and unit composition refers to precisely which employees fall within that group. He comments that there had been relatively few cases involving scope inasmuch as the parties generally agree beforehand on a university-wide unit encompassing one or more campuses. The matter of unit composition, however, has been raised much more frequently. Kennedy feels that the Board strives to include in a single faculty bargaining unit all members of a university's professional

staff who regularly teach or who are engaged in supportive activities clearly associated with the educational process and who otherwise share a community of interest in their working conditions.

With regard to the question of whether faculty members are employees, the author offered several propositions. First of all, the contention that all faculty members are supervisors finds its genesis in the accepted concept of collegiality or shared authority in which all segments of a university community, administration, faculty and in some instances, students participate in decision-making individually or through representatives. To the extent that faculty members participate in decisions affecting university policy and personnel they may be exercising supervisory authority and can, in effect, be seen on both sides of the bargaining table. It is the Board's contention that whatever policy-making power adheres to full-time faculty status is exercised by them only as a group and therefore does not make them supervisors. Under the Act, Congress narrowly defined the term supervisor so as to include only individuals who exercise supervisory authority in the interest of the employer. In the opinion of the Board, faculty participation in the collegial decision-making process satisfies neither the letter nor the spirit of the supervisory exclusion as contemplated by Congress. It is exercised on a collective rather

than an individual basis. And more importantly, it is exercised in their own interest rather than in the interest of the employer (Kennedy 1974).

Kahn, in a more recent article, believes that the major problem confronting institutions in the labor relations area is the unfamiliarity of the regulatory agencies with the unique aspects of labor relations in higher education. Kahn feels that the NLRB has been unable to recognize the differences between universities and colleges and industry because institutions have not compiled complete records in presenting their cases. One of the major future problems which will confront the NLRB is the conflict between the faculty senate and a union which is already or is seeking to become the elective representative of the faculty. It is possible that the NLRB will determine that faculty senates are employer-dominated labor organizations especially because most institutions provide financial support for their senates. Kahn contends that faculty senate systems could be attacked as an unfair labor practice on the following two grounds: (1) employer dominated labor organization and (2) the doctrine of exclusive representation which means that a college or university has the affirmative obligation to bargain with the elected bargaining representative of its faculty. This requirement can impair the ability of faculty members to work through existing internal structures in

dealing with the administration concerning institutional policies and the threat of an unfair labor practice would constrain the university from dealing with the senate or departmental committees.

On the issue of the supervisory status of some faculty, Kahn feels that the Board will have to exclude department chairmen from units in light of the recent Supreme Court decision (NLRB v. Textron, Inc.) in which the Court ruled that no managerial employee is protected by the Act and rejected the NLRB argument that only those management employees in positions susceptible to conflict of interests should be excluded from the coverage of the Act (Kahn 1975).

The literature that has appeared thus far which is significantly related to the NLRB and private institutions has focused on the apparent inconsistency of Board rulings particularly in the area of bargaining unit scope and determination. Presently there are two major viewpoints on the subject: one view contends that the NLRB has been almost irrational in its unit and supervisory rulings and is simply unequipped to deal with the special labor problems presented by academia; the other view maintains the Board has carefully considered each case on its merits and that contradictory rulings reflect the unique circumstances of each case rather than lack of uniformity in Board rulings. Additionally labor scholars are divided on the question of whether the NLRB should use its rule-making

authority, thereby delineating general rules and regulations which would be applied in every situation or continue to rely upon a case by case examination which results in decisions that the Board feels best accommodate the unique aspects of each situation.

Basically, this literature is concerned with the potential changes that may occur in university organization as a result of NLRB collective bargaining decisions, however, with the exception of a few notable discussions of the legal implications, scholars have not yet begun to assess the impact of these Board decisions except in a very general way.

Chapter 3

JURISDICTION

This chapter will review the cases and decisions arising from questions of jurisdiction brought before the National Labor Relations Board (the Board) by private institutions of higher education. Jurisdiction is the authority by which the Board recognizes and decides those labor cases it determines are within the scope of the power assigned to the Board by the Congress. Each case will be briefed, or summarized, and the summary will include the pertinent factual information necessary to convey a clear understanding of the issues involved and the particular circumstances of each case. All of the landmark jurisdictional cases will be reviewed here; those cases which are routine and merely repeat or reinforce the arguments and decisions of the important precedent setting cases have been excluded. The cases will be presented chronologically to enable the reader to follow the evolution of the Board's various jurisdictional positions. A complete legal citation, referenced to the Decisions and Orders of the National Labor Relations Board (NLRB), appears after the title and date of each case. A detailed analysis of each case and the interrelationship between the cases together with a discussion of

their past and potential impact upon private colleges and universities will follow the case.

The heart of the Board's involvement in the collective bargaining processes on private college and university campuses has been the philosophical and legal changes of attitude which brought the Board from an early interpretation of the National Labor Relations Act (the Act) as disallowing any basis for assuming jurisdiction over nonprofit institutions of higher education to its present position that it has unquestioned authority to order, direct and oversee the collective bargaining process on the private campus. The case law on the jurisdictional issue is limited because the major legal issue whether the Board could rightly claim jurisdictional authority was settled relatively early. However, there have been several unusual cases which have broadened the legal basis for jurisdiction and in a few instances the Board has reversed itself on key issues. In this and subsequent chapters there are Board decisions which address several topics. For example, a ruling may have established major jurisdictional precedent but may also have significance for Board bargaining unit determinations as well. Consequently, certain cases may be discussed in two, three or four chapters; however, the brief of the case will appear only once, in the chapter in which the decision is initially analyzed. For purposes of clarity and ease of review,

subsequent mention of a case will be cross-referenced to the chapter where the brief of the case appears. References to "the Act" which appear in this and succeeding chapters refer to the National Labor Relations Act of 1947 and all of its subsequent amendments.

JURISDICTION CASES

THE TRUSTEES OF COLUMBIA UNIVERSITY and COMMUNITY AND SOCIAL AGENCY EMPLOYEES, LOCAL 1707, DECEMBER 11, 1951. 97 NLRB 424 (1951).

The Board affirmed the decision of the Hearing Officer.

The petitioning union requested representation of a bargaining unit of all clerical employees of the Columbia University libraries. The union contended that the University was engaged in interstate commerce within the meaning of the Act; that the Congress had intended to exempt charitable hospitals only from Board jurisdiction; that all other nonprofit institutions were within the Board's jurisdiction and that, accordingly, it would effectuate the policies of the Act for the Board to assert jurisdiction over Columbia.

Columbia contended that it was not engaged in commerce and that even if the Board could rightfully assert jurisdiction over the University's bargaining activities, it should use its' discretionary powers and decline jurisdiction on the grounds that the institution was a nonprofit educational corporation whose sole purpose was the

promotion of education. Columbia maintained that all of its activities were directed toward the promotion of education and that as such the University was excluded from the definition of employer as it appeared in the Act.

The Board found that although the financial activities of the institution affected commerce sufficiently to satisfy the requirements of the Act and the Board's financial standards for the exercise of jurisdiction, it would not effectuate the policies of the Act to assert jurisdiction. The NLRB maintained that the Act directed it to assert jurisdiction over nonprofit organizations "only in exceptional circumstances and in connection with purely commercial activities of such organizations,"[27] and further stated that while this language may not have provided a mandate, it provided an interpretative guide which would permit the Board in its discretion to decline jurisdiction. Accordingly, the Board declined to assert jurisdiction and the petition was dismissed.

CROTTY BROTHERS, N. Y., INC. and HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL 483, APRIL 10, 1964. 146 NLRB 755 (1964).

The Board reversed the decision of the Hearing Officer.

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[27] Columbia Univ. 97 NLRB 424 (1951) at 427.

The petitioning union asserted that Crotty Brothers, the food services firm that operated the dining facilities at Trinity College, was a commercial operation and as such fell under the jurisdictional provisions of the Act.

Crotty Brothers and Trinity College contended that Crotty managed the food service facilities as an agent for Trinity, that the activities engaged in were noncommercial in nature and directly connected with the College's nonprofit educational purposes and that no comparable food services were available to students within a mile of the College. Trinity was responsible for the maintenance and repair of the food service facilities and made all new equipment purchases. The invoices for all food purchases were headed "Crotty Brothers-Trinity College" and the College reimbursed Crotty for liability insurance and workmen's compensation. Further, Crotty invested no capital in the operation and had no control over any matter which would allow the company to increase its profits from the Trinity College operation. Finally, the Crotty Brothers manager of the facility at the College regarded Trinity's director of food service, a college employee, as his immediate supervisor and he made no significant decision without consulting her.

Based on these facts the Board found that the food services operations was nonprofit in nature and "intimately connected with

Trinity's nonprofit educational purposes, and that, whatever the legal relationship existing between Trinity and Crotty,"[28] it would not further the intentions of the Act to assert jurisdiction; therefore, the petition was dismissed.

THE PROPHET CO. and BARTENDERS, HOTEL, RESTAURANT AND CAFETERIA EMPLOYEES, LOCAL 453, FEBRUARY 4, 1965. 150 NLRB 1559 (1965).

The Board affirmed the decision of the Hearing Officer.

The union petitioned to represent a unit of food service employees employed by the Prophet Company in its operation at Whitewater State University in Wisconsin.

The Prophet Company operated all dining facilities at the University, including two cafeterias and a snack bar, for the exclusive use of the faculty, staff, students and alumni of the University. No comparable eating facilities were available to the students of this residential university within a reasonable distance.

The University required its students to subscribe to a board plan and paid the Prophet Company a fixed fee for each student enrolled in the plan. The board plan fee amounted to seventy-nine percent of the Prophet Company's income at the University; one percent was made in the cafeteria through cash sales; fifteen percent

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[28] Crotty Brothers, 146 NLRB 755 (1964) at 757.

was made through cash sales in the snack bar; and five percent was made through special catering service. All fixed equipment and non-perishable goods used in the dining facilities were supplied and owned by the University. Further the company agreed that certain supervisory and management controls over the food services operation were the University's. This included the use of student help and the assignment of duty only to employees acceptable to the University.

The Board contended that the facts of this case were similar to the facts in Crotty Brothers, supra and dismissed the union's petition on the grounds that the Prophet Company's operation at the University was intimately tied to the educational purposes of a non-profit institution which was a political subdivision of the state of Wisconsin.

CORNELL UNIVERSITY, PETITIONER and THE ASSOCIATION OF CORNELL EMPLOYEES-LIBRARIES, STAFF ASSOCIATION OF THE METROPOLITAN DISTRICT OFFICE, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. and SYRACUSE UNIVERSITY, PETITIONER and SERVICE EMPLOYEES INTERNATIONAL LOCAL 200, JUNE 12, 1970. 183 NLRB NO. 41 (1970).

The Board affirmed the decision of the Hearing Officer.

Cornell and Syracuse universities, the Petitioners, contended that they had an overwhelming impact on interstate commerce and urged the Board to overrule its decision in Columbia Univ., supra and assume jurisdiction over nonprofit private colleges and

universities. Further, the Petitioners maintained that because of the research contracts granted to private institutions by various agencies of the federal government, the operations of private colleges and universities had increasingly become matters of federal interest. The Petitioners also maintained that the failure of the states to recognize and legislate for labor relations justified the Board's assertion of jurisdiction over what was thus a totally unregulated labor relations area. Both Cornell and Syracuse supplied extensive financial documentation to demonstrate their contention that they were engaged in substantial interstate commerce and therefore subject to the jurisdiction of the Board.

The unions opposing the assertion of jurisdiction contended that many private colleges were small and local in character and did not affect interstate commerce. They further maintained that because private institutions represented a declining proportion of higher educational institutions, the Board would have jurisdiction over only a fractional segment of the field. Finally it was argued that much conflict and instability would be avoided if all institutions were subject to state, not federal, control

In its discussion of the case, the Board maintained that, although education was still the primary goal of the private institution in question, the operations of this class of employer had significant

effect on commerce and that an assertion of jurisdiction by the Board was necessary to insure the "orderly, effective, and uniform application of the national labor policy."[29] The Board concurred with the Petitioners' assertions that the states had not enacted labor codes under which such matters as union organization, collective bargaining, unfair labor practices and other labor disputes on the private campus could be handled. They concurred with the holding in Cornell Univ., supra to the effect that the Board did have statutory discretionary jurisdiction over nonprofit educational institutions. The Board members acknowledged that two decades of change in the environment of higher education necessitated an assertion of jurisdiction.

The Board noted that the 1959 amendments to the Act as incorporated in Section 14(c)[30] had been intended to eliminate an existing jurisdictional no-man's land where neither states nor the federal government assumed the responsibility for regulating labor relations on the private campus.

Noting the expansion in private higher education and the increase in federal expenditures in this area, the Board also called

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[29]Cornell Univ. 183 NLRB No. 41 (1970) at 334.

[30]National Labor Relations Act, 40 Stat. 449 (1935 as amended by Pub. L. No. 101 (1947) and Pub. L. No. 257 (1959); 20 U.S.C., sec. 151-68.

attention to the organizational activity taking place among employees on college campuses and stated that "with or without federal regulation, union organization is already a fait accompli at many universities."[31]

Accordingly the 1951 Columbia Univ. decision was overruled and the Board determined that it would assert jurisdiction over "nonprofit, private educational institutions where we find it to be appropriate."[32] The Board did not establish jurisdictional standards for nonprofit colleges and universities as a class in this decision.

ITT CANTEEN CORPORATION and LOCAL 327, HOTEL MOTEL, CAFETERIA AND RESTAURANT EMPLOYEES, DECEMBER 5, 1970. 187 NLRB NO. 7 (1970).

The decision of the Hearing Officer was affirmed.

The union, Local 327, petitioned for recognition as the bargaining representative of certain employees of the ITT Canteen Corporation.

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[31] Cornell Univ., supra at 333.

[32] At the time of this petition, an election conducted at Syracuse under the direction of the New York State Labor Relations Board had resulted in the selection of the Service Employees International Union, Local 200 as the bargaining agent for a unit of full-time and regular part-time service and maintenance employees. The Board upheld the validity of the state-conducted elections and dismissed the Syracuse University petition for an assertion of jurisdiction in this instance on the grounds that all parties agreed the state-supervised election was free of any irregularities and reflected the true wishes of the employees. Id., at 334.

ITT Canteen, the Employer, contended that while it was engaged in commerce within the meaning of the Act, it provided food services to Bradley University, and that its facility there was "a noncommercial operation intimately connected with Bradley University's nonprofit educational process."[33] ITT Canteen provided all the food services at the University on a fee basis of seven percent of the gross sales. ITT's gross revenues from sales at the University were in excess of $500,00 and the company received over $10,000 in goods and materials from out of state. Citing the Board's decision in Crotty Brothers, supra the Employer maintained that the NLRB should decline to assert jurisdiction.

The Board held that ITT Canteen was engaged in activities of a commercial nature and for profit in many states and the facts that these operations were carried on pursuant to a contract with a non-profit educational institution did not divest those operations of their commercial nature. The decision also noted that since Crotty Brothers the Board had determined that it effectuated the policies of the Act to assert jurisdiction over private educational institutions because such commercial operations did affect commerce despite

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[33]ITT Canteen, 187 NLRB No. 7 (1970) at 1.

their nonprofit character. Thus Crotty Brothers was overruled and ITT Canteen's reliance upon the precedent of that decision was not accepted.

C. W. POST CENTER OF LONG ISLAND UNIVERSITY and UNITED FEDERATION OF COLLEGE TEACHERS, LOCAL 1460, APRIL 20, 1971. 189 NLRB 904 (1971).

The Board affirmed the decision of the Hearing Officer.

The United Federation of College Teachers, Local 1460 filed a petition seeking to represent certain professional employees of the C. W. Post Center of Long Island University.

The University filed a motion for dismissal of the case based upon a claim that the Board lacked jurisdiction over the University and that the potential Board assertion of jurisdiction over the University's professional employees was improper under the Act. The University also noted that proceedings were pending with the New York State Labor Board regarding this matter. The Petitioner subsequently withdrew its petition before the New York State Labor Relations Board on July 19, 1970.

Regarding the jurisdictional question of whether the Board could properly assert jurisdiction over professional personnel including faculty, the Board maintained that the individuals involved had the usual employer-employee relationship, were employers within the meaning of the Act, and therefore were entitled to the benefits of

the Act. The Board upheld the Petitioner and directed an election at the University.

FORDHAM UNIVERSITY and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND LAW SCHOOL BARGAINING COMMITTEE, SEPTEMBER 14, 1971. 193 NLRB NO. 23 (1971).

The Board affirmed the decision of the Hearing Officer.

The Petitioners were seeking two separate bargaining units at Fordham University - a unit of all full and part-time teaching faculty and a separate unit of the law school faculty. The Employer, Fordham, contended that all its faculty members were supervisors but that if the Board decided to assert jurisdiction over the Fordham faculty, it should not order a separate unit for the law school faculty.

The jurisdictional issue at hand was whether the Board would assert jurisdiction over law school faculties considering the separate professional qualifications for attorneys. Based on its findings in C. W. Post, supra the Board reiterated its decision, in making unit determinations, to apply the same principles "with respect to faculty members that we have applied in cases involving other types of employees."[34] Accordingly, the Board dismissed Fordham's argument that it should decline jurisdiction over faculty and directed elections for two separate bargaining units.

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[34] Fordham Univ., 193 NLRB 134 (1971) at 137.

DUKE UNIVERSITY and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES and NATIONAL UNION OF HOSPITAL, NURSING HOME EMPLOYEES, RWSSU, LOCAL 11990, NOVEMBER 18, 1971. 194 NLRB NO. 31 (1971).

The Board affirmed the decision of the Hearing Officer.

The Petitioners sought to represent specific units of employees of Duke University. The American Federation of State, County and Municipal Employees (AFSCME) was seeking to represent all service employees excluding maintenance employees. The National Union of Hospital and Nursing Home Employees sought a unit of all service and maintenance personnel at Duke University Medical Center.

The jurisdictional question in the case was whether the Board could rightfully assert jurisdiction over a private university's medical teaching centers and hospitals.

The Board found that although the Duke Hospital had no separate legal existence apart from the university, "a nonprofit hospital operated by another nonprofit entity - albeit one over which we would assert jurisdiction - is nonetheless still a nonprofit hospital" and as such the Board was excluded by Section 2(2) of the Act from asserting jurisdiction. This section of the Act stated that the definition of the term employer did not include "...any corporation or association operating a hospital, if no part of the net earnings insures

to the benefit of any private shareholder or individual...."[35] The Board, therefore, asserted jurisdiction over the unit sought by AFSCME but declined jurisdiction over employees performing a majority of their work in the hospital. A dissenting opinion was offered in this case.

TEMPLE UNIVERSITY and DISTRICT 65, WHOLESALE, RETAIL, OFFICE AND PROCESSING UNION, JANUARY 19, 1972. 194 NLRB NO. 195 (1972).

The Board affirmed the decision of the Hearing Officer.

The petitioning union contended that the Board was required to assume jurisdiction over the University because it was a private nonprofit educational institution whose annual gross revenue exceeded $1 million.

The University admitted its status as a private institution operating without profit and having a gross revenue of over $1 million; however, Temple further contended that there was a substantial nexus between the University and the Commonwealth of Pennsylvania. The Board, therefore, in its discretion should decline to assert

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[35]National Labor Relations Act, 49 Stat. 449 (1935), Section 2(2). This section was amended in 1974 by Pub. L. No. 93-360, 88 Stat. 395 by the striking of this clause and the insertion of the following in Section 2(14): "The term 'health care institution shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person."

jurisdiction because it would be encroaching upon governmental relations by asserting jurisdiction.

A 1965 statute established Temple University as a quasi-public higher education institution to provide low cost higher education for Commonwealth residents under this statute. The University, although private in form, had become a quasi-public institution of the Commonwealth of Pennsylvania.

The Board declined to assert jurisdiction in this case calling the University an "instrumentality of the Commonwealth" and relied upon the following facts in reaching its decision to decline jurisdiction:

1. Twelve of the thirty-six members of the University's Board of Trustees were designated "Commonwealth Trustees" and appointed by various Pennsylvania government officials.
2. Commonwealth appropriations subsidized resident tuition and fees.
3. The Commonwealth's appropriations as a percentage of Temple's budget had risen steadily from 1965 to amount to approximately two-thirds of the budget at the time the case was heard.
4. By 1972 the legislature had appropriated $79 million for future capital improvements. The University, on the

other hand, had spent only $67 million of its own funds on its physical plant from 1888 to 1972.

5. University officials testified before appropriate state legislative committees and the Commonwealth's auditor was empowered to audit University expenditures of state funds.

6. The annual report of the University's President was required to be transmitted to the Governor and members of the legislature.

7. The University was not required to post a bond prior to obtaining a preliminary or special injunction because it was an "instrumentality" of the Commonwealth. This status also made Temple a "public employer" within the meaning of the Commonwealth's Public Employees Relations Act.

Accordingly, the Board declined to assert jurisdicition over Temple University and dismissed the petition. A dissenting opinion was offered in this case.

PENNSYLVANIA LABOR RELATIONS BOARD and THE BOARD OF TRUSTEES, SETON HILL COLLEGE AND SETON HILL PROFESSIONAL ASSOCIATION, JUNE 16, 1972. 197 NLRB 627 (1972).

The Seton Hill Professional Association filed an unfair labor practice against Seton Hill College. In this proceeding before the

Pennsylvania Labor Relations Board, Seton Hill College, the Employer, contended that it was not subject to the jurisdiction of the State Board because it was not a public employer. Rather, it contended that it was subject to the jurisdiction of the Board. The Pennsylvania Labor Relations Board filed the petition seeking an advisory opinion from the Board to determine where jurisdiction properly lay.

The Board dismissed the petition claiming that the Pennsylvania Board was actually requesting a ruling on the question of whether Seton Hill was an Employer within the meaning of the Act or whether it was excluded because it was a political subdivision of the Commonwealth. The Board ruled that its Advisory Opinion proceedings were "designed primarily to determine questions of jurisdiction by application of the Board's discretionary standards to the 'commerce' operations of an employer." Since the petitioner had failed to comply with this advisory opinion proceeding, the petition was dismissed.

SLATER CORPORATION and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1684, JUNE 30, 1972. 197 NLRB 1282 (1972).

The Board affirmed the decision of the Hearing Officer.

The petitioning union sought to represent a unit of certain employees working in the food service facilities at Humboldt State

College, a nonprofit educational institution operated by the state of California.

Slater Corporation, the Employer, was a nationwide food services management corporation that maintained the food services operations at Humboldt State. Students were required to participate in the meal plan, and meal-plan service accounted for seventy-four to seventy-five percent of Slater's sales at the College.

The College owned all fixed equipment and nonperishable goods. It required Slater Corporation to maintain what it deemed an adequate staff of employees and it reserved the right to make rules and regulations governing employees and employee conduct as well as rules and regulations effecting the overall operation of the food service facilities. Further, the Slater contract with the College required the Employer to comply with the fair labor practices established by the College, give preference to students in filling temporary positions and pay the student the minimum wage established by the state legislature.

The Board held that the facts of the case were similar to those in the Prophet Company and that Slater Corporation was a service contractor whose services were intimately related to the operations of a state university over which the Board would not

assert jurisdiction. Accordingly, the Board declined to assert jurisdiction and dismissed the petition.

ALLEN AND O'HARA DEVELOPMENTS, INCORPORATED D/B/A ILLINI TOWER and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, APRIL 30, 1975. 210 NLRB NO. 41 (1974).

The Board affirmed the decision of the Hearing Officer.

At issue was the question of whether the Board should assert jurisdiction over an employer who owned and operated a dormitory and food service at the University of Illinois, a nonprofit institution operated by the state.

A University regulation required all students with less than sixty hours of credit (primarily freshmen and sophomores) to reside in housing which had been certified by the University. Such housing included both University and privately-owned housing units. To receive certification for its housing units, a private owner had to agree to abide by certain regulations formulated by the University to insure the safety and welfare of its students. In order to maintain University certification an owner had to agree not to rent space to anyone other than University students. Certified housing owners were free to rent their units at whatever level the market would absorb and the owners had complete freedom to hire, fire and discipline employees. The one exception was resident advisors who

were recruited, screened and recommended for hire to the private housing owners by the University.

The Board found that the operations of Allen and O'Hara Development, Inc., were not intimately connected with the University's purpose of promoting education because the amount of control the University exercised over the labor relations and operations of the Employer was minimal. The University did not establish or collect the fees involved in any student rental agreements. Leases were made solely between the student and the owner and any food services available in the privately owned certified housing were not required or controlled by the University. Further, the Employer could withdraw from the certified housing program at any time and upon doing so could rent units to any nonstudent or student with more than sixty hours of credit. Based on these facts, the Board denied the petition of the Employer and ruled to assert jurisdiction over Allen and O'Hara Developments, Inc. A dissenting opinion was offered in this case.

HOWARD UNIVERSITY and LOCAL 246, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, JUNE 10, 1974. 211 NLRB 247 (1974).

The Board affirmed the ruling of the Hearing Officer.

The petitioning Teamster's union requested that the Board assert jurisdiction over Howard University based upon its Cornell

University decision and the fact that the University was a private institution whose annual gross revenues were in excess of $1 million.

The Employer moved for dismissal of the petition on the grounds that they, like Temple University, operated under special considerations which warranted a judgement that the Board should not assert jurisdiction.

The Board declined to assert jurisdiction based on the following facts:

1. Howard University was established under a charter issued by the Congress.
2. Historically the University's operations had been funded, in large part, by the Federal government.
3. The University was required to allow the Secretary of the Department of Health, Education, and Welfare the "authority to visit and inspect such university and to control and supervise the expenditure therein of all monies paid under said appropriation."
4. The University was audited annually by DHEW and the General Accounting Office.
5. One hundred percent of the University's construction funds were supplied by the Federal government.

6. Up to 67.2 percent of the University's budget was based upon Federal appropriations.

7. Howard's employee wages, salaries, benefits and personnel policies closely paralleled those of the Federal government.

The Board was persuaded that Howard enjoyed "a unique relationship with the Federal government unmatched by any other university to which our discretionary jurisdictional yardsticks apply," and declined to assert jurisdiction over Howard University. It was the opinion of the Board that any collective bargaining processes between Howard University and its employees as contemplated by the Act would entail the involvement of numerous Federal agencies over which the Board had no jurisdiction. Accordingly the petition was dismissed. A dissenting opinion was offered in this case.

HOWARD UNIVERSITY and ALLIED INTERNATIONAL UNION OF SECURITY GUARDS AND SPECIAL POLICE, JUNE 11, 1975. 224 NLRB NO. 44 (1975).

The Board affirmed the ruling of the Hearing Officer.

The petitioning union sought to represent a unit of security guards and employees at Howard University.

The Board was presented with essentially the same facts which appeared in Howard Univ., 211 NLRB 247 (1974) wherein they declined to assert jurisdiction based on the view that a "unique

relationship" existed between Howard and the Federal government. Concurring that the University satisfied the established criteria for assertion of Board jurisdiction, the Board, in this review of the Howard facts, decided that the relationship between the University and the government differed greatly from the situation in Temple Univ., supra because Howard was not a public university or an instrumentality of the Federal government.

A rereading of the facts revealed that Howard's physical plant was not owned by the Federal government and that the government exercised no control over the appointment of members to the Board of Trustees. Further there was no evidence that Howard had ceded any of its administrative independence despite the fact that it received substantial funding from the Federal taxpayers. In 1973 the University was permitted to arrange and supervise its own construction contracts and was required to comply with General Service Administration bidding procedures only if it used the services of that agency.

With regard to its labor relations, the University exercised complete authority. Hiring and firing procedures, wages and working conditions and any collective bargaining activities were not restricted by the Federal government. It was determined that there were "no specific restrictions [imposed by the Federal government] of any sort

with regard to the University's personnel and labor policies," and further the record revealed that Howard had voluntarily recognized a number of labor organizations and had negotiated a number of collective bargaining agreements with these employee representatives. No evidence was presented which indicated that the relationship between the University and the Federal government had interfered with collective bargaining at Howard or that these procedures had involved any Federal agencies. Based on these facts, the Board decided that Howard had retained its administrative independence and that its employees were not public employees in any sense. Further, the Board maintained that the relationship between the University and the Federal government had not restricted or interfered with the institution's control over its labor relations and did not "act to negate the benefits of collective bargaining as recognized by the Act."[36] Accordingly the Board held that it would effectuate the policies of the Act to assert jurisdiction over Howard University, thereby reversing its earlier decision.

A dissenting opinion was offered in this case.

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[36]Howard Univ., 224 NLRB No. 44 (1975) at 6.

ANALYSIS

When the National Labor Relations Board declined to assert jurisdiction over Columbia University and by extension, all other private, nonprofit educational institutions, the prospect of either the institutions or their employees enjoying any protective benefits of the National Labor Relations Act was quashed.

Prior to the 1951 Columbia decision, the Board had assumed jurisdiction over some educational institutions; however, in each instance the facts indicated that the schools in question were establishments whose activities were commercial in nature. Reference is made in the text of the Columbia decision to three prior cases in which the Board assumed jurisdiction over what were ostensibly educational institutions, the Henry Ford Trade School,[37] the Illinois Institute of Technology[38] and Port Arthur College.[39] The Henry Ford Trade School manufactured and repaired tools for the Ford Motor Company, a business for which it received in excess of $3 million

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[37] Henry Ford Trade School, 58 NLRB 1535 (1944) 63 NLRB 1134 (1944).

[38] Illinois Institute of Technology, 81 NLRB 201 (1949).

[39] Port Arthur College, 92 NLRB 152 (1951).

per year. Research and experimentation projects for various industries were carried out on a cost per project basis at the Illinois Institute. The Port Arthur College case involved a unit of employees at a commercial radio station owned by the College but not operated for instructional purposes in connection with any of its courses of study.

The Board contended that none of these previous cases provided precedent for the Columbia petition because none of these institutions were actually engaged in offering nonprofit educational instruction. Thus, the first major jurisdictional question to come before the Board involving private colleges and universities was whether the Board should assert its jurisdiction "where the activities concerned are intimately connected with the educational activities of the institution and are noncommercial in nature."

Relying upon the legislative history of the Act and the amendments thereto and specifically the charitable hospital exemption contained in Section 2(2) of the Act as amended, the Board declined to assert jurisdiction over Columbia. Section 2(2), as of the date of the Columbia decision read, in the pertinent part as follows:

> "The term "employer" includes any person acting as an agent of an employer directly or indirectly, but shall not

include...any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual..."[40]

Although this section specifically exempted only nonprofit hospitals from jurisdiction, the legislative history indicated that other enterprises, namely corporations, funds or foundations established and organized exclusively for educational, scientific, religious and other noncommercial purposes, had been considered by some legislators as equally exempt from the definition of employer provided in the section despite the fact that these organizations had been excluded from the language of the statute as it was finally passed by the Congress. The thrust of relevant portions of the legislative history and subsequent interpretations by the Board was that all organizations which were charitable in nature rarely, if ever, affected interstate commerce. The Conference Committee Report on the 1947 amendments to the Act stated that "only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act."[41]

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[40]National Labor Relations Act, 49 Stat. 449 (1935), Section 2(2).

[41]H. R. Rep. No. 871, 80th Cong. 1st Sess. (1947) at 32.

The Board interpreted this language as the primary guide for its rejection of jurisdiction in Columbi Univ., supra.

Of major significance in this case, however, is the fact that the Board did not conclude that it was specifically disallowed by the Act from asserting jurisdiction. The decision was purely a discretionary one. The Board was convinced that the "activities of Columbia University [did] affect commerce sufficiently to satisfy the [jurisdictional] requirements of the statute and the standards established by the Board for the normal exercise of jurisdiction,"[42] but the Board did not believe that it would effectuate the policies of the Act to assert jurisdiction over an educational institution whose activities were nonprofit, noncommercial in nature and were intimately connected with "the charitable purposes and educational activities of the institution." Nevertheless, the door for future assertion of jurisdiction had been left open.

The Board's reliance upon exemptions that had been discussed in the legislative history but never actually incorporated in the text of the Act, together with the conclusion that discretionary jurisdiction existed, created a significant basis for later deviation from the interpretation. Further, the Board's Columbia decision

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[42] Columbia, supra at 425.

clearly implied that any educational institution which could demonstrate that its activities had a significant affect upon interstate commerce would almost automatically come under the jurisdiction of the Board regardless of whether the institution was a nonprofit organization or not.

Thirteen years after Columbia Univ., supra a case involving Crotty Brothers, a contractor to Trinity College in Washington, D.C., sustained the Board's 1951 reasoning. The facts in the Crotty case convinced the Board that despite Crotty Brothers' status as a private, profit-making corporation engaged in the business of food service management, its contractual relationship with Trinity College was such that its operations were "noncommercial in nature and intimately connected with Trinity's nonprofit educational purposes"[43] (emphasis added).

As interpreted by the Board in Crotty and subsequent decisions, the concept of intimate connection means the nexus or close relationship between the nonprofit purpose of promoting education and the operations and activities of an educational institution or its contractors. Crotty Brothers contended that it exercised no control over the profit-making variables (e.g., prices, amount of capital

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[43] Crotty, supra at 756.

investment, purchasing procedures) in its operations on the Trinity campus, therefore, its activities were noncommercial in nature and existed primarily as a requisite support service in furtherance of Trinity's nonprofit, educational goals. The Board concurred with this analysis and declined jurisdiction.

The Crotty Brothers decision seemed consistent with the decision in Columbia University and appeared to reinforce the Board's jurisdictional position regarding private educational institutions. A closer examination of the decision reveals that what the Board had actually done was to confer nonprofit status upon a profitmaking corporation and allow that corporation the same charitable exemption that it had conferred upon private colleges and universities. The purpose of the Act was to provide recourse to employers and employees in their labor relations, however the Board seemed to be establishing a precedent contrary to the purposes of the Act which would deny protection under the Act to profit making corporations and their employees affiliated with private colleges and universities.

In 1965 in Prophet Company the Board reached a decision similar to Crotty Brothers although for slightly different reasons. When the Board determined that the food service operations of the Prophet Company were intimately connected to the educational purposes of Whitewater State University, it declined to assert

jurisdiction "over any state or political subdivision thereof."[44] The Board relied on the guidelines it had established in Crotty Brothers to determine whether an intimate connection existed between the Prophet Company and Whitewater State University. The added dimension in this case was the fact that the University was clearly a political subdivision of the state of Wisconsin. In Prophet Company the Board felt that the commercial activities of the company were intimately tied to the educational institution operated by the state. Because of this intimate relationship, the Board decided that it would not assert jurisdiction even though the Prophet Company was engaged in commerce within the meaning of the Act.

The precedent established by Crotty Brothers and partially reinforced in Prophet Company predictably was subject to reversal should the Board change its policy with respect to the discretionary aspect of jurisdiction over educational institutions. The Board's refusal to assert jurisdiction was an extension of its decision to exercise discretion and decline jurisdiction over private educational institutions. The provisions of the Act allowed the Board to assert jurisdiction if it chose so long as the educational institutions in

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[44]National Labor Relations Act, 49 Stat. 449 (1935) Section 2(2).

question were engaged in commerce within the meaning of the Act. In the Prophet decision, the Board had the authority to assert jurisdiction over the employees of private companies operating on the campuses of public educational institutions, however it declined to do so.

The 1970 Cornell University decision was the beginning of the Board's active and continuous involvement in all aspects of labor relations on the private campus. Cornell and Syracuse universities filed petitions seeking elections to determine the bargaining representatives of certain of their nonacademic employees. Both institutions contended that the operations and activities of educational institutions as a class and of Cornell and Syracuse in particular were increasingly commercial ones and had a sizeable impact upon interstate commerce. Further, the petitioning universities maintained that their operations had increasingly become matters of Federal interest because of the amount of Federal grant research and scholarship monies extended to the institutions and that "this interest coupled with the failure of the states adequately to recognize and legislate for labor relations affecting these institutions and their employees"[45] justified an assertion of jurisdiction by the Board.

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[45]Cornell, supra at 329.

This case was the first instance in which a nonprofit educational institution had requested the Board to overrule Columbia Univ., supra and assert jurisdiction over private colleges and universities as a class. The crux of the Cornell and Syracuse argument advanced was that the petitioning institutions and private colleges and universities in general represented multi-million dollar businesses which were actively and significantly engaged in interstate commerce. In holding assets and investment portfolios valued in the millions, in operating facilities in other states and in numerous foreign countries and in receiving Federal research contracts, representing millions of dollars, these institutional operations were clearly commercial even though their primary purpose was still the noncommercial promotion of education.

A summary of the financial activities information submitted by Cornell to document this claim revealed the following: largest employer in the area; 8,000 employees; offices located in Ohio, Massachusetts, Illinois, Florida, Pennsylvania and Puerto Rico; annual expenditures of $142,300,000; assets valued at $282,500,000; investment portfolio of over $250 million; Federal research contracts during 1968-69 amounting to $26,600,000 plus $6 million in foundation grants; $10,750,000 in purchases outside New York State made by the University purchasing department; out-of-state University Press sales

of $942,000 and out-of-state expenditures by that press of over $500,000; radio station advertising receipts from national advertisers of $38,000. The factual portrait of Syracuse's financial investments, expenditures and income paralleled Cornell's.[46]

The petitioning universities felt that their interests would be better served under the provisions of the Act than under state labor relations legislation. One of the important motivating factors behind the Cornell decision to petition for Board jurisdiction was the fact that the New York State Labor Relations Act had been recently amended to cover nonprofit institutions; however, the state statute had no counterpart to the National Labor Relations Act's union unfair labor provisions and the universities realized that they would be without legal protection from any unfair labor practices by unions on their campuses.

In considering the petitions of Cornell and Syracuse universities which request that the 1951 Columbia University decision be overruled, the Board first noted that its discretionary standards for asserting jurisdiction were not fixed ones and then found that the fact that Congress had omitted numerous specific exemptions from the Act indicated that "Congress was content to

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[46]The complete text of the Cornell and Syracuse financial activities documentation is contained in Cornell, supra.

leave to the Board's informed discretion in the future as it had in the past, whether and when to assert jurisdiction over nonprofit organizations whose operations had substantial impact upon interstate commerce."[47] The Board ultimately concluded that it would no longer effectuate the policies of the Act to decline to assert jurisdiction over nonprofit educational institutions.

Essentially the Board was convinced that in the intervening twenty years between Columbia and Cornell, the educational activities of private colleges and universities had changed greatly. In order to carry out their educational functions, private institutions had become involved in numerous activities which were commercial in character. The Board was convinced that the petitioner in Cornell had produced evidence which fully documented their claim that "educational institutions as a class have not only a substantial but massive impact on interstate commerce."[48]

Acknowledging this drastic change in the commercial activities of private institutions over the preceding two decades, the Board noted that Sections 14(c)(1) and 14(c)(2) of the Act,[49] passed

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[47] Columbia, supra at 331

[48] Cornell, supra at 332.

[49] Id. at 331.

in 1959, had been designed to eliminate a labor relations no-man's land where some employers, such as private educational institutions, were subject neither to Board jurisdiction nor to appropriate state legislation.[50] In this connection, the Board noted that only fifteen states had enacted labor management statutes and that only eight of these states had expressly extended coverage to employees of private institutions. Further, the Board agreed that the New York labor legislation offered no remedy for unfair labor practices which might be committed by a union.

Although the Board conceded that private institutions represented the smallest portion of the education market in terms of student population and growth rate, they considered the total number of private institutions, the number of employees and the expenditures and incomes of these institutions to be significant. In the text of its decision the Board cited numerous statistics which documented the expansion of higher education that had occurred in the years since Columbia University and concurred with the petitioners that the

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[50] Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). This 1957 decision ruled that the states could not entertain cases which fell under Board jurisdiction even if the Board had declined to assert jurisdiction in such areas. Until the passage of Section 14(c), two years later, this Supreme Court decision left the employees of private colleges and universities without a forum for the resolution of labor disputes.

expanded role of the Federal government in higher education had added strength to the argument for assertion of jurisdiction by the Board.

Acknowledging the dramatic growth that had occurred in American higher education between 1950 and 1970, and the Board conceded that in order to "insure the orderly, effective and uniform application of the national labor policy"[51] it was essential that private educational institutions be recognized for the businesses that they were regardless of the fact that their ultimate product was the non-profit promotion of education. Thus Columbia University was overruled.

Predictably reversal of the Columbia decision had ramifications for private college and university contractors. In Crotty Brothers, the Board had declined to assert jurisdiction over the college food service operations contractor because, at that time, it had not asserted jurisdiction over private educational institutions. On those grounds the Board declined to assert jurisdiction over any contractor whose operations were so intertwined with an educational institution as to be indistinguishable. Once the Columbia University doctrine was rejected, it was inevitable that there would eventually be

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[51] Cornell, supra at 334.

a reversal of Crotty Brothers. Six months after the Cornell decision, ITT Canteen Corporation, relying upon Crotty Brothers in its brief to the Board, contended that its operations at Bradley University were noncommercial in nature and intimately connected to the educational processes of the University. The Board noted that since Crotty Brothers it had decided it would effectuate the policies of the Act to assert jurisdiction over nonprofit educational institutions. Accordingly, the Board elected to assert jurisdiction over ITT Canteen.

For the first time the Board also realized its inconsistency in refusing to consider the impact an employer (in this case ITT Canteen) had upon commerce simply because that employer carried out its operations within the setting of a nonprofit educational institution.

This new ruling on the status of university contractors engaged in activities of a commercial nature on private college and university campuses created the possibility of numerous unions on campus. Because the private university was now subject to the jurisdiction of the Board, its employees could petition for a representation election. Further, although ITT Canteen was a university subcontractor it met the Board's jurisdictional standards and therefore remained a separate employer located on the campus of

Bradley University. Now there could also be unions engaged in collective bargaining with those corporations who performed contractual services for the private institutions. A second new facet of college and university labor relations management had been created.

However, in ITT Canteen the Board had not discarded its concept of intimate connection as enunciated in its Prophet decision. The facts in the June 1972 Slater Corporation case did not differ significantly from the facts in either Crotty Brothers or ITT Canteen, but the Slater Corporation like the Prophet Company performed its food service operations on the campus of a state university. Expressly excluded from asserting jurisdiction over states or any of their political subdivisions, the Board declined jurisdiction over Slater. The determinant criteria in the Slater Corporation ruling was the intimate relations of a food services corporation to a state university such that the purposes for the company's operations were undistinguishable from the university's purpose of promoting education.

The Board had yet to consider the issue of a private company whose operating purposes were clearly different than a college or university's purposes but who still provided a necessary support service to such an institution. In the 1974 Allen and O'Hara decision, the Board was presented with such a case and ruled to assert

jurisdiction. Specifically, the Board determined that the Corporation owned its own facilities and could release itself, at any time, from the regulations imposed by the University. Therefore, Allen and O'Hara Developments exercised complete control over their labor relations, and provided a service which was open to the general public. In a footnote to the case the Board articulated its standard in asserting jurisdiction thusly:

> "The University has effectually transferred to an employer in commerce some of its inherent authority to provide housing for students. This Employer meets the Board's discretionary standards for asserting jurisdiction and the University has retained virtually no control over its operations and labor relations."[52]

Despite that fact that Allen and O'Hara Developments provided housing facilities for students at the University of Illinois, a political subdivision of the state of Illinois, the connection between the University and the corporation was not substantial or intimate enough for the Board to decline jurisdiction. In Prophet (and later in Slater), the Board had declined to assert jurisdiction over a food services contractor at a state institution.

Board member Kennedy, in his dissent in Allen and O'Hara, pointed out this inconsistency noting that the "Board had long

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[52] Allen and O'Hara, supra at 356, note 4.

followed a policy of not asserting jurisdiction over food service contractors at state universities and colleges because of their intimate relationships with institutions over which we cannot assert jurisdiction."[53] Believing that the housing facility operated by Allen and O'Hara was essential to and intimately related with the operation of a public university, Kennedy felt that the Board should have dismissed the petition. The degree to which an institution, public or private, exercises control over the promulgation and enforcement of employee rules, regulations and operational standards used by private, profitmaking operations on its campus and can demonstrate either the existence or lack of intimate connection seems to be one of the major determinants of whether the Board will assert jurisdiction over university contractors.

Prior to the C. W. Post decision the Board had clearly established its authority to assert jurisdiction over private institutions and their non-professional employees. However, the C. W. Post case was the first to test the issue of whether the Board was empowered by the Act to assert jurisdiction over professional employees including faculty members.

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[53] Id. at 357.

The Board contended that the usual employer-employee relationship existed between professionals and their institutional employers and ruled to assert jurisdiction. This decision opened the way for the major unit determination decisions that would test the Board's capacity to adjust its industrial standards and unit determination models to the working relationships that existed at an academic institution.

In the Fordham University decision, the Board followed C. W. Post and again stated that it could rightfully assert jurisdiction over professional faculty members and would apply the same unit determination standards[54] to faculty as it had to any other groups of employees. This decision reinforced and more clearly enunciated the Board's policy to include university-employed professionals within its jurisdiction.

The 1972 Duke University hospital decision accentuated a labor relations problem that was peculiar to the private educational institution - the severing of the university teaching and research hospitals from the rest of the institution. Until 1974 the Act specifically excluded hospitals under the charitable exemption clause

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[54]Unit determination is the term for the process by which the Board decides what group or groups of employees will be allowed to vote in election(s) to select (or reject) an exclusive bargaining agent to represent them.

of Section 2(2), therefore the Board ruled that it was prohibited from asserting jurisdiction over hospital functions and found that all Duke University employees who performed over fifty percent of their work in the hospital were excluded from the bargaining unit even though the University's personnel practices and policies were standardized and applied equally to hospital employees.

In his dissent, Board Member Fanning recognized this problem and pointed out the possible ambiguity in the language of the exemption clause, maintaining that Duke University was not necessarily an employer within the meaning of the narrowly drawn exemption. The clause in question referred to a "nonprofit corporation operating a hospital"[55] and it could be argued, claimed Fanning, that Duke was a nonprofit corporation in the business of operating a university of which the hospital was a part not an employer solely engaged in the operations of a hospital. The argument is a narrow one but not without its merits. The Board's decision to truncate the operation of a private institution, asserting jurisdiction over some parts of it and not over others simply added to the confusing patchwork of labor relations which existed on the private campus.

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[55]NLRA, Section 2(2), supra.

However, in 1974 the entire issue became a moot one when the Congress amended Section 2(2) of the Act by striking the hospital exemption clause.[56] This amendment extended the coverage and protection of the Act to employees of nonprofit hospitals and other health care institutions. The passage of the amendment eliminated the possibility of the continued division of employees performing the same jobs into union and nonunion because of where on the institution's premises, they performed their duties.

The Temple University decision was the first of the Board's decisions to decline jurisdiction over a private, nonprofit institution because that institution demonstrated a special financial relationship to the local or national government. The facts in Temple University clearly indicated that the institution received substantial economic support from the Commonwealth of Pennsylvania. Additionally Temple received several of the specific economic benefits and privileges generally accorded to Pennsylvania state institutions. Nevertheless the 1965 legislation stated that the University would

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[56] Pub. L. No. 93-360, 88 Stat. 395 (1974). The amendment read: "(a) Section 2(2) of the National Labor Relations Act is amended by striking out "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefits of any private stockholder or individual."

"continue as a corporation for the same purposes as, and with all rights and privileges heretofore granted,"[57] referring to the original charter which had been granted by the legislature in 1888. Thus, Temple remained a private nonprofit institution enjoying a financially advantageous relationship with the Commonwealth of Pennsylvania.

The Board's reasoning in this decision is understandable and the practice of providing for the special instances in private higher education may be laudatory. However, there is also the question that the Board violated its own rules governing the assertion of jurisdiction over private institutions as set forth in Cornell Univ. As Member Fanning pointed out in his dissent Temple had the necessary $1 million annual revenues and the private, nonprofit educational institution status to meet the jurisdictional standards established by the Board. Like Cornell it also had a state-related status.[58] That the Board chose to place more emphasis on the University's relationship with the state government of Pennsylvania than on its status as a nonprofit institution grossing in excess of

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[57] Temple Univ., 194 NLRB No. 195 (1972) at 160.

[58] The Industrial and Labor Relations School is a part of the New York State University System that is contracted to Cornell University.

$1 million annually, indicated a willingness to exempt certain institutions from jurisdiction if the Board thought that a possible encroachment upon a state government's authority would result.

The matter of special relationships or circumstances existing between private educational institutions and state or national governments arose again in the first Howard University decision. Relying upon the opinion expressed by a majority of the Board in Temple Univ., Howard contended that its relationship to the Federal government was such that the Board should not assert jurisdiction because it would be encroaching upon Federal jurisdiction, specifically the agencies that exercised control over some aspects of Howard's financial affairs. Consistent with its decision in Temple University, the Board declined jurisdiction again altering its own jurisdictional standards in the face of possible conflict with state or Federal government or any subdivisions thereof. The Board maintained that its discretionary jurisdictional yardsticks could not be applied to a university with a status as unique as Howard's.

The problem with both the Howard and the Temple ruling was the fact that they contradicted the standards set by the Board in Cornell and reopened at least one aspect of the jurisdictional question

that had seemed settled, namely, the standards the Board would consistently apply to private colleges and universities to determine jurisdiction.

Two Board members dissented in the Howard decision maintaining that the extent of Howard's relationship to the Federal government was not sufficient to justify a decision not to assert jurisdiction. In essence, the dissenting members could find no connection between Howard and the Federal government intimate enough to demonstrate that the Federal government substantially controlled the labor relations at Howard University. Noting that increased Federal involvement in higher education had been one of the contributory factors to asserting jurisdiction in Cornell, the dissenters pointed out that the Howard majority was declining jurisdiction for the same reason.

One year later a second Howard University decision[59] overruled the first. Two new members had been appointed to the Board in the intervening period and the Cornell approach to jurisdictional questions were reasserted. Although that the facts presented in this case were the same as those presented in the first Howard ruling, the Board found, upon reexamination, that the

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[59] Howard, supra.

relationship between Howard and the Federal government was not of sufficient magnitude to warrant a decision to decline jurisdiction. Noting further that Howard employees were not public employees and were therefore unprotected by applicable statutes regarding public employees, the Board maintained that Howard's employees would be left in a labor relations "no-man's land without an avenue of redress" if the Board declined jurisdiction, "a result manifestly contrary to the thrust of Section 14(c) of the Act."[60]

This new decision indicated an attempt to adhere to a defined standard of jurisdiction even though the Board is not bound to follow prior decisions. However, this abrupt change in opinion by the Board implied that any change in Board membership could result in further reversals of previous rulings. (Between the 1974 ruling and the 1976 ruling, two members retired from the Board and two new members were appointed.)

In a strident dissent, Board Member Jenkins decried the fact that this change of opinion in the Howard case would create a continual clamor for case decision review. This possibility was particularly acute, he contended, because the overruling opinion had been based on the same facts that had been presented in 1974 and was

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[60] Id. at 6, note 9.

only the result of an altered Board membership. Such a precedent, Jenkins wrote, "would stimulate the testing of numerous issues with each change in membership of the Board."[61] This reasoning is absolutely correct, and employers or unions who feel that previous Board rulings are inconsistent or otherwise questionable, now have the opportunity to test these rulings again without resorting to the courts particularly if, as in the case of Howard, there was a dissenting opinion in the original rulings.

In an interview conducted with a high-ranking administrative official at Howard University[62] on the subject of Board jurisdiction, he expressed the opinion that the Board's reversal of its first Howard decision (211 NLRB 247 (1974)) was a mistake. Noting that Howard's peculiar financial relationship to the Federal government placed the university in a quasi-federal agency status, this official expressed the opinion that the Act implicitly prevented the Board from asserting jurisdiction. In his view, the initial decision declining jurisdiction had been a legally sound one and the overruling decision (Howard Univ., 224 NLRB No. 44 (1975)) was due more to the fact

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[61] Id. at 10.

[62] The administrator requested anonymity. The interview was conducted in the fall of 1976.

that the composition of the Board's membership has changed, then because of the introduction of new evidence meriting a change of jurisdictional opinion.

In terms of the effect of this decision to assert jurisdiction on the administration of the university, the official stated that it had created some initial disruption in Howard's labor relations. Prior to the decision, the university had recognized and bargained with various unions on its campus, however, this was done in the interest of maintaining effective, satisfactory labor relations between Howard's employees and its management. Until the Board's assertion of jurisdiction such bargaining was not subject to regulatory influences. The unions viewed the second decision as a defeat for the university, and the official noted that this attitude created a more agressive, hostile and threatening atmosphere on the part of union negotiating teams at the bargaining table. However, there were no long-range debilitating effects on Howard's labor relations, when it became clear to all parties that the Act also protected employers and that the institution would not back down from positions it considered fair and reasonable.

Finally, this official expressed the view that the message provided by the second Howard decision was that universities and unions should bring their cases back to the Board if a significant

change in membership occurs, particularly if a dissenting opinion is offered in an initial decision. Since these circumstances existed in the case of Howard University, and a new appeal to the Board yielded a new decision, the Board seemed to be stating that such appeals were, at the very least, worth attempting.

SUMMARY

In summation, the major jurisdictional issues involving private colleges and universities to come before the Board have been:

1. whether the Board was empowered by the Act to assert jurisdiction. The Board did so in 1970.
2. whether the Board should, in its discretion, assert jurisdiction over the private nonprofit educational institution. The Board did so in 1970.
3. whether the Board should assert jurisdiction over private college and university contractors when such contractors are involved in profitmaking activities on these campuses and whether the Board would assert jurisdiction over private contractors who provide services for public colleges and universities. The major decisions of the Board indicate that it will assert jurisdiction over any private college and university

having gross annual revenues of over $1 million and over any contractor to a private college and university whose retail or service operations meet Board standards for private industries. The jurisdictional questions relating to private contractors all depended to some extent upon the degree of intimate connection between the university and the other parties involved.

4. whether the Board would assert jurisdiction over faculty members at private colleges and universities and whether the Board would extend such jurisdiction to university professionals such as law school professors. The Board did both.

5. whether the Board should assert jurisdiction over a private institution that demonstrated a considerable relationship with the Federal government. The Board asserted jurisdiction over Howard University.

The reversal of Board decisions however also indicates a flexibility in the Board's approach to college and university jurisdictional cases. Its decision to adhere to a case-by-case approach to educational institution questions has permitted the Board and its private college and university area petitioners to argue for decisions which apply to the specific problems at hand. The Board has

certainly established some precedent in this area of private education labor relations over the past six years but it is clear from an analysis of the major jurisdictional issues considered thus far, that it is still too soon to assume that all of these decisions are irreversable ones.

Chapter 4

BARGAINING UNIT SCOPE

The phrase "scope of a bargaining unit" is a generic one referring to the group or groups of employees included in a unit; the phrase "composition of a bargaining unit" refers to precisely those employees to be included in the group or groups that constitute the scope of the unit. For example, a labor organization may petition the Board seeking to represent a unit of all clerical employees at a particular institution excluding executive secretaries and supervisors; this is the scope of the unit. The composition of the unit is the actual number, type and kind of employees considered to be performing clerical functions excluding executive secretaries and supervisors but perhaps including library, grounds and dormitory personnel performing clerical functions.

Determining the scope of a bargaining unit is one of the major functions of the Board and virtually every case considered in this dissertation includes a unit determination question. This chapter will analyze the major unit scope decisions reached by the Board in cases involving private colleges and universities. Unit determinations are a significant variable in college and university labor relations because the size, number and kind of bargaining units

present on a campus have a direct relationship to the time, work and resources that an administration must devote to labor relations and contract negotiations.

The unit scope decisions considered in this chapter will be divided topically into the following four areas:

1. Multi-campus units
2. Non-professional department units
3. Professional schools
4. Part-time faculty members.

In instances where a single case involves more than one important bargaining unit question, the questions will be considered separately under each applicable topic area. Hopefully, this division will preserve the continuity of the discussion, and convey a clearer understanding of the specific circumstances of each case and the general issues which have evolved in private college and university bargaining unit determination decisions thus far.

UNIT SCOPE CASES

Multi-campus Units

These cases involved questions of whether bargaining units should be formed only on the main campus of a college or university or whether the units should encompass all employees of the

institution performing similar duties at subsidiary locations removed from the main campus.

CORNELL UNIVERSITY and ASSOCIATION OF CORNELL EMPLOYEES, LIBRARIES and STAFF ASSOCIATION OF THE METROPOLITAN DISTRICT OFFICE, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS and CIVIL SERVICE EMPLOYEES, ASSOCIATION, INC. SYRACUSE UNIVERSITY and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 220, JUNE 12, 1970. 183 NLRB 329 (1970).[62]

Each of the three petitioning unions were seeking different bargaining units. The Association of Cornell Employees-Libraries requested a unit of approximately 270 nonprofessional, nonsupervisory employees of the Cornell libraries located on the main campus in Ithaca. The Staff Association of the Metropolitan District Office School of Industrial and Labor Relations was requesting a unit composed of the professional and nonprofessional employees located in the ILR School's district office located in New York City.

The Civil Service Employees Association petitioned for a state-wide unit which would include all of the University's non-academic nonsupervisory employees throughout the state of New York. The Cornell University petitioned also sought a state-wide unit. The Board noted that such factors as "prior bargaining history,

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[62]This case is discussed in chapter 3 at 71. Subsequent references to this and other cases that are discussed in more than one topic area will use an abbreviated citation form.

centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of the plants, differences or similarities in skills and functions of the employees, and geographical location of the facilities in relation to each other"[63] were the guidelines which it used in deciding what constituted an appropriate bargaining unit, whether the employer operated one or several facilities. Since the evidence indicated that many of the personnel policies and employment practices of Cornell University conformed to the guidelines used by the Board in determining single units encompassing employees at several scattered locations, the Board found that a unit which was statewide in scope was the appropriate one.

TULANE UNIVERSITY and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 275, FEBRUARY 4, 1972. 195 NLRB 329 (1972).

The Board affirmed the decision of the Hearing Officer.

The Petitioner sought to represent a unit of approximately 400 nonacademic maintenance and cafeteria wage employees at Tulane's main campus in New Orleans, Louisiana. The Employer contended that the only appropriate unit was one which was university-wide in scope, encompassing all nonacademic wage employees

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[63] Cornell, supra at 336.

throughout the university including those at the medical center and the research centers.

The Board held as it did in Cornell Univ., supra that in determining whether a particular group of employees constitute an appropriate unit for bargaining where the employer operated a number of facilities, it relied upon evidence of centralized personnel practices, similarities of duties and the degree of autonomy exercised by the various locations. The evidence in this case indicated that the operations of Tulane's four facilities were integrated and centralized and that a community of interest was shared by all of its wage employees. Personnel functions were highly centralized and the non-academic personnel executive committee, located on the main campus, formulated wages, hours and working conditions for the entire university.

The Board found that a unit limited to wage employees at Tulane's main campus was inappropriate and that an appropriate bargaining unit at Tulane should embrace all wage employees of the University including the main campus and the three University facilities located away from the main campus.

A dissenting opinion was offered in this case.

FLORIDA SOUTHERN COLLEGE and FLORIDA EDUCATION ASSOCIATION, MAY 3, 1972. 196 NLRB 888 (1972).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner requested a bargaining unit composed of all professional, full-time faculty members employed by Florida Southern College at its main campus in Lakeland, Florida.

The College contended that certain part-time and dual capacity faculty members should be included in the unit. The College further contended that Reserve Officer Training Corps (R. O. T. C.) instructors and the part-time instructors employed by the College to teach at its facility located at McCoy Air Force Base also be included in the unit on the basis that all of these instructors were part of the college faculty.

The Board found that the R. O. T. C. instructors, because of their status as U. S. Army officers, paid by and subject to the regulations of the U. S. Army, did not share a sufficient community of interest with the rest of the faculty. Therefore, they were excluded from the unit.

The Board included the College's librarians and part-time faculty within the unit and then considered the dual capacity employees individually excluding the dean of students and the registrar; including in the unit the college chaplain, the assistant

dean of academic affairs, and administrative officer, an assistant to the dean of student affairs, and the director of athletics.

The Board determined that interaction between the McCoy facility and the main campus was minimal: that few, if any instructors at McCoy, had any direct connection or contact with the faculty at the main campus or had been promoted to faculty status at the main campus. Additionally, there was no day-to-day or even frequent contact or direction between the faculty at the main campus and the instructors at the McCoy facility. Accordingly, the Board found a unit limited to the main campus at Lakeland, Florida.

FAIRLEIGH DICKENSON UNIVERSITY and FAIRLEIGH DICKENSON UNIVERSITY FEDERATION OF COLLEGE TEACHERS, LOCAL 1841 and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS CHAPTERS, AUGUST 23, 1973. 205 NLRB 673 (1973).

The Board affirmed the ruling of the Hearing Officer.

The Fairleigh Dickenson University Federation of College Teachers, [hereafter called the AFT] filed a petition to represent certain employees of the Fairleigh Dickenson University. The Fairleigh Dickenson University Council of American Association of University Professors Chapters [hereafter called AAUP] also filed a petition seeking to represent certain employees of the employer. The AFT sought a unit of all full-time and regular part-time members of the faculty including department chairmen employed at the

University's Teaneck campus and excluding the Provost, Deans, Assistant Deans, assistants-to-deans, directors of special programs, guards and supervisors as defined in the Act and all other employees. The AFT also wished to exclude the faculty of the dental school.

The AAUP sought a unit of all full-time faculty including the dental school faculty and department chairmen at all the University's facilities and wished to exclude part-time faculty, supervisors, maintenance personnel, executives, administrators, watchmen, and all other service personnel.

Fairleigh Dickenson, the Employer, contended that a universitywide unit including the dental school faculty was the appropriate unit but that department chairmen were supervisors within the meaning of the Act and therefore should be excluded from the unit. The Employer took no position on the status of part-time faculty members and requested that the Board resolve this issue. There was considerable evidence presented to indicate that the employers' campus facilities were integrated and centralized and that there was a substantial community of interest shared by all faculty regardless of their location. It was demonstrated that wages, hours, working conditions, payroll procedures, hiring and terminations, vacation schedules and fringe benefits were identical throughout the university. Furthermore, rules and procedures related to faculty promotions,

attainment of tenure and the rights and benefits enuring to tenure status also applied on a university-wide basis and the university senate, the institution's highest academic body responsible for formulating academic policy and making recommendations to the Board of Trustees, had among its members faculty representatives from all the colleges and from each of the campuses.

The AAUP sought an election in a universitywide unit, contending that only a universitywide unit was appropriate because the administration of the university was centralized in one governing body with various authorities emanating from this centralized governing body and carrying out the basic administrative policies of the university. Further the AAUP maintained that terms and conditions of employment vis-a-vis the relationship of the various faculties with the administration was identical, that there had been substantial interchange between the campuses and that the skills and functions of the faculty members used in the course of their employment were indistinguishable other than on an academic basis. In addition, the AAUP contended that to fragmentize the university into separate campuses for collective bargaining would do irreparable harm to the educational mission of the university.

The AFT contended that the Teaneck campus consisted of a homogeneous identifiable group of faculty members with sufficient

community of interest to comprise an appropriate bargaining unit. Further, the AFT maintained that the management of the university was highly decentralized; that there was little if any, day-to-day management of the Teaneck facility emanating from the central administration located at the Rutherford campus that virtually all employment of new faculty members originated from the campus with the vacancy and that except for the formality of ultimate approval by the central administration decisions regarding employment, promotion, and tenure were made within the administrative organization of each individual campus.

The Board found that the appropriate unit would be a universitywide one that included all of the Employer's various campus facilities.

Nonprofessional Department Units

The following cases involve the Board's determinations in establishing appropriate private college and university bargaining units comprised of nonprofessional employees.

CORNELL UNIVERSITY, 183 NLRB 329 (1970).[64]

The Board concluded that a statewide bargaining unit composed of nonprofessional employees would be the most appropriate

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[64]This case is discussed under the section entitled "Multi-Campus Units" above at page 119 and in chapter 3 at page 69.

unit for Cornell University because the various nonprofessional job duties performed at the university's main campus in Ithaca were paralleled or duplicated by the duties of the nonprofessional positions that existed at other Cornell facilities.

Two of the petitioning unions maintained that separate units - one to represent the employees at Cornell's thirteen libraries on the Ithaca campus and one to represent the employees at the Manhattan office of the Industrial and Labor Relations school - were appropriate.

Noting evidence which indicated that Cornell's personnel operations were integrated and centralized throughout all of its campuses, the Board expressed the opinion that a community of interest existed between nonprofessional employees at all of the university's facilities. The Board also noted that the work performed by the ILR school employees was similar to the work performed by numerous employees working at the Ithaca campus. Finally, the job classifications for the positions were the same at both locations.

Because of this similarity in job duties and classification, the uniform and centralized employment practices of the university, the fact that no prior collective bargaining history existed, and finally, the fact that one of the petitioning unions was seeking a "broad inclusive unit coextensive with the Employer's administrative

and geographic boundaries,"[65] the Board concluded that the non-professional employees of Cornell excluding employees of the medical and nursing schools, skilled trades employees, guards, confidential employees and professional employees.

YALE UNIVERSITY and YALE NON-FACULTY ACTION COMMITTEE, AUGUST 11, 1970. 184 NLRB 860 (1970).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought to represent a separate unit of approximately 109 nonprofessional employees of the Department of Epidemiology and Public Health [hereafter cited as EPH] of the Yale School of Medicine. This included the nonfaculty, technical and clerical employees of EPH, one of seventeen academic departments within the School of Medicine and one of sixty-eight departments within Yale University as a whole. The EPH department was housed in a building separate from the medical school and contained its own library and labs.

The petitioning union maintained that EPH exercised a considerable degree of independence and autonomy within the University and that the day-to-day authority to hire, supervise, discipline and discharge employees rested with the faculty

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[65] Cornell, supra at 336.

supervisors in each section of the department. Further, the union contended that the work performed by EPH employees was unique and required special skills. The union noted the low degree of employee interchange that occurred between EPH employees and other university employees.

In its decision, the Board was not persuaded by the petitioner's contentions, finding that Yale's personnel policies and practices were considerably standardized for the entire university and that these standards emanated from the central personnel offices and its adjunct offices located on the campus. EPH received all its power, maintenance, utility, cleaning and dining hall services from the university. Additionally purchasing, accounting and payroll functions were centralized and the EPH budget required approval from several hierarchial sources before being submitted to the provost, treasurer and board of trustees for final approval.

The Board was not convinced that the jobs performed by EPH employees were unique or particularly different from other positions on campus and noted evidence which demonstrated that 1,776 nonfaculty employees had the same job titles and performed duties as twenty-five employees at EPH. It was determined that sixteen members of the EPH staff performed their duties in locations other than the EPH building and that one-third of the staff employees

located in the EPH building were actually employees of other university departments.

Finally, two intervening unions - the Federation of University Employees and the Hotel and Restaurant Employees and Bartenders International - pointed out that Yale's prior collective bargaining history had established a pattern of universitywide units.

The Board was not convinced of either the geographical or functional separateness of the EPH department, finding its location and educational and administrative activities to be thoroughly integrated into the Yale School of Medicine and the university as a whole. Accordingly, the Board found that EPH employees did not share a sufficiently special community of interest to warrant the creation of a separate bargaining unit and the petition was dismissed.

CALIFORNIA INSTITUTE OF TECHNOLOGY and LOCAL 986, INTERNATIONAL BROTHERHOOD OF TEAMSTERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, AUGUST 11, 1971. 192 NLRB 482 (1971).

The Board affirmed the rulings of the Hearing Officer.

The Operating Engineers were seeking to represent a unit of all central power plant personnel contending that such a unit is a "typical functionally distinct and homogeneous powerhouse departmental unit such as the Board has found appropriate where as here, there is no collective bargaining history."

The Teamsters sought to represent a unit of all shop and administrative services personnel and indicated its willingness to accept grounds service personnel, transportation and motor pool personnel, central plant personnel or any unit of personnel in the physical plant services department deemed appropriate by the Board.

California Institute of Technology, the Employer, maintained that the only appropriate unit was one that would include all of the employees in the physical plant services department. Such a unit would encompass the central power plant and the shop services section made up of plumbers, electricians, trades helpers, carpenters, painters, truck drivers, tool crib attendents, heating, ventilation and refrigeration mechanics. This unit would also include the administrative services section of the physical plant under which the central stores area, shipping and receiving, the transportation section, the custodial services unit and the grounds section were located.

After a delineation and comparison of the basic duties of each of the subsections of the physical plant department, the Board concurred with the opinion of the Operating Engineers that the central power plant employees might constitute a separate bargaining

unit if they so desired because their work was functionally different from that of other physical plant employees.

The Board decided that the units sought by the Teamsters were too limited, and relied upon hetrogeneous groupings which would exclude one or another group from that unit who shared a substantial community of interest with the other members of the unit.

The Board also concurred with the Employer's position that a unit including all physical plant employees would also be appropriate. Thus, the Board noted three possible alternatives:

1. a separate unit of the central power plant employees within the physical plant.
2. a unit of all physical plant employees excluding central power plant employees.
3. a unit of all physical plant employees including central power plant employees.

Accordingly, the Board did not make a final unit determination but directed elections in two voting groups - all central power plant personnel excluding guards and supervisors (Voting Group A) and all other physical plant personnel excluding watchmen, guards, professional and technical employees and supervisors (Voting Group B). If a majority of Voting Group A voted to constitute a separate bargaining unit, then the employees in Voting Group B

would also constitute a separate unit for bargaining. If, however, Voting Group A elected not to become a separate bargaining unit, then these employees would be combined with Voting Group B and the combined groups would constitute an overall unit appropriate for collective bargaining purposes.

LELAND STANFORD JUNIOR UNIVERSITY and FREIGHT CHECKERS, CLERICAL EMPLOYEES AND HELPERS, LOCAL 856, and INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1-12 and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and STANFORD EMPLOYEES ASSOCIATION, CHAPTER 510 CSEA, JANUARY 20, 1972. 194 NLRB 1210 (1972).

The Board affirmed the ruling of the Hearing Officers.

At issue in this proceeding were the nonsupervisory and nonprofessional employees employed at Stanford University including employees of the Stanford University Press and Stanford hospital.

The Teamsters sought a unit of all physical plant department employees, and in the event that the Board found such a unit inappropriate the Teamsters requested an alternative unit comprised of all maintenance employees. The Fire Fighters sought a unit of all firemen and fire captains excluding student firemen and employees above the rank of captain. The Police Officers requested a unit of all employees of the staff of the university police department excluding supervisors. CSEA-SEA sought a unit of all employees engaged in service maintenance and technical positions, excluding firemen, clerical employees, guards and supervisors.

Six organizations were permitted to intervene as parties in the proceedings, and each of these intervening parties sought various units.[66] The machinists sought a unit of all laboratory technicians, physical science and engineering technicians and maintenance machinists employed at the main campus. USE sought a unit of all nonprofessional full-time and part-time permanent and seasonal employees of the university. WAC contended that the election should be directed in three separate units: (1) the unit sought by the Fire Fighters, (2) the unit sought by the Teamsters and (3) a residual unit of all other employees excluding professional employees and supervisors. IBEW sought a unit of all journeymen and apprentice electricians. The UE expressed no unit position and the Laborers also took no unit position but indicated its desire to be on the ballot in any election in an overall unit or any residual unit from which one or more crafts had been severed.

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[66]The following organizations were permitted to intervene as parties: Construction & General Laborers Union, Local 270; International Hod Carriers, Building and Common Laborers; United Stanford Employees-USE; Workers Action Caucus-WAC; International Brotherhood of Electrical Workers-IBEW; University Employees, Division of United Electrical, Radio, and Machine Workers-UE; International Association of Machinists and Aerospace Workers-Machinists.

The employer contended that two units were appropriate; (1) a unit of all nonsupervisory, nonprofessional employees employed by the university within the state of California but excluding employees of Stanford Hospital, employees of the Stanford University Press who were currently represented, students, part-time and casual employees, confidential employees and guards. The second unit would be composed of all employees of the Stanford University Police Department excluding all other employees and supervisors as defined in the Act.

The Board noted that in cases such as this where considerable difference of opinion existed among the parties as to the appropriateness of units, it was not the Board's function to determine which unit or units was the most appropriate. Rather the Board's role in such circumstances was to determine which, if any, of the petitioned-for units could be considered appropriate for purposes of collective bargaining.

On the basis of the information presented, the Board found that there was no separate community of interest among employees of the Physical Plant which could justify the finding that the unit requested by the Teamsters would be an appropriate one for collective bargaining purposes. The Teamster's alternative unit position covered a broader grouping of maintenance personnel. However, the

Board found that this unit excluded certain employee groups, notably custodians, who shared a considerable community of interest with other employees in the unit and was also too limited in scope to constitute an appropriate unit. Accordingly, neither of the units requested by the Teamsters was found to be an appropriate one for purposes of collective bargaining.

The unit sought by CSEA-SEA was essentially a grouping of all employees engaged in maintenance type functions. Evidence indicated that the maintenance functions at the university were highly integrated, standardized and centralized and it was clear to the Board that all of the university's maintenance employees shared a close community of interest. The Board noted further that ample precedent existed for including in such an overall unit various non-maintenance classification personnel such as press employees and audio-visual operators. Consequently, the Board held that the maintenance service unit sought by CSEA-SEA would be an appropriate one, however, university clerical employees had to be excluded from the unit because they did not share a close community of interest with the other members of the group.

On the question of the police officers, the Board held that the police department employees were guards within the meaning of the Act. Since the Board was precluded from determining an

appropriate unit for bargaining which groups guards with other employees,[67] the Board found that a unit of all employees of the Stanford University Police Department excluding all other employees and supervisors as defined in the Act was an appropriate unit.

The Board found that a separate unit of firemen was appropriate for the purposes of collective bargaining and rejected the Employer's contention that the fire captains were supervisors within the meaning of the Act. The Board determined that fire captains had not authority to hire or discharge employees or effectively recommend such actions. The record demonstrated that all disciplinary matters were subject to an independent investigation and review and that the fire captain had no definitive role to play in the ultimate resolution of such matters. The Board found that the fire captains followed the routine operating procedures of the department in carrying out their duties and had little opportunity to exercise independent judgement.

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[67] Section 9(b)(3) of the NLRA as amended states that the Board shall not decide that any unit is appropriate for purposes of bargaining "if it includes together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representation of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Accordingly, the Board found the following unit to be appropriate for the purpose of collective bargaining: Unit A - all employees of the Stanford University Police Department excluding all other employees and supervisors as defined in the Act; Unit B- all firemen and fire captains employed by Stanford University at headquarter station; Unit C - all maintenance employees and laboratory support personnel, custodians, food service employees, audio-visual operators and unrepresented employees of Stanford University Press who were employed by the university at the main campus. TULANE UNIVERSITY, 195 NLRB 329 (1972).[68]

The petitioning union, the Service Employees International Local No. 275, sought to represent a unit of approximately 400 nonacademic nonprofessional maintenance and cafeteria workers at Tulane University's main campus in New Orleans.

The university contended that the only appropriate bargaining unit would be one which was university-wide in scope and encompasses all of the nonacademic nonprofessional wage personnel employed by the university at all of its facilities.

An examination of the evidence presented revealed that the wages, hours and working conditions for all of Tulane's nonacademic

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[68]This case is briefed under the section "Multi-campus Units" above at page 120.

employees at all of its facilities were developed by the Non-Academic Personnel Executive Committee located on the main campus. This committee also processed all nonacademic employee grievances, established job classifications, job titles, and ranges and rates of pay. The seventy-two job classifications that existed for nonacademic wage personnel were identical throughout the university's facilities and the skills and functions required and the wages paid for a particular job classification were also standardized.

Relying upon the criteria delineated in Cornell Univ.[69] for determining whether a particular group of employees constituted an appropriate bargaining unit, the Board found that the nonacademic wage employees at Tulane's three facilities located away from the main campus shared a community of interest with the nonacademic wage employees on the main campus.

Accordingly, the Board found the appropriate unit to be all nonacademic wage employees including maintenance and cafeteria

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[69] These criteria are: (1) prior bargaining history, (2) centralization of management particularly in regard to labor relations, (3) extent of employee interchange, (4) degree of interdependence or autonomy of the plants, (5) differences or similarities in skills and funtions (6) geographical location of the facilities in relation to each other. Cornell, supra at 336.

employees at all of Tulane's facilities and excluding all office clerical employees, professional employees, guards and supervisors.

A dissenting opinion was offered in this case.

CLAREMONT UNIVERSITY CENTER, CLAREMONT MEN'S COLLEGE, HARVEY MUDD COLLEGE, PITZER COLLEGE, POMONA COLLEGE AND SCRIPPS COLLEGE, KNOWN AS THE CLAREMONT COLLEGES and OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 30, AUGUST 9, 1972. 198 NLRB 811 (1972).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought to represent a unit of all full-time and regular part-time professional employees and nonprofessional employees of the Honnold Library System under the supervision of the Director of Libraries at the Claremont Colleges. The petitioning union recognized the statutory right of the professional employees to vote as a separate group to determine whether they wished to be represented as a part of the overall unit and noted such in the petition.

The Employer maintained that the unit sought was inappropriate because it did not include all nonacademic employees in all of the colleges that comprised The Claremont Colleges or, at least, all nonacademic employees of the Claremont University Center.

The Claremont Colleges was not a legal entity but rather a pluralistic term to describe the loose confederation of the individual colleges and the Claremont University Center which were located on contiguous campuses in the city of Claremont. Each of the individual colleges comprising The Claremont Colleges granted its own degrees, determined its own curriculum, admission and graduation requirements, had its own board of trustees, president, administrative officers, faculty and support personnel.

The Claremont University Center, however, operated certain central facilities used by all the individual institutions comprising The Claremont Colleges. These facilities included the Claremont Graduate School, the Honnold Library, the Human Resources Institute, the Student Health Center, the Counseling Center, Auditorium and Theater Events, the Joint Admissions Office, the Chaplain's Office, the Business Office and Plant Services, the Personnel Office, the Computer Institute, Campus Security and the Office of the Provost.

The Honnold Library system consisted of the main library and several satellite libraries located on the campuses of the various colleges. The Director of Libraries was the chief administrative officer of the Honnold Library system and its staff which consisted

of approximately eighty full-time professional and nonprofessional employees and about 130 part-time employees most of whom were students.

The Director of Libraries, under agreements provided by each college of the individual colleges in the Claremont system had control over the administrative functions, expenditures, acquisitions, technical services and certain of the personnel procedures and functions of the Honnold Library system.

Although the library system recruited its own professional employees, the central personnel office monitored the hiring process of both the professional and nonprofessional staff to insure equal opportunity employment for minority applicants. The authority to hire and discharge employees rested with the Director of Libraries and the Director interviewed everyone who was finally employed at any of the library's facilities.

Because of the nature of the library's function and the varied business hours which routinely included evenings and weekends, the average work week for most library employees was thirty-seven and one-half hours rather than forty hours. Employees who worked one evening a week were scheduled for a thirty-six-hour work week and those employees who worked two evenings a week were scheduled a thirty-five-hour work week. Other differences between the

working conditions of library system employees and non-library employees on the various campuses included the fact that compensatory time off was granted to employees who worked on Saturday and Sunday and that some wage increases had been higher for library employees. There were few personnel transfers between the libraries and other facilities and the library's relationship with the Honnold Library Staff Association was an informal one. Finally, a prior history of bargaining existed between the Claremont University Center and the employees in its shops maintenance department.

Using the guidelines employed in making unit determinations in industrial organizations and restated in Cornell Univ., 183 NLRB 329 (1970), the Board found that the employees of the library system constituted a separate and identifiable group of employees with a substantial community of interest. The Board noted that the petitioning union was seeking a unit of employees of all the libraries that were a part of The Claremont Colleges and that the Honnold Library system, a centrally located and supervised one, served several independently incorporated colleges. The Board then went on to differentiate professional employees and supervisors from nonprofessional, nonsupervisory personnel and directed a separate

voting group for professionals in accordance with Section 9(b)(1)[70] of the Act to ascertain whether they wished to be included in a unit with nonprofessional employees or whether they desired a separate unit. Contingent upon the results of this election, the Board found that any one of the following four unit possibilities would be appropriate:

1. a unit of all full-time and regular part-time nonprofessional employees excluding guards, supervisors, confidential employees and special collection curators.
2. a unit of professional and full-time and regular part-time nonprofessional employees.
3. a unit of professional employees excluding curators of two special collections and supervisors.

A dissenting opinion was offered in this case.

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[70]Section 9(b)(6) of the NLRA states "that the Board shall not (1) decide that any unit is appropriate for such purposes [collective bargaining] 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;"

THE PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE FOR GEORGETOWN UNIVERSITY and LOCAL 1199 DC, NATIONAL UNION OF HOSPITAL AND NURSING HOME EMPLOYEES, NOVEMBER 19, 1972. 200 NLRB 215 (1972).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought a unit of all full-time and regular part-time service and maintenance employees, including students employed by Georgetown University and excluding all academic faculty, professional, technical, confidential, clerical and hospital employees and all other employees, guards and supervisors as defined in the Act.

The Employer maintained that the appropriate unit should consist of all nonacademic employees at the university including clerical, technical and hospital employees but excluding students. Further, the Employer wished to establish a definition of "regular part-time employees" as employees working twenty or more hours per week or, alternatively, employees working a regular schedule on a year round basis regardless of the number of hours worked per week.

In support of its' position, the university noted the centralization of personnel programs and policies including the university wide wage and salary program, the uniform recruiting policy and the considerable degree of transfer and interchange of personnel between departments. The opportunities for promotion

and transfer were increased and enhanced by the skills improvement training program and the university's on-the-job training programs.

Since it was the Board's long-established policy to exclude office clerical workers from units of manual or "blue collar" workers, it held that the unit requested by the Employer, which sought to include manual workers with clerical workers, was an inappropriate one. The Board also excluded technical workers from the unit because the record indicated that the university's technical employees had a separate line of supervision, were trained to become proficient in the technical fields, were closely supervised by other technicians and were involved in work that differed substantially from the work of service and maintenance employees.

The Board supported the Employer's contention that students should be excluded from the unit, noting that students had "many facts peculiar to themselves and do not appear to have a community of interest with other regular part-time employees."[71] Further, the Board accepted the Employer's classification of regular, part-time employees as those employees who regularly worked twenty or more hours per week. However, the Board noted that "this holding is based on the facts of this case and is not to be

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[71] Georgetown Univ., supra at 216.

construed as a standard definition of regular part-time employees applicable to all universities or colleges."[72] Accordingly, students were excluded from the unit and regular part-time employees were included in the unit.

The Board then considered the disagreement between the parties as to the placement of laboratory assistants, autopsy assistants, a glass blower, parking attendants, library assistants and library aides and messenger clerks, and several other position titles. The Board found the following unit of nonprofessional employees to be an appropriate one for the purposes of collective bargaining: all full-time and regular part-time service and maintenance employees working twenty hours or more per week including library aides, messenger clerks, printing estimator, printing planner, stripping production coordinator, printing production coordinator, physical plant trainee, patient transporter, and parking attendant, but excluding the glassblower, laboratory assistants, autopsy assistants, library assistants, students, academic, faculty, professional, technical, confidential, office, clerical, hospital employees and all other employees, guards and supervisors as defined in the Act.

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[72] Id. at 217.

CORNELL UNIVERSITY and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 66, MARCH 8, 1973. 202 NLRB 290 (1973).

The Board affirmed the ruling of the Hearing Officer.

The Teamsters sought to represent a unit of all full-time and regular part-time employees, including the students employed at ten of the eighteen dining facilities operated by Cornell University on the Ithaca, New York campus. All of the dining facilities in the unit requested by the Teamsters reported to the university's director of dining services. The record showed that the six facilities excluded in the Teamsters petition were snack bars or coffeehouses run through various academic departments or college heads; the other two facilities were Statler Hall, a hotel run by the Hotel Management School and the Sage Infirmary operated as a part of the Department of Health Services.

Cornell maintained that an appropriate unit would include all nonacademic, nonsupervisory employees state wide, excluding employees of the medical school and nursing school and all student employees. The university contended that because of the centralization of its operations and personnel policies and employment practices, all of its nonacademic, nonsupervisory employees throughout the state of New York shared a substantial community of interest. Student employees, however, who were hired under completely different procedures and worked on a semester basis with

no expectation of remaining permanently in their present jobs, did not share a community of interest with the other employees of the university.

The Board held that the unit sought by the Petitioner which excluded employees at eight of the dining facilities was too limited to be appropriate for purposes of bargaining and found that a substantial community of interest existed between the nonacademic, non-supervisory employees employed at all eighteen of the university's dining facilities. Neither did the Board agree with Cornell's contention that the appropriate unit should be a much wider one. Noting the considerable geographic distance between Cornell's facilities and finding that there was a minimal degree of transfer or interchange of dining service employees with employees of other departments, the Board went on to state that the "food service facilities function to provide a common service that is not offered by any of the other university departments or services, and its employees comprise a homogeneous and distinct groups."[73]

Relying upon the general guidelines used by the Board in making unit determinations in the industrial sphere, the Board noted that the employees of the university's dining facilities shared a

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[73]Cornell Univ., 202 NLRB 290 at 291.

substantial community of interest separate from other Cornell employees and that a unit comprised of all the Employer's dining facilities on the Ithaca campus plus the chefs at the university-owned fraternity houses constituted an appropriate unit for bargaining purposes.

The Board concurred with the Employer that students should be excluded from the unit because for the greater majority of students their campus employment was incidental to their academic objectives, and they had no expectation of remaining permanently in their present jobs. Thus, the Board found a unit appropriate for collective bargaining purposes composed of the following dining facility employees: all food handlers, cafeteria workers, vending operators, cashiers, store employees, dishwashers, custodians, cooks, waitresses, bus boy, pantry men, counter men, soda bar workers, laborers, kitchen helpers, pot washers, coffee hostesses, salad makers, grill men, etc. and the five chefs employed in the fraternity houses owned by Cornell but excluding all other nonacademic employees, office clericals, professionals, students, guards and supervisors.

TUSKEGEE INSTITUTE and LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 246, MARCH 19, 1974. 209 NLRB 773 (1974).

The Board reversed the decision of the Regional Director.

The Petitioner sought a campus wide unit of approximately 300 service and maintenance employees. These employees were administratively organized into the Auxiliary Enterprises division and the Physical Plant department. The mailroom, snack bar and bookstore employees were part of the Auxiliary Enterprises division; power plant employees were part of the Physical Plant.

The Board's Regional Director, upon hearing the case, had determined that an appropriate bargaining unit would exclude stationary engineers and firemen on the grounds that they were technical employees. The Director also excluded mailroom, snack bar and bookstore employees from the unit. The basis for both exclusions was the Regional Director's finding that an insufficient community of interest existed between the stationary engineers and firemen (power plant employees), the auxiliary services employees and the remainder of the Physical Plant employees. The Regional Director also noted the fact that there was no interchange between power plant and other Physical Plant employees and that contact between the two groups was limited.

The Board, upon reviewing the case, noted that stationary engineers and firemen perform "the same work under basically the same conditions as other Physical Plant Department employees who

operate the smaller power units in various campus buildings."[74] Further, the Board recognized the fact that the excluded employees of the Physical Plant were subject to the same ultimate supervision, wore the same uniforms, and performed similar tasks related to the internal environmental conditions of campus buildings as did the employees included in the unit. Finding a substantial community of interest, the Board included the stationary engineers and firemen in the unit.

On the matter of the excluded Auxiliary Services employees, the Board disagreed with the Regional Director that the work performed by the mailroom, snack bar and bookstore employees was in the nature of office clerical work. Rather, the Board found that these employees were a part of the same centralized administration and that all the employees sought by the union for the unit performed various service functions related to the overall operation of the college. The Board held that these Auxiliary Enterprises employees did not possess a sufficient separate community of interest and included them in the unit. Accordingly, the unit determined to be appropriate for bargaining purposes included all service and maintenance employees of Tuskegee excluding teachers, students, office

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[74] Tuskegee Institute, 209 NLRB 773 at 774.

employees, agricultural and professional employees and guards and supervisors.

Professional Schools

This section will include the major cases which have come before the Board involving unit decisions for professional school faculty members.

FORDHAM UNIVERSITY and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS and LAW SCHOOL BARGAINING COMMITTEE, SEPTEMBER 14, 1971. 193 NLRB 134 (1971).

The Board affirmed the rulings of the Hearing Officer.

The Fordham University Chapter of the AAUP petitioned for a unit of all full-time and regular part-time teaching faculty, including department chairmen, professional librarians and ancillary support professionals and excluding the law school faculty. The AAUP also indicated its willingness to represent any unit that the Board determined to be an appropriate one. The Law School Bargaining Committee sought a unit of full-time and regular part-time faculty of the law school.

Fordham University, the Employer, contended that no bargaining unit was appropriate since all faculty members except instructors were supervisors. In the event that a bargaining unit was found to be appropriate, the Employer sought to exclude all professional librarians, ancillary support professionals and part-time

faculty and expressed the view that the law school faculty should not constitute a separate unit but instead be included in a unit with the remainder of the faculty.

Based upon its findings that faculty members were not supervisors but professional employees within the meaning of the Act and as such were entitled to the benefits of collective bargaining if they so desired, the Board ruled that a university wide unit of faculty members and other professional employees was the appropriate one.

In reaching its finding that the members of the law school faculty constituted a separate appropriate unit the Board relied upon a number of criteria. Noting the separate physical location of the law school and the fact that law school activities were carried out almost exclusively in this building, the Board also took cognizance of the absence of interchange between the law school and other faculty members. In the matter of wages, salaries and working conditions, the Board found that approximately fifty-seven percent of the Fordham Law School faculty were full professors as opposed to twenty percent in the university as a whole; that law school faculty were eligible for tenure after three years (seven years service was required for professors in the university) and that the average salary of the law school faculty was higher than that of university faculty members and

took into account the prevailing salary rates at private law firms and other law schools.

The New York Court of Appeals regulated the hours during which classes were held, the American Bar Association (ABA) required that the law school have a certain financial independence, a particular faculty-student ratio and a private office for each faculty member and the Association of American Law Schools (AALS) exercised substantial control of maximum proper teaching loads. Thus, the record showed that separate and distinct regulatory standards existed for the law school and its faculty, if it wished to maintain its accreditation, that did not exist for the non-legal faculty of the university.

Further, the law school had its own faculty committees to determine curriculm, schedules, tenure and the like and determined its own opening, closing and vacation dates that did not necessarily coincide with the schedules of the other schools of the university.

Accordingly, the Board decided that the law school faculty constituted a separate appropriate unit for bargaining. The Board maintained that the law school faculty constituted an identifiable group of employees whose separate community of interest is not irrevocably submerged in the broader community of interest which they share with other faculty members and concluded that the

operations of the law school were not so highly integrated with the remainder of the university to justify the finding desired by the Employer of an overall unit that included both university and law school faculty members.

The Board then considered questions of inclusion or exclusion of department chairmen, assistant chairmen, part-time faculty, members of the Society of Jesus (the Jesuits who taught at Fordham), and professional librarians.

The Board found two separate bargaining units appropriate:

1. a unit composed of all full-time and regular part-time members of the teaching and research faculty but excluding the president, vice president, deans, associate and assistant deans, graduate assistants, teaching fellows, law school faculty, guards and supervisors.
2. a separate unit composed of all full-time and regular part-time members of the faculty of the school of law excluding the dean, the law librarian, guards and supervisors.

There was a dissenting opinion in this case.

THE CATHOLIC UNIVERSITY OF AMERICA and LAW FACULTY BARGAINING COMMITTEE, FEBRUARY 20, 1973. 201 NLRB 929 (1973).

The Board affirmed the ruling of the Hearing Officer.

The Law Faculty Bargaining Committee sought a unit of the full-time faculty of the law school excluding the dean, associate dean, assistant dean and all other employees and supervisors.

Catholic University contested the appropriateness of a separate law school faculty unit and argued that if such a separate unit was found to be appropriate it must encompass all regular part-time law school faculty.

Relying upon its decision in Fordham Univ., supra the Board noted that the same stringent accreditation and professional standards established by the ABA and the AALS as well as various state judiciaries applied to the law school at Catholic University; that the Catholic law school faculty received substantially higher salaries than other faculty members; that to a significant degree the law school operated independently of the rest of the university; and that there was virtually no interchange between the law school and non-law school faculty members. Accordingly, the Board found a separate unit of law school faculty members an appropriate one for purposes of bargaining.

As to the differing opinion of the parties regarding the inclusion or exclusion of regular part-time faculty members in the unit, the Board found that all part-time faculty members whose teaching load was at least one-fourth the average teaching load of their full-time counterparts would be included in the unit.[75]

The Board also included the law school's head librarian and assistant and associate deans in the separate unit after finding that none of these three faculty members actually exercised supervisory authority sufficient to sever their community of interest with other law school faculty.

SYRACUSE UNIVERSITY and THE SYRACUSE UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, JUNE 29, 1973. 204 NLRB 641 (1973).

The Board affirmed the rulings of the Hearing Officer.

The Syracuse University Chapter of AAUP sought a unit of all full-time faculty members including the department chairmen and the law school faculty.

The Employer did not dispute the appropriateness of the scope of the unit requested by the AAUP, however, the Employer did contend that department chairmen should be excluded from the unit on the grounds that they were supervisors within the meaning of the Act.

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[75]This standard is referred to as the "twenty-five percent rule."

The Law Faculty Association (LFA), intervening in the case, contended that the law school had a community of interest separate and apart from the rest of the university "that the professional responsibilities of the faculty are compatible with placement in a larger unit and that historically, the law school had in fact been treated as a separate entity in many ways."[76]

Both the AAUP and the Employer maintained that a separate unit for the law school faculty was precluded because the administration of the university was centralized in one giverning body with "various subauthorities emanating therefrom which carry out the basic administrative policies of the university," that the terms and conditions of employment among faculty members were identical and that the "skills and functions of all the faculty members used in the course of their employment were indistinguishable other than on an academic basis."[77]

The LFA, in support of its opinion, maintained that the law school was a professional school which did not share a community of interest with the other colleges and schools within the university and

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[76] Syracuse Univ., 204 NLRB 641 at 641.

[77] Id. at 641.

cited the various separate accrediting and regulatory agencies which exercised control over some specific law school matters. The LFA further noted that the students, faculty and alumni of the law school did not identify themselves with Syracuse University, that they maintained their own fund raising drives and that a confidential attorney-client relationship existed in the operation of various legal clinics by law school faculty and students.

The Board noted that here, as in Fordham, supra, the vast majority of the professional and administrative responsibilities of the law school faculty were performed within the confines of the law school, that there was virtually no interchange between law school and other faculty positions and that the operations of the law school were practically autonomous, subject only to the university's basic administrative rules and regulations.

Stating that the purposes of the Act and the interest of the academic community would not be served best by "paying lip service to the distinctive nature of academic employment while submerging its differences in a sea of precedent, selected piecemeal to give a result plausible in the particular yet somehow disquieting as a whole,"[78] the Board found that either separate units for the law

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[78] Id. at 643.

school and the university or overall faculty unit which included the law school would be appropriate. Declining a final determination, the Board ordered two voting groups - one of law school faculty (A), the other university faculty (B) - and issued an order for an election in which group A would determine whether they wished a separate unit or inclusion in an overall unit.

Two Board members dissented in this case.

NEW YORK UNIVERSITY and NEW YORK UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND NYU FACULTY OF LAW ASSOCIATION, JULY 20, 1973.
205 NLRB 4 (1973).

The Board affirmed the rulings of the Hearing Officer.

The New York University Chapter of AAUP sought a unit of all full-time faculty of the university and half-time faculty in the school of dentistry including professional librarians but excluding all other employees.

The NYU Faculty of Law Association sought a separate unit of all full-time law school faculty members excluding the deans, law librarians, guards and supervisors. The Faculty of Law Association specifically sought to exclude part-time law faculty.

New York University contended that the appropriate unit was an overall one that included the law school. The Employer sought to exclude part-time faculty, librarians, faculty on terminal contracts,

department chairmen, certain directors and faculty whose primary responsibility was contract research.

The Board, relying upon its decisions in Fordham and Syracuse, supra, concluded that either a separate or an overall unit would be appropriate for the law faculty and the final determination of the issue rested with the voting decision of the law school faculty. Consequently the Board directed separate elections among the law school faculty to determine whether they preferred to be included or excluded in an overall unit with the rest of the university faculty.

Considering the issue of part-time faculty members' inclusion in either the separate or overall units, the Board held that a mutuality of interest was lacking between the part-time and full-time faculty at NYU and therefore part-time faculty members were excluded from either the separate or overall units as determined by the elections. This decision also excluded the part-time faculty members at the school of dentistry.

FAIRLEIGH DICKENSON UNIVERSITY, 205 NLRB 673 (1973)[79]

The American Federation of Teachers (AFT) sought a unit of full and part-time faculty members excluding the dental school faculty. The AAUP sought to represent a unit of all full-time faculty

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[79]This case is discussed in the section "Multi-campus Units" above at 123.

including the dental school faculty and department chairmen. The Employer maintained that a university wide unit which included the dental school was the appropriate one.

The dental school was located across the river from the main campus in a building primarily devoted to dentistry, however, various other science courses were taught by nondental professors and instructors. Dental school faculty members served on the university senate, availed themselves to the university's grievance procedures and were subject to university policies related to tenure, sabbatical, promotions, etc. However, the record showed that a substantial number of the dental school faculty were dentists with private practices whose average salaries were higher than other university faculty members and there appeared to be a variance in the university "moonlighting" or outside employment activities rule for dental faculty. The dental school's accreditation was based on entirely separate factors than those applied to the university and there was little integration between the dental school and the other colleges. These factors, the Board noted, appeared to support a separate unit limited to dental school faculty, however, because no labor organization sought to represent the dental school separately, the Board included them in the overall unit.

UNIVERSITY OF SAN FRANCISCO and ASSOCIATED LAW PROFESSORS, UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW, NOVEMBER 7, 1976. 207 NLRB 12 (1973).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought to represent a unit composed of all regular members of the school of law who taught on a full-time basis and had received or who had become eligible to receive tenure. The Petitioner noted that it would accept the part-time faculty if the Board determined that such faculty were included in the unit.

The Employer maintained that the only appropriate unit would include all full-time and part-time faculty of the entire university community and wished to include in this unit the assistant dean of the law school and the law school librarians.

Relying upon its decision in Fordham, supra and Catholic Univ., supra and noting that similar circumstances existed at the University of San Francisco Law School, the Board concluded that a unit limited to the law faculty was an appropriate one for bargaining purposes. The Board excluded part-time law faculty from the unit noting that they were generally practicing lawyers employed on a semester basis only and lacked a community of interest with the full-time law school faculty.

The assistant dean and the assistant law librarians were included in the unit because the Board determined they were not

supervisors within the meaning of the Act and therefore, shared a substantial community of interest with their colleagues.

Part-time Faculty Members

The cases briefed in this section deal with questions of the inclusion or exclusion of part-time faculty members in faculty bargaining units.

C. W. POST CENTER OF LONG ISLAND UNIVERSITY, 189 NLRB 904 (1971)[80]

The petitioning union was seeking to represent a unit of all professional employees at C. W. Post.

The university contended that a separate unit for full-time faculty should be established and that a separate unit should be established for the employees in the other categories sought.

The record indicated that C. W. Post employed 206 adjunct or part-time faculty including full professors, associate and assistant professors and lecturers. Adjunct faculty taught twelve semester hours or fewer per year, had the same educational background as their full-time colleagues and engaged in the same teaching activities.

To the extent that they were able to attend, adjunct faculty participated in policy and faculty meetings and did, on occasion, vote

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[80]The initial discussion of this case appears in chapter 3 at 74.

at such meetings even though the statutes did not give them the right to do so.

Adjunct faculty did not qualify for tenure or sabbatical leave nor did they receive any of the fringe benefits granted to full-time faculty members. Further adjunct faculty members were reappointed annually on a contingency basis, were paid twice each semester at a rate of pay computed on a semester hour basis and in a ratio of approximately one-half to one-third less than the full-time faculty.

The Employer maintained that these facts demonstrated a significant enough difference between adjunct, part-time faculty and the full-time faculty to warrant a separate unit.

The Board found that it was appropriate to include the adjunct faculty in the unit maintaining that the part-time faculty possessed the same qualifications and engaged in activities identical to those of the full-time faculty. Noting that the part-time faculty took part in various faculty policy deliberations and did, on occasion, vote at such deliberations, the Board held that despite the university statutes which prohibited part-time faculty from voting at such meetings, these regulations were not "sufficiently significant" to require the exclusion of the adjunct faculty from the unit.

Further, the Board held that differences in benefits, the high ratio of part-time to full-time employees and the fact that most of

them were engaged in employment elsewhere did not necessitate exclusion. Accordingly, the Board ruled to include part-time faculty in the unit with the full-time faculty.

LONG ISLAND UNIVERSITY (BROOKLYN CENTER) and UNITED FEDERATION OF COLLEGE TEACHERS, LOCAL 1460, APRIL 20, 1971. 189 NLRB 909 (1971).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought a unit of full and part-time professional employees at the Brooklyn Center of Long Island University.

The Employer maintained that the full-time faculty should be represented separately and that additional separate units were appropriate for employees other than full-time faculty. Determining that the qualifications and duties of the regular (full-time) and adjunct (part-time) faculty were the same as the faculty at the C. W. Post Center the Board held, as it had in its earlier decision, that the full-time and adjunct faculty were professional employees with common interests who together constituted an appropriate unit for bargaining purposes.

UNIVERSITY OF NEW HAVEN, INC., EMPLOYER-PETITIONER and UNIVERSITY OF NEW HAVEN FACULTY FEDERATION; UNIVERSITY OF NEW HAVEN BOARD OF FACULTY WELFARE; AND UNIVERSITY OF NEW HAVEN FACULTY SENATE, MAY 21, 1971. 190 NLRB 478 (1971).

The Board affirmed the rulings of the Hearing Officer.

The Employer contended that for purposes of bargaining an appropriate unit would consist of all full-time and part-time, or adjunct, faculty members.

The labor organizations involved in the case sought units of full-time faculty members only and wished to exclude the part-time faculty. The record revealed that part-time faculty members taught from three to twelve hours each semester, with most of them teaching fewer than six hours. Full-time faculty taught twelve hours per semester. Part-time faculty did not receive or participate in the various fringe benefits available to full-time faculty and they were not eligible for tenure. Further, they were not represented on the Board of Faculty Welfare, however, they did receive representation on the university's board of governors.

The Board found that a unit of regular part-time and full-time faculty members was the appropriate one because the qualifications and work functions of the two groups were identical, the only difference between the groups being the number of teaching hours involved. However, because the labor organization sought to represent a unit of full-time faculty professionals only and because the Board excluded regular part-time employees from a unit of faculty professionals only when all the involved parties agree to such

an exclusion of faculty, the Board held that no representation question existed and dismissed the union's petition.

FORDHAM UNIVERSITY, 193 NLRB 134 (1970).[81]

The Employer maintained that no unit of faculty members was appropriate, however, if such a unit was deemed appropriate by the Board, the Employer sought to exclude part-time faculty, professional librarians and ancillary support personnel.

Fordham employed about 245 part-time faculty members of whom ten taught at the law school. Part-time faculty were not eligible for tenure, did not enjoy any fringe benefits and did not participate in faculty policy decision on department or school levels.

The Board held that the facts in Fordham were essentially the same as those in Univ. of New Haven, supra, and reiterated its holding in that case that regular part-time faculty must be included in the same unit as the full-time faculty, "absent agreement of the parties to exclude them."[82] Accordingly the Board determined the

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[81]The initial discussion of this case appears in chapter 3, page 75; also in the section entitled "Professional School" above at page 153.

[82]Fordham, supra at 139.

appropriate unit for bargaining purpose to include the full and part-time faculty excluding part-time and full-time law school faculty who constituted a separate unit.

UNIVERSITY OF DETROIT and THE UNIVERSITY OF DETROIT CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, OCTOBER 6, 1971. 193 NLRB 566 (1971).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought to represent a unit of full-time faculty members at the University of Detroit and contended that a unit of full-time and part-time faculty members was inappropriate because only the full-time faculty members were involved in the formation and implementation of department, school and university policies. Additionally, the petitioning AAUP chapter asserted that the university treated the two employee groups differently. If the Board did find a combined unit of full and part-time faculty members appropriate, however, the AAUP chapter maintained that the Board should establish a standard to determine voter eligibility for regular part-time employees.

The Petitioner suggested that only those currently employed part-time faculty members who taught more than three credit hours per semester or who taught more than one day a week in the dental school and who had taught at least one semester in each of the

immediately preceeding two academic years exclusive of the summer session be considered regular part-time faculty members and allowed to vote as such.

The University of Detroit, the employer, maintained that a unit of full-time and regular part-time faculty members was the appropriate one and contended that the Board's decision in Univ. of New Haven, supra, was the controlling one.

The Board held that the part-time faculty members at the University of Detroit were part-time professional employees sharing a substantial community of interest with full-time faculty members and as such constituted an appropriate unit. The Board agreed with the Petitioner that they should develop a test for this case to insure that only those part-time faculty members having a "substantial and continued interest in the wages, hours, and working conditions of unit employees be eligible to vote."[83]

Dismissing the standard proposed by the petitioning AAUP chapter for determining the voting eligibility of part-time faculty, the Board relied upon the ratio it established in New Haven, supra. This was a 4-to-1 full-time to part-time-hours-taught ratio or the

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[83] Univ. of Detroit, supra at 567.

"twenty-five percent rule.[84] Accordingly, the Board found that part-time faculty teaching three hours or more per semester in all university schools except the school of law and dentistry were regular part-time employees eligible to vote in the election. In the school of law, where the full-time faculty teaches approximately four two-credit hour courses per term, they would apply the same 4-to-1 full-time-to-part-time-hours-taught ratio as in New Haven.

MANHATTAN COLLEGE and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, JANUARY 25, 1972. 195 NLRB 65 (1972).

The Board overruled the Hearing Officer's decision to disallow another labor organization from intervening in this case.

The Employer contended that the petitioning AAUP chapter was not a labor organization and further, that the bargaining unit requested by the organization was inappropriate because faculty were not employees within the meaning of the Act but rather supervisors and managerial employees. However, the college maintained that if the Board found a unit of faculty members appropriate, such unit should exclude those faculty on terminal contract and part-time faculty members. Manhattan College took no formal position on the

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[84] At University of Detroit as in New Haven, supra, full-time faculty taught at least twelve hours per week.

inclusion or exclusion of R. O. T. C. instructors and nonteaching athletic coaches.

The Petitioner sought to represent all full-time faculty members and professional librarians excluding all administrative officers, part-time faculty, R. O. T. C. officers, athletic coaches who did not teach and all other employees.

The intervening New York State Teachers Association sought a unit similar to that of the AAUP but wished to include part-time faculty, R. O. T. C. officers and nonteaching coaches.

The Board rejected the Employer's contention that the petitioning AAUP chapter was not a labor organization and maintained that both the Petitioner and the intervening New York State Teachers Association were labor organizations. It was the Board's contention that the Employer's argument regarding the supervisory status of faculty amounted to nothing less than a request for the Board to reconsider its decision in C. W. Post and Fordham Univ. Rejecting this, the Board held that faculty members were professional employees under the Act and therefore entitled to vote for or against collective bargaining representation.

The Board determined that a unit of full-time and regular part-time faculty including terminal contract faculty members was appropriate. The Board held that there was no evidence to suggest

that those faculty on terminal contract were hired as other than permanent employees subject to termination on the same grounds as any other employee in the unit. As long as they remained on the faculty, the Board noted that they shared a substantial community of interest with their colleagues and were, therefore, eligible to vote so long as they were employed at the time of the election. Part-time faculty members who regularly taught at least one-quarter of the teaching load of their full-time coaches were also included in the unit. The R. O. T. C. officers were excluded from the unit.

FLORIDA SOUTHERN COLLEGE, 196 NLRB 888 (1972)[85]

The Employer, Florida Southern College, maintained that part-time and dual capacity individuals (employees who served partly in a teaching capacity and partly in an administrative capacity) should be included in any faculty unit found appropriate by the Board. The petitioning union, on the other hand, was seeking to represent all full-time, professional faculty members.

The record showed that there were approximately ten part-time faculty members teaching half-time or less at the college. Each taught under an annual contract covering teaching duties of either three or six credit hours a semester. They were accorded

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[85] See "Multi-campus Units" above at 122 for the initial discussion of this case.

faculty status and attended and spoke at faculty meetings. Although they were never officially accorded voting privileges at these meetings, the record indicated that they did vote on issues in some instances.

The Board considered the dual capacity employees individually and included those employees in this category who spent a portion of their time engaged in the teaching function. The Board held that the six dual capacity employees in question had a direct community of interest with the full-time faculty and spent a "substantial portion of their time using [their] professional qualifications in work functions similar to the full-time faculty."[86] Accordingly, the unit determined by the Board included all professional full-time and regular part-time faculty and those faculty who occupied dual capacity positions.

COLLEGE OF PHARMACEUTICAL SCIENCES IN THE CITY OF NEW YORK and NATIONAL EDUCATION ASSOCIATION, NEW YORK STATE TEACHERS ASSOCIATION-CPS-COLUMBIA CHAPTER, JUNE 26, 1972. 197 NLRB 959 (1972).

The Board affirmed the rulings of the Hearing Officer.

The Petitioner sought to represent a unit of full-time and regular part-time faculty including librarians and teaching assistants

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[86] Florida Southern, supra at 890.

but excluding evening extension programs faculty, clinical instructors, technicians, lab assistants and various other employees.

The Employer maintained that the proposed unit should include the extension faculty, lab assistants and clinical instructors but exclude teaching assistants.

The record showed that there were approximately seventeen faculty members on the teaching staff in the evening extension program of the college. This evening program offered science courses for students engaged in the pharmaceutical and cosmetic industry. Virtually all of the students in the extension division had bachelor's degrees and many of them held advanced degrees as well. The seventeen faculty members on the teaching staff of the extension program taught between two and four hours per semester; some held the title of adjunct professors; all had the same educational background as the faculty members in the regular and undergraduate programs. Additionally some full-time faculty taught in the evening extension program. The starting salary of faculty in the evening program was $250 less than that paid to full-time faculty members teaching their first course in the evening division, however, the incremental increase for each additional year of teaching in the program for both extension and full-time faculty was $125 with the maximum yearly salary set at $1,000.

Like part-time faculty, the extension faculty members did not receive the fringe benefits of full-time faculty and had to pay for courses they took at Columbia (the college was affiliated with Columbia University), but did not have to pay tuition for courses they took at the college.

The Board held that extension faculty members were regular part-time professional employees whose chief function was teaching and whose qualifications for that function were identical to the other members of the unit. Accordingly, the extension faculty was found to share a substantial community of interest with the full-time and regular part-time faculty of the college and therefore they were included in the unit.

NEW YORK UNIVERSITY, 205 NLRB 4 (1973)[87]

The New York University AAUP chapter sought a unit of all full-time faculty of NYU and half-time faculty in the school of dentistry, including professional librarians but excluding all other employees.

The Employer denied the Board's authority under the Act to assert jurisdiction but alternatively urged, that if the Board denied

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[87]The case appears first at 161 above in the section entitled "Professional Schools."

this initial contention, then an appropriate unit would exclude part-time faculty and various other employees.

The United Federation of College Teachers, intervening in this case, sought a unit which would include all regular part-time faculty.

The Board noted that the issue of part-time faculty had been "raised before and [had been] consistently resolved in favor of inclusion. However, after careful reflection, we have reached the conclusion that part-time faculty do not share a community of interest with full-time faculty and should not be included in the unit."[88] In reaching its decision to exclude part-time faculty from the unit, the Board noted that the following four factors were crucial to the formation of its altered conviction that no mutuality of interest existed between the full and part-time faculty at New York University.

1. Compensation - the record revealed that a substantial percentage of the part-time faculty received a modest sum which was essentially an honorarium. Part-time faculty received their primary income from sources other than the institution and fringe benefits were not available to part-time faculty.

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[88] New York Univ., supra at 6.

2. Participation in university government - part-time faculty were excluded from membership on the university senate and the faculty council. Additionally, they did not participate in departmental decisions and were not consulted with respect to curriculum, degree requirements and admission requirements, etc.
3. Eligibility for tenure - part-time faculty were not eligible for tenure and were hired on a semester basis with no obligation of renewal of appointment.
4. Working conditions - part-time faculty members had no responsibility beyond teaching and grading, unlike full-time faculty members who were expected to engage in research, writing, counseling of students and numerous department and university activities.

Noting that collective bargaining by college and university faculties was at an early stage of development and that unit determinations must be appropriate for bargaining purposes, the Board maintained that the lack of similarity or a substantial community of interest among full and part-time faculty prevented it from including these two groups in the same unit. In its judgement, the Board felt that "the grouping of the part-time and full-time faculty into a single

bargaining structure will impede effective collective bargaining."[89] Accordingly, the Board excluded the part-time faculty from this unit and also overruled all preceeding cases "to the extent [the preceeding cases were] inconsistent with this decision."[90]

Two dissenting opinions were offered in this case.

FAIRLEIGH DICKINSON, 205 NLRB 673 (1973)[91]

The petitioning American Federation of Teachers (AFT) sought a unit of all regular full and part-time faculty at the university's Teaneck, New Jersey campus only.

The AAUP chapter sought a unit of all full-time faculty including department chairmen and the dental school faculty at all three campuses.

The Employer contended that a university wide unit was the appropriate one but took no position on the question of part-time faculty.

The Board relied upon its decision in New York Univ. supra, and excluded the part-time faculty from the unit.

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[89] Id. at 7.

[90] Id. at 8 note 12.

[91] See "Multi-campus Units" at 123 above and "Professional Schools" at 162 for additional discussion of this case.

UNIVERSITY OF SAN FRANCISCO, 207 NLRB 12 (1973).[92]

The Petitioner sought a unit of all full-time members of the law school faculty who had received or were eligible to receive tenure but noted that it would accept part-time faculty if the Board found them to be a part of the unit. The Employer maintained that the only appropriate unit would include all full-time and part-time faculty.

The record showed that the part-time law school professors were generally practicing lawyers employed on a semester basis only. Further they did not sign a contract with the law school, did not receive the fringe benefits enjoyed by the full-time law school faculty, were not eligible for promotion and tenure, did not participate in the law school governance processes and were compensated on the basis of the number of credit hours taught per semester.

The Board held that these circumstances demonstrated that no substantial community of interest existed between the full-time and part-time members of the department and accordingly excluded the part-time faculty from the unit.

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[92]See "Professional Schools" at 164 above.

ANALYSIS

Virtually every case involving a private college or university to come before the Board involves a unit scope question, thus the importance of unit determinations on labor relations on the campus cannot be underestimated. Former Board Member, Ralph E. Kennedy, stated that in establishing the scope of university bargaining units the Board "focused upon two primary areas: the interests of employees in their working conditions and the administrative structure of the employer."[93]

The complexity of determining appropriate employee units on the campus lies in the necessity to define shared or substantial mutual interests between varying groups of employees. The four basic educational institution unit questions that the Board has been asked to examine are:

1. Whether multi-campus institutions should have units for bargaining that extend to all the branch campuses or whether the units should be limited to a specific branch.

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[93]Ralph E. Kennedy, "The Educators Role in Educating the NLRB: Requirement of a Complete Record," Summer J. College Univ. L. 305 (1974).

2. Who should be included in a nonprofessional department unit and which members of the institution's community can be appropriately termed nonprofessional.
3. Whether professional schools on campus constitute a separate community of interest and consequently require an exclusive unit.
4. Whether part-time faculty members should be included in the bargaining units with full-time faculty.

This section will analyze the cases which have been included in this chapter and will attempt to explain the basic criteria used by the Board in making its unit decisions.

Unit determination for educational institutions is a new area for the Board and, as with its jurisdictional decisions, there have been reversals of major opinions even after reliable precedent seemed established.

Multi-campus Units

Interestingly, the first case to come before the Board requesting a decision on multi-campus units was Cornell Univ., supra. In this case the university believed that a unit of all of Cornell's nonacademic, nonsupervisory employees throughout the state of New York was the appropriate unit. Two labor organizations, the ACE and the UFCT, operating at different Cornell campuses

were each seeking separate units - one unit for the 270 nonprofessional, nonsupervisory employees of the university's libraries on the main campus in Ithaca; one unit of the seventeen professionals and twenty nonprofessionals employed in the Manhattan district office of the School of Industrial Relations. A third labor organization, the Civil Service Employees Association, agreed with Cornell that a state wide unit was the appropriate one.

The Board noted that the library employees had organized themselves separately and recognized the fact that the ACE had represented library employees at a number of meetings held with university administrators and had handled unit-wide and individual employee grievances. However, the record indicated that the ACE had taken these actions informally and that it had never been recognized by the university as the collective bargaining agent for the library employees working on the Ithaca campus.

In considering the request by the UFCT for a separate unit at the New York City office of the Industrial and Labor Relations School (ILR), the Board took note of the fact that the ILR office in question was located approximately 280 miles from Ithaca and that the ILR was accorded a great degree of autonomy in certain of its employment practices. Closer examination of this autonomy revealed that the New York City office in order to compete with the

higher wage market in Manhattan paid higher salaries. In order to hire and retain staff, the district office, of necessity also tailored such practices as holiday leave and length of the work week to those of other offices in the city. The record revealed, however that his situation was not peculiar to the New York City ILR office. It was Cornell's policy to grant relative independence to all of its administrative departments and the three other ILR district offices (located in Ithaca, Albany and Buffalo) also tailored some of their employment practices programs to meet specific area needs and conditions.

In finding a state wide unit of nonsupervisory, nonprofessional employees the appropriate one, the Board maintained that the university's personnel practices were centralized and integrated ones and extended to all of the facilities scattered throughout the state.

The personnel department established the employment practices and labor relations policies for the entire university; it determined job titles and position classifications, administered the fringe benefits program; financial records were maintained and checks were issued from the Ithaca campus. A myriad of other employment matters including guidelines for leave, tardiness,

overtime, and seniority were all promulgated by the personnel department on the Ithaca campus.

The Board, in the Cornell decision, acknowledged the fact that it was "entering into a hitherto uncharted area,[94] having never determined appropriate units in an educational context, and stated that it would rely upon the same guidelines for determining units that it used in an industrial situation. These guidelines as enunciated by the Board in Cornell included the following factors: (1) prior bargaining history, (2) centralization of management particularly in regard to labor relations, (3) extent of employee interchange, (4) degree of interdependence or autonomy of plants, (5) differences or similarities in skills and functions of employees and (6) geographical location of the facilities in relation to each other.

Applying these guidelines to the facts in Cornell, the Board ruled that the unit of library employees requested by the ACE was inappropriate because the work and skills performed by the employees in the requested unit was similar to those of many others on the campus. Additionally, the library employees shared the same working conditions and benefits as other Cornell employees.

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[94] Cornell, supra at 336.

In its discussion of the request for a separate unit by the UFCT, the Board held that the nonprofessional employees of the ILR school office in New York City perform the same duties as many other Cornell employees, had the same job classifications and were subject to the same uniform and centralized employment practices that emanated from the Ithaca office. Although the considerable distance and relative autonomy of the ILR office measured up to some of the guidelines used by the Board to determine the appropriateness of a separate unit, the Board felt that the centralized employment practices of the university and the fact that the employees at the ILR school shared enough common employment interests mitigated those factors supporting a separate unit.

In Cornell, the Board was also influenced by the fact that the union was seeking "a broad inclusive unit coextensive with the Employer's administrative and geographic boundaries."[95] Thus in its first multi-campus unit decision the Board clearly established the guidelines it would use in finding the presence, or lack thereof, of a shared community of interest between employees working at educational facilities that were geographically distant from each other. Location, in this case, was the least important consideration.

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[95] Id. at 336.

The fact that all Cornell's nonprofessional employees were subject to identical, centralized employment procedures and practices that were integrated and uniformly administered proved to be the significant factor.

In Tulane Univ., supra, the Board found that the appropriate unit for bargaining included all nonacademic wage employees at all of the university's facilities. The petitioning unit had only requested a unit of the cafeteria and maintenance employees on the main campus in New Orleans. The three facilities located away from the main campus were the Medical Center located five miles from the main campus, the primate research center, forty miles from the main campus and the research center, located fifteen miles from the main campus.

The Board applied the same standards as it had applied in Cornell, and found that considerable evidence existed to indicate that the four facilities were integrated and centralized with regard to employment practices and procedures.

Because the various departments located off the main campus were subject to centralized supervision from the main campus, there was little, if any, autonomy at any of the off-campus facilities. No single facility or department was authorized to pay debts or enter into contracts; all job classifications and ranges and rates of pay

were determined by the nonacademic Personnel Executive Committee; and the various fringe benefits and insurance plans were uniform for all wage employees.

In his dissent from the majority opinion in this case, Board Member Jenkins, would have excluded the employees at the primate research center and the research center because the record indicated a lack of interchange or transfer of employees between these facilities and the other Tulane facilities. Further, Jenkins maintained that there was no showing that all four facilities recruited their respective wage employees from a common labor market. Stating that the Board should "weigh all the factors in each case arising in this area, and consistent with prior decisions, arrive at unit determinations based on factors which would be consistent with our [the Board's] duty to define the appropriateness of units,"[96] Jenkins felt that a unit comprised of the main campus and the medical center would have been the appropriate one.

The Board had noted in Cornell, supra that the extent of employee interchange was one of its unit-dictating guidelines and the Cornell record revealed that there was substantial transfer and interchange among the employees in the various departments and at

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[96] Tulane, supra at 331.

the scattered facilities. However, both decisions clearly indicated the Board's determination to make the centralization of various employment and personnel practices one of the most important determinants in solving multi-campus questions.

The Tulane decision reinforced the Board's inclination to determine "overall units encompassing all employees who may statutorily be included in a single bargaining unit."[97]

In Fairleigh Dickenson, supra, the American Federation of Teachers (AFT) contended that an appropriate unit for bargaining was one composed of all faculty, full-time and part-time, at the university's Teaneck, New Jersey campus. Claiming that the mangement of the university was decentralized, that there was a minimal amount of day-to-day management of the Teaneck campus emanating from the central administration on the Rutherford campus, and that almost all faculty employment, promotion and tenure decisions were made by the appropriate faculty administrators on each separate campus, the AFT maintained that the Teaneck campus faculty was a homogeneous identifiable group of faculty members with sufficient community of interest to comprise an appropriate bargaining unit. Additionally, the AFT noted that there was practically no

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[97] Kennedy at 306.

interchange of faculty or students between the three campuses and that this circumstance reinforced their contention that each campus represented an administratively distinct unit.

The university and the AAUP, the second petitioner in the case, contended that the administration was quite centralized, having one governing body, the Board of Trustees, "with various central authorities emanating therefrom carrying out the basic administrative policies of the university."[98]

The record showed that at Fairleigh Dickenson the Board of Trustees delegated authority to the university president, who, in turn, further delegated authority to each separate campus. Faculty hiring was initiated solely by each separate location according to its needs and funds for new hires came from the individual college budgets. Department chairmen along with other members of a department conducted faculty employment interviews and submitted evaluations and recommendations for hires to the academic vice president of the specific college; however, the minimum starting salaries, teaching conditions, promotions, fringe benefits and tenure standards were centrally established and identical for all faculty at every location. There was no differentiation on these matters from

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[98] Fairleigh Dickenson, supra at 674.

campus to campus. Budgets for the individual colleges were subject to modification by the central administration in relation to the overall budget.

Finally, the university senate which approved all educational policies before they were submitted to the Board of Trustees for final approval was composed of representatives chosen from all the campuses. In fact, each campus was guaranteed a minimum representation in this body. As to the question of interchange, the record indicated that there had been an average of four transfers or interchange of faculty from one campus to another over the four-year period preceeding the date of the case.

The Board reiterated the standards it set forth in Cornell, supra for determining whether a particular group of employees constituted an appropriate unit when the employer operated several facilities. Based upon evidence indicating that wages, hours, working conditions and various other personnel matters were centralized, the Board held that all of Fairleigh Dickenson's facilities were centralized and integrated and therefore the faculty of each of these various locations collectively shared a substantial community of interest. This finding was substantiated by the fact that the rules and regulations related to faculty promotions, the attainment of tenure and the rights and benefits enuring to a tenured

faculty member were applied on a university wide basis. The Board also noted that the university senate was the institution's highest academic body and intentionally included among its members faculty representatives from all locations.

Finding the same basic type of centralized employment procedures and personnel practices in Fairleigh Dickenson as had existed in Cornell and Tulane, supra, the Board held that a university wide unit was the appropriate one. The significant difference in this case was the fact that the petition involved a faculty unit scattered over three locations where every location performed the same functions and had the same status as each of the others. Unlike the McCoy facility in Florida Southern, no one of the three campuses of Fairleigh Dickenson University served a drastically different student population or restricted access to its programs to present or former government employees.

In remarks made in 1974, well after all of these cases had been decided, Board Member Kennedy offered the following insight into some of the tests used by the Board in determining multi-campus questions:

> "... it is important to know the extent to which each campus is operated as a self contained unit. The presence or absence of daily supervision by university administrators, the frequency

> of inter-campus employee transfers, the effect of geographical separation on pay scales and fringe benefits, the extent to which course offerings at the separate campus are supplementary or duplicative are all important considerations."[99]

It is clear from a review of the significant multi-campus unit cases that the physical separation of campus facilities is not sufficient to merit a separate bargaining unit for each campus. As long as an employment affinity exists between persons performing the same jobs, it matters not that these jobs are being performed at geographically distant locations. Kennedy's comments on the matter lend authoritative credence to this conclusion.

Administrative centralization in the area of employment practices and personnel procedures, particularly with regard to wages, hours and working conditions, has been the most significant consideration in the Board's multi-campus unit findings to date. University wide units encompassing locations at great or short distances to each other are preferable ones as long as a community of interest exists between the employees at the various scattered facilities of a single college or university.

Further, if a geographically separate unit can demonstrate that it is autonomous enough to constitute an individual, distinct

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[99]Kennedy at 306.

entity, then the possibility of the Board's finding for separate unit representation is enhanced. Florida Southern, supra, is an example of this.

The Board stated in its Cornell decision that

> "...our practice is to find a single plant of a multiplant employer presumptively appropriate where the facility is geographically separated from the others, where the operations of the single plant are not integrated with those of other plants, where there is a degree of local managerial autonomy, and where no other union is seeking a larger unit."[100]

Unless a petitioner can demonstrate that one or more of the geographically separate facilities of a multi-campus college or university meets these criteria, it is unlikely that the Board will find a separate unit for bargaining appropriate for that facility.

Nonprofessional Department Units

Once again the discussion of the Board's rulings on nonprofessional department units begins with the Cornell University decision. In this case the Board was asked to make a decision on the appropriate composition of a unit of staff employees as differentiated from faculty employees. With the exception of the seventeen professionals at the New York City Office of the ILR School and requested

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[100] Cornell, supra at 336.

by the UFCT for inclusion in a separate unit there,[101] all of the possible units proposed to the Board were composed of non-supervisory, nonprofessional staff employees. The Board was also asked to decide whether the work of certain professional library employees was distinct enough from the work performed by other university employees to warrant a separate unit.

The Board was not convinced that the work performed by library employees was of such a semi-professional character that it could not be compared to the work performed by other clericals, research aides and proofreaders on the Cornell campus. In short, the Board found that a sufficient community of interest existed between the library employees and all other nonacademic, non-supervisory and nonprofessional employees of the university.

It is clear from this decision that the Board applied many of the same criteria in determining the composition of nonprofessional units which it used in deciding the multi-campus unit questions.

In Yale Univ., supra the Board dismissed the petition of a labor organization seeking to represent a unit restricted to the nonfaculty, clerical and technical employees in the Department of

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[101] The Board excluded these professionals from the final unit ruling but did not discuss them separately in the text of the decision.

Epidemiology and Public Health (EPH). The Petitioner was unable to convincingly demonstrate that the employees of EPH were distinct, autonomous or technically skilled and specialized enough to prevent them from sharing a substantial community of interest with other Yale nonfaculty employees. Finally, in this case the Board also noted that Yale's prior bargaining history had established a pattern of "university wide bargaining units encompassing employees holding similar job titles."[102]

The Board is reluctant to disturb existing bargaining patterns and relationships and places increased importance upon the consideration of these established patterns in cases where a prior collective bargaining history exists.[103] An consequently denied the argument that EPH employees composed an appropriate unit for bargaining.

In Cal. Inst. Tech., supra, the Board ruled that a unit of central utility plant employees separate from a unit of other physical plant employees would be appropriate if the central utility plant employees decided that they wished a separate unit.

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[102]Yale, supra at 862.

[103]Kennedy at 306.

The Board was convinced that the work performed by the central plant personnel at Cal Tech was functionally distinct from that of other physical plant employees. Supervision of the central plant employees was separate from the supervisory lines for other employees in the physical plant. Virtually no interchange or transfer occurred between central plant personnel and other physical plant employees. Further, the locker and lunchroom facilities of the central plant personnel were separate and their work shifts were different than other employees in the department. Finally, there was no prior bargaining history.

Again, the Board was consistent in applying its standards of autonomy, distinct functions, lack of transfer or interchange and other related factors in deciding that a separate unit would be justified in this case if the central plant employees desired one. On the other hand, the Board was flexible enough on this issue to recognize that since the central plant personnel did work in the institution's physical plant department, a unit that encompassed both groups was also acceptable to the Board.

In Leland Stanford Junion University, supra ten separate labor organizations sought ten different bargaining units.[104] The

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[104]The listing of these organizations can be found at page 133 above, note 66.

requests for units ranged in scope from separate craft and departmental units to units encompassing all nonprofessional employees. In the opening discussion of the decision the Board stated that its' function in cases involving a myriad of organizations and unit petitions was to determine which, if any, of the petitioned-for units could be considered appropriate for collective bargaining purposes not which unit or units might be most appropriate. The Board approached the function it had outlined for itself by first dismissing those petitions that requested units which the Board felt were too limited in scope.

The Teamsters' suggested unit of all physical plant employees and or, alternatively all maintenance employees, were both rejected by the Board because each was too narrowly drawn and, in both instances, excluded groups of employees who performed the same or similar jobs in other departments, shared common supervision (such as the custodians and the food service employees) and had day-to-day contact with each other. In short, the Board would not permit a unit which did not recognize the common interests of campus employee groups and sought to truncate or otherwise break up the substantial community of interest which existed between these groups.

The Board deemed appropriate the unit requested by CSEA-SEA composed of service, maintenance and technical employees and various other nonrepresented employees on the main campus and at the university's Linear Accelerator Center two miles away. Acknowledging that perhaps the most appropriate unit might be one composed of all of the university's nonprofessional, non-supervisory employees, the Board noted that an overall unit of maintenance employees was appropriate under certain circumstances, citing Cal. Inst. Tech., supra as an example.

Although the university classified its security officers and firemen together as protective services personnel, separate units were deemed appropriate by the Board. Reviewing the duties and responsibilities of the policemen, the Board was convinced that the duties of the Stanford University police force made the members of that force guards within the meaning of the Act. Since the Act prohibited a unit that grouped guards with other employees, the Board was precluded from finding anything but a separate unit. Thus the Board determined that the most appropriate unit petitioned for was the CSEA-SEA unit and that two separate units composed of firemen and policemen who performed distinct job functions which were not similar to or comparable to the duties of any other university employees were also appropriate.

In Tulane Univ., supra the petitioner sought a unit of about 400 maintenance and cafeteria employees but suggested an alternative unit of all wage employees at all of Tulane's four facilities.

The Board found that the lack of a prior bargaining history at Tulane and the conclusive evidence that the university's personnel policies and procedures were centralized and integrated throughout all four facilities, indicated that a community of interest existed between all of Tulane's wage employees. The Board noted that there were about seventy-two classifications and subclassifications of wage employees and that these classifications appeared throughout the university's fifty-one departments and subdivisions. As in Stanford Univ., supra the Board found that the community of interest shared by all of Tulane's wage employees dictated the necessity for one unit that encompassed all of them.

When the Board decided in Claremont Univ. Center, supra that a unit composed exclusively of library employees was an appropriate one for bargaining purposes, it appeared to be contradicting its ruling in Cornell Univ., 183 NLRB 329 in which it dismissed a petition for a separate unit limited to nonprofessional library employees at one of Cornell's several locations. However, the record in Claremont Univ. Center indicated reasonably different circumstances

The term "The Claremont Colleges" referred to five separate colleges located on contiguous campuses in Claremont, California. The Claremont University Center, also a part of Claremont Colleges, operated several central facilities for the use of all the colleges. These central facilities included, among other things, the main Honnold Library and its ten branches located on the campuses of the various colleges, the Graduate School and the Office of the Provost, the personnel office, the business office and physical plant, security and student health.

The chief administrator of the Honnold Library System was the Director of Libraries. The director was responsible for the overall operation of the library and for coordinating the operation of the library system with the various colleges. The library supplied its services to the colleges in the Claremont organization under separate agreements with each of them. A Library Council made up of representatives from the several colleges advised the director on matters of policy. Additionally, the director reported to the Provost, whose office was an organizational part of the Claremont University Center.

The Honnold Library System staff was composed of approximately eighty full-time professional and nonprofessional employees, 130 part-time employees, most of whom were students.

The director was assisted by an associate director and four assistant directors. Each of the assistant directors was responsible for one of the four major library services: technical, public services, sciences and humanities.

The record revealed that the library recruited its own staff; that the director had the authority to hire and discharge; that library employees worked shorter work weeks on schedules that included evenings and weekends; that recent general wage increases had been twice as high for library employees; and that there was practically no transfer or interchange between library employees and other central services employees. Further, the Board found that many of the non-professional job classifications within the library were technical and specialized ones requiring college background skills.

Using the Cornell decision as a standard against which the facts in Claremont were measured, the Board found that the Honnold employees constituted a recognizably distinct group of employees with a community of interest separate from other employees involved in providing central services at The Claremont Colleges. The work of the library employees was determined to be specialized and different from the work of other central service employees such as custodians, security guards, and staff in the student counseling

center. There was no perceptible transfer or interchange between the groups. Further, the library was separately supervised.

In its opinion, the Board noted that, unlike Cornell, the petitioning union was seeking an election among employees of all libraries which were part of The Claremont Colleges; further no other union was seeking to represent the library employees in a broader unit. Another crucial difference between the situation at Claremont and Cornell was the fact that the Honnold Library was a self contained administrative unit which supplied its services to several different colleges, each one separately incorporated. The Cornell library system was composed of geographically scattered facilities, each providing service to one educational institution.

In Leland Stanford Junior, supra and Cal. Inst. Tech., supra unit determination cases occurring after Cornell, the Board had found less than an overall unit appropriate when it could be clearly shown that a homogeneous group of employees within the institution had a community of employment interest which was not or could not be shared by other employees at the institution. In the instant case a majority of the Board convinced that the skills required for the duties performed by Honnold Library employees were singularly different from the skills and duties of other Claremont employees. Accordingly, both professionals and nonprofessionals

were included in the petitioned-for unit. The Board designated two separate voting groups and two elections in order to ascertain whether the professional library employees wished to be included in the same unit with the nonprofessional.[105]

In a lengthy dissenting opinion, Member Kennedy expressed the view that under the standard set out in Cornell for making unit determinations including "prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of plants, differences or similarities in skills and functions of the employees, geographical location of the facilities in relations to each other,"[106] the Board majority erred in finding a separate unit of library employees appropriate. Maintaining that "the prime determinants of community of interest are work and skills,"[107] Kennedy believed that the job skills, work and training of the Honnold

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[105]"...the Board shall not (1) decide that any unit is appropriate for such purposes[collective bargaining] 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..." Section 9(b)(1) of the National Labor Relations Act.

[106]Cornell, supra at 336.

[107]Claremont Colleges, supra at 816.

Library System and nonprofessional staff was not substantially different from the work, skills and training of numerous other employees engaged in clerical jobs in the central services function of the Claremont Colleges.

Further, Kennedy felt that the fact that the Honnold Library System was the most vital part of the cooperative nature of The Claremont College and illustrated the library system's unity with the colleges and not its separateness from them. Kennedy pointed to the fact that this decision severed both the professional and nonprofessional staffs of the Honnold Library from their 1,900 working colleagues throughout the Claremont University Center, 550 of which were professional faculty members. Noting that the Board had consistently "refused to permit fragmentation of the professional and clerical staffs for bargaining purposes."[108] Kennedy pointed out that if the professionals at Claremont did not select a union, the remaining unit of library nonprofessionals would be as narrow as the one petitioned for and rejected in Cornell.

A second dissenting opinion prepared by Member Jenkins pointed out that once the Board established a pattern of separate units for an individual department on a campus, it could not reasonably

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[108] Id. at 818.

refuse to find separate units appropriate for each department, thus opening the possibility, for example, of a bargaining unit for a physics department and another separate unit for a sociology department. Jenkins reiterated Kennedy's criticism that creating separate bargaining units artificially fragmented the employees on a campus and arbitrarily divided some clerical staff from other clerical staff members and some professional employees from other professional employees.

The organization similarities between the Honnold Library System of The Claremont Colleges and the Cornell library system were minimal. The Board perceived of the Honnold Library System as a distinct, indeed almost separate, entity existing to serve several loosely connected colleges but not having an administrative or organizational connection to any of them. However, the Board majority seems to have considered Honnold's relationship to the Claremont University Center secondary.

The record indicated that within the organization of the Claremont University Center personnel policies and employment practices were centralized and standardized; that provisions were made for a centrally run recruitment and employment effort within the central services area and that employee benefits were equally applicable to all central service employees. Other facts presented

in the record indicated that Claremont University Center was taking additional steps to fully integrate and standardize its employee operations.

One of the difficulties in understanding the basis for any of the Board's unit determinations is the fact that the bargaining unit determination guidelines are standardized but not prioritized. In other words the Board does not arbitrarily place more emphasis on one factor than another but seems to look for the presence or absence of all factors and then focuses on those which seems dominant in each case.

In his dissenting opinion, Kennedy stated that similar work and shared skills were the prime determinants of shared interests. The majority obviously felt that lack of employee interchange, the autonomy of the Honnold Library, the lack of a prior bargaining history and the centralization of management in the director and the Library Council were more important than possibly similar work skills, experience and duties. The decision in Claremont University Center did establish, however, the option of separate units for professional and nonprofessional employees on college campuses and represented a departure from the Board's nonprofessional department bargaining unit decisions up to that time.

In Georgetown University, supra the Board ruled that the employer's request for an overall unit of all nonacademic employees was inappropriate and found a unit limited to service and maintenance employees to be the appropriate one.

The record clearly showed that Georgetown's personnel policies and employment practices were centralized and integrated. All recruitment, employment, wage and salary and benefit programs were conducted by the central personnel office. Additionally the 300 or so job classifications that existed on the campus were university wide ones and there was a considerable degree of employee transfer and interchange. In fact the university planned and sponsored training programs and on-the-job skills development programs were designed to encourage and promote transfer and interchange. Based on these considerations, the university maintained that all its non-academic employees shared a substantial community of interest and that an overall unit which included the clerical, technical and hospital employees but which excluded students, was the appropriate one.

In its opinion, the Board took note of the fact that the service and maintenance employees were the ultimate supervisory responsibility of the vice president for planning and physical plant. The clericals and technicians, on the other hand, were ultimately

responsible to an administrator other than the vice president of planning and physical plant. Further, the Board noted that the employees engaged in the service and maintenance departments were employed in occupational service classifications that were essentially "blue collar" ones. The Board felt that such a unit on the university campus was "analogous to the usual production and maintenance unit in the industrial sphere, and is a classic appropriate unit."[109]

Clerical workers were excluded from the unit in accordance with the Board's policy of excluding clerical workers from units of manual workers. Technicians, concluded the Board, should also be excluded because their work was substantially different from that of the service and maintenance employees and required close supervision by other technicians thus creating lines of supervision differing from the service and maintenance workers.

In this case the Board was required to make several determinations regarding the placement of specific positions in the unit. These positions included: glass blower, laboratory and autopsy assistants, library assistants, library aides and messenger clerks

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[109] Georgetown Univ., supra at 316.

and parking lot attendants. Considering each of these positions separately the Board first decided whether the tasks performed in these positions was of a technical or clerical nature and then included or excluded positions on that basis. Thus library aides, who spent their work time physically moving books about the library and messenger clerks who carried messages between buildings (and also performed some light clerical work) were included in the unit because their work was judged to be essentially blue collar labor. Lab and autopsy assistants were excluded because they performed more technical duties. Similarly the parking lot attendants were included in the unit while the glass blower was excluded.

In Georgetown, the Board was asked to find an overall unit appropriate but decided instead to allow a separate unit for the non-academic blue collar workers at the university. The Board had expressed its reluctance to fragment groups of employees performing similar functions at various locations on multi-unit campuses as Cornell and Tulane demonstrate. The Georgetown decision, however, illustrated the Board's belief that less-than-overall separate bargaining units on campus were appropriate particularly if sub-groups of university employees shared communities of interest that clearly parallelled comparable bargaining units in industry. The decision in Cal. Inst. Tech., supra demonstrated the Board's

willingness to allow a sub-group of physical plant employees who performed a specialized job requiring particular skills to determine whether they wished to form a separate unit or be included with all other department employees.

In a second Cornell University case, 202 NLRB 290, the Board again was asked to find a unit appropriate that included all the nonsupervisory, nonacademic employees at Cornell and all of its other New York state locations. The Board conceded that Cornell's operations were highly centralized particularly with regard to employment practices and personnel policies. Despite this fact, the Board rejected Cornell's request and ruled instead that an expanded version of the petitioning union's requested unit of dining facility employees on the Ithaca campus was appropriate. The Board was convinced that the "food service facilities, function to provide a common service that is not offered by any of the other university departments or services, and its employees comprise a homogeneous and distinct group performing similar duties..."[110] The record indicated a minimal degree of transfer and interchange between employees of the food services departments and other university departments. Additionally the Board noted the considerable distance

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[110] Cornell, supra at 291.

and geographic diversity between the various Cornell facilities. Another major factor in the unit determination in the case was the fact that no labor organization was seeking a state wide unit.

The modifications theBoard made in the petitioner's request were the inclusion of all eighteen of Cornell's dining facilities rather than only the ten dining room and cafeteria facilities the union had requested. The eight additional units included coffeehouses and snack bars, vending and delicatessen facilities, the infirmary and Statler Hall, the model hotel operated by Cornell's Hotel Management School. The Board also included the five chefs employed by the university at five Cornell owned fraternity houses.

In this case the Board was again relying upon its established industrial models and drew an analogy between a university operating dining facilities for its students and a hotel or club operating a restaurant for its guests:

> "In the latter situation we have held that the functions of a restaurant and the rest of a hotel's operation are not necessarily so highly integrated that only an overall unit is appropriate... we find that the employees of all the Employer's dining facilities share a substantial community of interest separate from that of other university employees...."[111]

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[111] Id. at 291.

Thus the Board was consistent with its decision in Georgetown, supra, where it had found a reasonably narrow unit of nonacademic employees appropriate. The Board's dual concern in this case was not only that an appropriate separate unit be determined but also that the unit include all of those employees who rightfully belonged in the unit. The Employer had requested a unit that was too wide in scope and had failed to convince the Board that all of the employees in that requested unit possessed sufficient mutual interest. It was not enough that the employment practices and personnel policies of all of Cornell's nonacademic, non-supervisory employees were the same. The union, on the other hand, could not adequately justify its rationale for excluding various food service facilities employees and had requested a unit which was, in the mind of the Board, too narrow.

In Tuskegee Inst., supra, the Board disagreed with a Regional Director's finding that stationary engineers and stationary firemen (power plant employees) as well as mailroom, bookstore and snack bar employees be excluded from a campus-wide unit of maintenance and service employees.

The Board expressed the opinion that the record did not sufficiently demonstrate that the skills and functions of the stationary engineers and firemen were significantly more specialized or

complex than those of other physical plant department employees in the unit such that automatic exclusion from the unit was dictated. Conceding that the power plant employees were separately supervised and experienced little transfer, interchange or contact with other employees in the physical plant department, the Board was convinced that all the physical plant employees were "engaged in functions related to the internal environmental conditions of campus buildings ...[and were] subject to the same ultimate supervision as other employees in the [department],"[112] and as such shared a community of interest with the other maintenance employees. The Board did state, however, that the stationary firemen and engineers and other power plant employees would be allowed to vote subject to challenge.

In comparing Tuskegee Inst. with Cal. Inst. Tech., supra, it is interesting to note that in the latter case the Board agreed with the petitioning union that the power plant employees at Cal Tech formed a "typical funtionally distinct and homogeneous powerhouse departmental unit,"[113] and should be permitted a separate unit for bargaining purposes if they so desired. The facts in the two cases do not differ significantly; the difference is the fact that in the Cal Tech

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[112] Tuskegee Inst., supra at 773.

[113] Cal. Inst. Tech., supra at 582.

case, a union was specifically seeking a unit limited to central power plant employees and was able to document a legitimate separate and distinct community of interest for these employees although it was also true that these employees were also a part of the large unit of service and maintenance employees at Cal Tech.

In Tuskegee, the union requested a unit that included all service and maintenance employees and clearly the central power plant employees at Tuskegee Institute were a logical segment of the larger unit composed of all maintenance and service employees.

The Board also disagreed with the Regional Director's finding that the mailroom, bookstore and snack bar employees duties were in the nature of office clericals. Concluding that these employees were part of the same centralized administration and performed functions related to the overall operation of the institution the Board was not convinced that they possessed a sufficient separate community of interest.

Professional Schools

Fordham Univ., supra was the first case in which the Board found as appropriate a unit of faculty members employed in one of the professional schools on a university campus. The facts in the case clearly illustrated the separateness of the law school and its faculty from the rest of the institution. Basic differences

between the personnel policies and employment practices at the law school and at the remainder of the university included substantial salary differences, shorter service requirements for tenure, the lack of departments within the law school and separate calendars. The Board also noted the regulation of specific law school policies and procedures by such outside agents as the American Bar Association, the New York Court of Appeals and the American Association of Law Schools.

Although law school faculty members were certainly a part of the larger group of Fordham University faculty, the Board maintained that the law school faculty constituted an identifiable group of employees "whose separate community of interest [was not] irrevocably submerged in the broader community of interest which they share with other faculty members."[114] Additionally, the Board was not convinced that the operations of the law school were so highly integrated with the operations of the remainder of the university to justify including law school faculty in a unit with other members of the university faculty.

The Board's finding in Fordham clearly established a pattern of separate units for professional school faculty members

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[114] Fordham Univ., supra at 137.

if they desired and subsequent decisions involving professional schools reiterated this standard.

The next case to come before the Board requesting a separate unit for law school faculty was Catholic Univ., supra. The Board decided that the pertinent facts in Catholic were substantially the same as those in Fordham, supra, and ruled that a separate unit composed of all full-time and regular part-time law school faculty was appropriate. In Catholic the Board devoted much of its attention to the question of whether part-time faculty would appropriately be included in the unit. This issue will be discussed at length in the following section.

The most complete discussion of the Board's philosophy on the question of separate units for law school faculty is found in Syracuse Univ., supra. This case also includes lengthy dissent from the majority opinion which effectively rounds out the issue. In Syracuse, the AAUP sought a unit of all Syracuse faculty members including the law school faculty. The Law Faculty Association (LFA) intervened in the case contending that the faculty at the Syracuse Law School constituted an appropriate separate unit. The Board noted that here, as in Fordham University, the law school had to comply with relatively stringent accreditation and professional standards established by outside state and professional regulatory

agencies. Further, the Board stated that the record revealed that although the law school faculty did perform some non-law functions, "the vast majority of their professional and administrative responsibilities [were performed] within the confines of the law school," and that their primary teaching functions were directed toward the specialized field of law. "There is no showing," the Board continued, "that the law faculty progresses into the administrative hierarchy of the university, nor is there any showing that the student body in the main has progressed from the university's undergraduate schools."[115]

In a lengthy discussion on the nature of faculty minority groups whose shared interest in and paramount allegiance to a particular discipline may transcend their mutual interest with other faculty members in general, the Board noted that it could not blindly rely upon its industrial models for unit determination as though there was a one-to-one correlation in the academic world. The fact that special allegiances existed in academia such as law school faculty members whose primary allegiance was to the legal profession and other lawyers and whose secondary connection was to teaching faculty in other disciplines meant that the Board had to consider the

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[115] Syracuse Univ., supra at 643.

employee-employee relationship as well as the employee-employer relationship.

The law school faculty was a group "relatively small in number, oriented more closely to their chosen field than to the academic or university world, with intellectual interests more nearly aligned with those of their brethren in practice than with their academic colleagues of the faculty."[116] The Board continued its opinion stating that:

> "We believe we must be especially watchful in guarding the rights of minority groups whose intellectual pursuits and interests differ in kind from the bulk of the faculty. 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."[117]

Recognizing that the law school faculty must be granted the right to demonstrate their wishes in the matter of representation for the purposes of bargaining, the Board ruled that a separate election be conducted among the law school faculty to determine if they desire to be included with the remainder of the faculty in a university wide unit for purposes of collective bargaining. Maintaining that the law school faculty were members of two professions - the legal profession and the teaching profession - a majority of the Board believed that the

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[116] Id. at 643.

[117] Id.

Board was obliged to provide the opportunity for members of two professions to decide whether they wish to remain apart from or be cojoined with the members of their second profession.

Two members of the Board offered a vigorous dissent in this case. The dissenters took issue with both the extraordinary election procedure directed by the Board and the argument that the law school faculty constituted a distinct minority group lacking any overriding shared community of interest with other non-legal teaching faculty at the university. Members Fanning and Penello noted that if the community of interest among the law school faculty was so distinct, the proper solution would be to find separate units appropriate particularly in view of the fact that "our colleagues freely admit that there is an overall community of interests and that the factor they rely on to justify their unique treatment of the law faculty is not peculiar to that faculty...the real distinction is the identity of that profession."[118] Questioning the wisdom of singling out and bestowing a special status on the law faculty by allowing them to be excluded from a unit in the face of a request to include them (as the petitioning AAUP had done) and the lack of any other labor

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[118] Id. at 645.

organization seeking to represent them separately, the dissenting opinion noted that the Board had not permitted elections "for the purpose of carving out a segment of an appropriate unit for purposes of nonrepresentation."[119] Since the Board had established a procedure for permitting minority groups of employees with identifiable separate interests who nevertheless shared a sufficient community of interest to be included in an overall unit,[120] the dissenting

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[119] Id. at 646.

[120] In view of the foregoing, including our conclusion that either separate university and law school units or an overall unit would be appropriate and that the desire of the law faculty are critical on this issue, we shall not make a final unit determination at this time, but shall direct that elections be conducted in the following voting groups at the Employer's campus.

(a) All full-time faculty members of the Law School employed at the Employer's Syracuse, New York, law school excluding all other full-time faculty members employed by the Employer and excluding all officers of administration, guards, watchmen and supervisors as defined in the Act.

(b) All full-time faculty members employed by the Employer and excluding the faculty members in voting group (a) and all officers of administration, guards, watchmen and department chairman and supervisors as defined in the Act.

The employees in voting group (a) will be asked to answer the following three questions on their ballots:

(1) Do you desire to be included with the remainder of the faculty in a universitywide unit for purposes of collective bargaining?

(2) In the event the tally of the ballots as to question (1) shows that a majority of the employees in groups (a) desire to be represented in a universitywide unit do you wish to be represented for purposes of collective bargaining by the AAUP?

members were not convinced that the election procedure directed by the Board in this case was similar to permitting professionals to decide whether they wished to be included in a unit with nonprofessionals particulary in view of the fact that all of the faculty involved here were professionals. Noting that educational institutions were not unique in their employment of minority groups with special interests, the dissenter posed the question:

> "If the law faculty is more professional than the faculties of the schools of engineering or economics, are corporation's lawyers then not more professional than its engineers or accountants?"[121]

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(3) In the event the tally of the ballots as to question (1), shows that a majority of the employees in group (a) desire to remain in a separate unit do you wish to be represented for purposes of collective bargaining by the AAUP, the LFA, or neither?

If a majority of the group (a) employees vote "yes" to question (1), the tally of the ballots as to question (3) shall be disregarded and the tally of the ballots as to question (2) shall be merged with the ballots of the remainder of the university faculty, which in the circumstances, we find to be an appropriate unit, with all ballots to be accorded their face value whether for representation by the AAUP or for no representative. If a majority of the group (a) employees vote "no" to question (1), the tally of the ballots as to question (2) shall be disregarded and the ballots as to question (3) shall be tallied and the Regional Director shall issue the appropriate certification.

[121] Id. at 646.

Since the law school faculty were employed as teachers not as lawyers, the dissent noted that it was their terms and conditions of employment as teachers, not as lawyers, which would concern the parties in any collective bargaining negotiations.

Claiming that "it is evident that Congress intended the fact of professional status and not the identity of the profession"[122] to be the controlling factor in determining separate professional units, the dissent concluded that it was not adverse to a separate unit for the law school faculty but was opposed to the adoption of a special voting procedure which would permit separate nonrepresentation.

In New York Univ., supra, the Board concluded that a separate unit for the law school faculty would be appropriate but that an overall unit of all the faculty would also be appropriate. Deciding that the situation was similar to that in Syracuse the Board directed the same separate election here as in that case.

Part-time Faculty Members

The 1971 C. W. Post Center of Long Island Univ., supra case was the first one in which the Board was requested to determine an appropriate bargaining unit for a university teaching staff. The university maintained that a unit composed of the full-time faculty

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[122] Id.

was the appropriate one; the petitioning union was seeking a unit of all professional employees, directly or indirectly involved in student instruction. The record revealed a number of differences between the full and part-time teaching faculty, notably the number of hours each group was expected to teach, a separate salary scale and the unavailability of tenure and fringe benefits to part-time faculty.

The Board's decision to include part-time faculty in the unit hinged on its finding that part-time faculty shared the same professional qualifications as their full-time colleagues. Further, both groups were engaged in the identical primary function of teaching.

Discounting the university's argument that the Board should apply other principles in making unit determinations than those used in its industrial sector cases, the Board commented that "we are not persuaded that such prinicples will prove to be less reliable guides to stable collective bargaining in this field [the educational one] than they have proven to be in others [the various industrial fields]."[123] The Board concluded that neither the outside employment of the part-time faculty, nor the fact that they out numbered the full-time faculty or that they did not receive benefits dictated their exclusion from the

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[123] C. W. Post Center, supra at 905.

unit and found that as regular part-time professional employees they could appropriately be included in a unit with the full-time faculty. On the same day, the Board reiterated this decision in a case involving the Brooklyn Center of Long Island Univ. In Long Island Univ., supra the Board again included part-time faculty in the unit.

In Univ. of New Haven, the Board dismissed the unions' request for a unit which would exclude part-time faculty members. Full-time faculty members at the university taught twelve hours per semester, received fringe benefits, were eligible for tenure and were paid substantially more than the part-time faculty. Part-time faculty members taught from three to twelve hours a semester, with most teaching less than six hours; they did not receive fringe benefits and were not eligible for tenure.

The Board stated that "we have previously held in C. W. Post Center of Long Island Univ. that the well-settled principles concerning the unit placement of part-time employees with full-time employees apply to a professional unit of faculty members [emphasis added]."[124] Further, the Board held that it could find no significant differences between the facts in C. W. Post and the facts in this case; therefore a unit of full-time and part-time faculty was the appropriate

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[124] Univ. of New Haven, supra at 478.

one unless all parties involved agreed to exclude part-time faculty members. Since no labor organization sought to represent such a unit the Board dismissed the petition.

In Fordham Univ., supra, the Board again upheld its previous decisions regarding part-time faculty members. Referencing Univ. of New Haven, the Board stated that "regular part-time faculty members must be included in the same unit absent agreement of the parties to exclude them."[125]

The next major case to come before the Board involving a question of the placement of part-time faculty within a unit was Univ. of Detroit, supra.

The university employed about 230 part-time faculty members in several of its schools including the Day and the Evening College of Arts and Sciences, the School of Architecture, the College of Engineering, the School of Law and the School of Dentistry. The length of time part-time faculty spent teaching per semester varied from school to school within the university depending upon the particular needs and circumstances of the specific school involved.

The Petitioner requested that if the Board decided to include part-time faculty in the bargaining unit, it should also determine

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[125] Fordham Univ. at 139.

which part-time faculty members were eligible to vote by establishing a standard to determine eligibility.

The Board agreed "that the circumstances herein require that the Board develop a test for this case to insure that only those part-time faculty members having a substantial and continuing interest in wages, hours, and working conditions of unit employees be eligible to vote."[126] It proceeded to articulate the 4-to-1 full-time to part-time hours taught ratio it had vaguely mentioned in New Haven Univ., supra; thus since all full-time faculty taught twelve hours per week per semester, a regular part-time faculty member included in this unit was one who taught three hours or more per week, per semester in all the university schools except the School of Law and the School of Dentistry. In the law school, full-time faculty taught eight hours, thus a regular part-time faculty member was one who taught two hours or more. Because the dental school was organized on a days-worked-per-year basis, and full-time faculty taught 128 days per school year, all part-time faculty who taught thirty-two days or more per school year were eligible to vote for representation.

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[126] Univ. of Detroit, supra at 567.

This was the first case in which the Board clearly defined a standard for determining voter eligibility among employees working only a part of their time at an institution. This standard was designed to insure the inclusion of regular part-time faculty who shared a substantial and continued interest in employment matters with other members of the unit.

In Manhattan College, supra, Florida Southern College, supra, and College of Pharmaceutical Sciences in the City of New York, supra, the Board consistently found regular part-time faculty to be members of the unit and relied upon the standard established in Univ. of Detroit to determine which part-time faculty constituted a regular part-time faculty member.

In July 1973, two years after the C. W. Post ruling on part-time faculty and the several later cases continuing this precedent, the Board completely reversed itself and decided that part-time faculty should not be included in a bargaining unit with full-time faculty.

In New York Univ., supra, the Board noted that it had consistently included part-time faculty in faculty bargaining units but that upon careful reflection, it had reached the conclusion that this practice was incorrect. Quoting Justice Frankfurter's observation that "wisdom too often never comes, and so one ought

not to reject it merely because it comes late,"[127] the Board stated that the arguments and contentions of the parties in this and other pending cases had convinced them that the function, nature and character of part-time faculty members was substantially different from that of the full-time faculty.

In New York Univ. the Board maintained that the differences between the full-time and the part-time faculty at NYU with respect to (1) compensation, (2) participation, (3) eligibility for tenure and (4) working conditions, demonstrated that no substantive mutuality of interest existed between the full-time and part-time faculty members.

Recognizing that "mutuality of interest in wages, hours and working conditions"[128] was the major determinant in whether a specific group of employees constituted an appropriate unit, the Board ruled that to include part-time faculty in a single unit with the full-time faculty would impede effective collective bargaining, noting that "we should not endanger the potential contribution which collective bargaining may provide in coping with the serious problems confronting our colleges and universities by improper

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[127] New York Univ., supra at 6.

[128] Id. at 7.

unit determinations."[129] Accordingly, New Haven and similar cases were overruled to the extent consistent with this decision.

Two members of the Board dissented in this decision. Chairman Miller, in his dissenting opinion, pointed out that regular part-time faculty were employees under the Act and were therefore entitled to be represented by a labor organization if they wished. By splintering the part-time faculty from the full-time faculty, the Board was opening the door to the proliferation of separate units on college and university campuses. "The universities, having no bottomless well of funds with which to provide everything that all groups ask, will be forced to seek accommodations as between these two groups, each of which will be competing for the same university dollars."[130] Miller believed that this decision both disenfranchised the part-time faculty members and disallowed a unit that offered the optimum in bargaining stability.

In the second dissent in the case, Member Fanning noted that the essential duty of the full-time and part-time faculty was teaching. Additionally the variance in compensation, working conditions and eligibility for tenure between the two groups was sufficently and

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[129] Id.

[130] Id. at 10.

proportionately related to the work and pay of the full-time faculty to support the inclusion of both in one unit.

In the matter of university governance, the record indicated that while the part-time faculty had no formal voice in university government, neither did all of the full-time faculty members; in fact the faculty had a minority role in the university senate where it was outnumbered by student and administration representation.

As to the matter of tenure eligibility, Fanning pointed out that tenure was "no more than a measure of continuity of interest... it does not insure that the employee himself will not sever the employment relationship."[131] Further, there was no guarantee that tenure eligibility would be accorded to full-time faculty members.

Part-time employees in industry were not excluded from appropriate units and the Board had previously held that it would apply the same rules in making unit determinations in university cases as it did in industry cases. Fanning further noted that a continuing process of unit fragmentation by the Board i.e., from university, to law school, to professional school, coupled with the segregation of units into full-time and part-time faculty ones would

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[131] Id. at 12.

prevent stable, effective collective bargaining from occurring on the university campus.

In Fairleigh Dickenson the Board devoted a single paragraph to its ruling on the inclusion of part-time faculty in the unit citing the New York Univ. decision and noting that "for reasons set forth in our decision"[132] in that case, part-time faculty were excluded from the unit. In Univ. of San Francisco, supra the petitioner wished to exclude the part-time faculty members in the law school. Again citing New York Univ. the Board concurred that the part-time faculty did not share a sufficient community of interest to warrant inclusion in the unit.

SUMMARY

The major bargaining unit scope issues involving private colleges and universities to come before the Board have been

1. whether multi-campus institutions should have units for bargaining that extend to all branch campuses. The conclusions of the Board indicate that separate units for multi-campuses are only considered when it is clear that these units pursue separate and distinct directions in

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[132] Fairleigh Dickenson, supra at 675.

matters of administration, personnel practices and policies, instruction and other areas. However, if the operations of a branch campus are integrated with those of the main campus, then the Board has consistently held that there is no basis for a separate unit.

2. who should be included in a nonprofessional department unit and which members of an academic institution are appropriately termed nonacademic and further which are clerical, technical, or service employees. In determining nonprofessional department units, the Board has been reluctant to splinter up college and university faculties and staffs thereby causing a proliferation of units that simply mirror the institution's organizational chart. Thus the Board has not permitted separate units for library clericals or for clerical and technical employees in certain departments when it was not convinced that the basic duties performed by these employees differed significantly from the work performed by clerical or technical employees in all other departments on campus. However, if there is evidence that the work performed by a specific group of nonprofessionals differs greatly in type and kind from other

employees, including employees in the same department, the Board has allowed separate units. The standard is whether it can be demonstrated clearly that the work performed by the employees of the requested unit is distinct and separate and includes such considerations as different lines of supervision, lack of transfer or interchange of employees, differing work shifts and lack of prior bargaining history. It is the Board's intent to prevent needless fragmentation of nonacademic employees on a campus however the Board has also been unwilling to place all campus clerical, technical and service or blue collar workers in the same unit for purposes of bargaining because separate communities of interest exist for these differing groups.

3. whether professional schools on a campus constitute a separate community of interest and if so, do they require a bargaining unit separate from other units. The Board has consistently found separate units for professional school faculty if that faculty indicated a desire to be represented in a separate bargaining unit because it has been convinced that a separate and distinct

community of interest exists among the professional schools faculty members.

4. whether part-time faculty members should be included in bargaining units with full-time faculty. Despite several early cases where part-time faculty members were included in units with full-time faculty, the Board has reversed itself and adopted a pattern of excluding part-time faculty from units of full-time faculty members because of the significant differences in compensation, working conditions and eligibility for tenure.

Chapter 5

BARGAINING UNIT DETERMINATIONS

Bargaining unit decisions invariably involve issues of supervisory status. A major function of the Board is determining who is or who is not a supervisor within the meaning of the Act and insuring that bargaining unit configurations will maintain the integrity of the unit.

In the academic environment, the distinction between supervisory and nonsupervisory personnel is often a blurred one. This is true particularly among college and university faculty and administrators where the concept of a community of scholars exists in place of more traditional hierarchial lines of authority.

Successful bargaining units are those that include as wide a range of employees sharing similar work-related interests as possible. A unit which excludes personnel who are logically a part of the unit will only exacerbate bargaining problems, particularly if the basis for exclusion is a finding that the excluded personnel perform supervisory functions.

This chapter will analyze the following four supervisory issues that have come before the Board: (1) status of faculty collectively, (2) administrators, (3) department chairmen and

(4) miscellaneous supervisory personnel. The Board has addressed each of these issues separately.

Status of Faculty Collectively

This section will review the five major cases to come before the Board involving questions on the status of faculty collectively.

C. W. POST CENTER OF LONG ISLAND UNIVERSITY, 189 NLRB 904 (1971)[133]

The Petitioner requested a unit of all professional employees at the C. W. Post Center who were engaged directly or indirectly in student instruction.

The Employer contended that the Board should not assert its jurisdiction over the professional personnel employed by the university.

The Board held that the usual employer-employee relationship existed between the university and its faculty and therefore, the faculty were employees within the meaning of the Act and entitled to its benefits.

The statutes of the university granted the full-time faculty "the power and responsibility to formulate and recommend student

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[133]This case is discussed in chapter 4 at 165 in the section "Part-time Faculty Members."

admission, curriculum, and graduation requirement policy, and rules for students, grading and honor assignments."[134] However, the Board noted that on these and other matters, the recommendations of the faculty were the result of collective discussion and consensus, and required a review by university officials and the final approval of the board of trustees.

The Board held that the full-time faculty members of the university qualified as professional employees under Section 2(12) of the Act and as such were entitled to all the benefits of collective bargaining.[135]

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[134] C. W. Post, supra at 905.

[135] The term "professional employee" means (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 judgement 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) had completed the courses of specialized intellectual instruction and study and described in clause (iv) in 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)." Section 2(12) of the NLRA as amended.

FORDHAM UNIVERSITY, 193 NLRB 134 (1971)[136]

The petitioning AAUP chapter sought a unit of all full-time and regular part-time teaching faculty including department chairmen, librarians and other support personnel.

Fordham, the Employer, maintained that all department and division chairmen, and assistant chairmen and all faculty members serving on policymaking committees were supervisors. The Employer maintained further that all of its faculty members, with the exception of the instructors, were supervisors.

The record indicated that faculty representatives sat on all board of trustee committees except the executive committee and participated in the faculty senate and a graduate council as well. The Fordham full-time faculty had a significant voice in determining degree and admissions standards and curriculum and in decisions on faculty appointments, tenure and promotion. Some faculty members responsible for the administration of research grants were able to hire and fire personnel working under such grants without the approval of the university.

The Board held that the faculty exercised its role in policy determination only as a group and that in keeping with its findings in

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[136]This case is discussed in chapter 4 at 153 and 169.

C. W. Post, this group determination was not sufficient to make the faculty supervisors. Accordingly, the Board held that faculty members were professionals within the meaning of Section 2(12) an as such were entitled to the protection of the Act.

MANHATTAN COLLEGE, 195 NLRB 65 (1972)[137]

The Employer contended that its faculty members were not employees within the meaning of the Act but supervisors and managerial employees.

The Petitioner sought to represent all full-time faculty members and professional librarians.

The Board held that "the contentions of the Employer amount to nothing less than a request to the Board to reconsider its decisions in C. W. Post, supra and Fordham Univ., supra,"[138] and ruled that a unit of faculty members was an appropriate one.

ADELPHI UNIVERSITY and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, FEBRUARY 29, 1972. 195 NLRB 639 (1972).

The petitioning AAUP chapter sought a unit of all full-time and regular part-time faculty including professional librarians and

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[137]This case is discussed in chapter 4 at 172 in the section entitled "Part-time Faculty Members."

[138]Manhattan College, supra at 66.

research associates and faculty members serving on the university's personnel and grievance committees.

The Intervenor, the American Federation of Teachers, Local 1460, sought an identical unit.

The Employer agreed that the requested unit was appropriate but sought to include graduate teaching and research assistants. There also was disagreement between the parties on the supervisory status of certain program directors and coordinators and department chairmen. Further, the Employer maintained that faculty members on the university's personnel and grievance committees collectively possessed and exercised supervisory authority.

The university was governed by a board of trustees who appointed the president. The vice president for academic affairs was directly responsible to the president and the board for the university's teaching and administrative personnel; each of the schools within the university was headed by a dean and associate or assistant deans directly responsible to the vice president.

The administration of the university's professional personnel relations program was shaped and guided by the faculty constitution and the personnel plan. One of the stated purposes of the personnel plan was "to assure that in accordance with the provisions

of this Plan, the faculty shall have primary responsibility for all personnel decisions concerning its members."[139]

The Board dealt with each of the disputed categories individually finding that graduate assistants, department chairmen, sequence chairmen and field work program directors should be excluded from the unit. Faculty members of the personnel and grievance committees, however, were included in the unit as were certain other directors and coordinators of miscellaneous programs at the university.

The Board noted that it had "not previously considered whether, in a university setting, professional employees are rendered supervisors if they have authority to hire and fire, as well as direct, students as part-time employees."[140] However, relying upon decisions made in an industrial setting, the Board found that professionals who devoted fifty percent or more of their time to nonsupervisory duties during the twelve months preceeding the election could properly be included in a professional unit.

In its discussion of the supervisory faculty personnel and grievance committee members, the Board noted that authority

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[139] Adelphi Univ., supra at 640.

[140] Id. at 645

exercised by the faculty as a group was not sufficient to exclude individual members of such a group from a faculty bargaining unit. Citing its decision in C. W. Post, supra, the Board maintained that in this case, as in Post, ultimate authority rested with the Board of Trustees not with the peer group. Therefore, the Board included the faculty members of the personnel and grievance committees in the unit stating that it was "not disposed to disenfranchise faculty members merely because they have some measure of quasi-collegial authority either as an entire faculty or as representatives elected by the faculty."[141]

NEW YORK UNIVERSITY, 205 NLRB 4 (1973)[142]

The Petitioner sought a unit of all full-time faculty, the half-time faculty in the school of dentistry and all professional librarians.

The Employer contended that its faculty members were outside the jurisdiction of the Act because they were not employees within the meaning of the Act but rather, "either collectively or individually, ... [they were] independent agents or supervisors."[143]

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[141] Id. at 648.

[142] This case is discussed in chapter 4 at 161 and 177.

[143] New York Univ., supra at 4.

Further, the Employer maintained that its faculty members, through their representation in the university senate and on the faculty council, possessed a true collegial system of governance and exercised actual supervisory authority that was not limited to merely providing advice to the board of trustees.

In its argument that the faculty were independent contractors and not statutory employees, the Employer stated that "the central issue in determing independent status is whether the recipient of services has the right to control the manner and means of performance as well as the results"[144] and contended that such was the case with its faculty members who, among other things, determined their own course content.

The Board was not convinced by these arguments. Stating that the Employer's contention that the faculty were supervisors instead of employees "amounted to nothing less than a request to the Board to reconsider its decision in C. W. Post... and Fordham University...,"[145] the Board found that it was unable to discern any major differences between the role of the faculty at New York University and the various roles of the faculties at C. W. Post Center

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[144] Id. at 5.

[145] Id. at 4.

or Fordham University. Further, the Board rejected the Employer's claim that the faculty made management-type decisions.

The Board concluded that the faculty were employees and as such were therefore entitled to the protection and benefits of the Act. This conclusion was based, in part, upon the fact that the faculty worked on the Employer's premises, used the Employer's equipment, received a fixed annual salary, sabbatical leave and, in some cases, tenure, and were not subject to the "entrepreneurial risks and profits normally associated with independent contractors."[146] Accordingly, the Board ruled that a university wide unit of New York University faculty was appropriate.

Administrative Officials

In the academic environment issues of who possesses supervisory status are less clear because faculty and administrators often share identical professional qualifications, backgrounds and experience. On some campuses, deans and department chairmen are chosen by their faculty colleagues and are more appropriately viewed as first among equals rather than holders of supervisory authority and representatives of management. This section will consider several of the most important cases that have been considered by the Board

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[146] Id. at 6.

involving decisions of whether administrative officials should be included in faculty bargaining units.

LONG ISLAND UNIVERSITY, 189 NLRB 909 (1971)[147]

The Board excluded academic deans and division chairmen from a unit of full-time and part-time faculty members. The Petitioner had requested that these employees be excluded; the Employer contended that these employees were not supervisors and therefore should be included in the unit.

The university was organized into various schools or colleges, each with an academic dean who acted as chief administrator. The schools or colleges were further divided into divisions and within each division were several related departments. The record indicated that each dean was a chief administrative officer, responsible for coordinating department and division budget requests and reconciling these requests with the individual school or college budget. The deans were empowered to reject the budget requests or recommendations of the division and department chairmen. All deans carried reduced teaching loads.

Division chairmen exercised the authority to make effective recommendations regarding the hiring of new faculty members and

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[147]This case is discussed in chapter 4 at 167.

changes in the status of other faculty members and employees. The Board interpreted this to indicate that deans and division chairmen were supervisors within the meaning of the Act,[148] and as such they were excluded from the unit.

ADELPHI UNIVERSITY, 195 NLRB 639 (1972)[149]

The Employer and the two petitioning labor organizations had agreed to exclude the director of admissions from the unit of full-time and regular part-time faculty members being sought.

The record indicated that the director of admissions did not have the authority effectively to recommend the hiring of faculty members or adjust grievances. The director of admissions did have, however, the authority to assign and reassign work to the twenty faculty members involved in the admissions program as well as the authority to recruit, select and effectively recommend the hiring of a full-time secretary. Asked to consider the question of "whether a

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[148]"The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement." Section 2(11) of the NLRA as amended.

[149]The initial discussion of the case appears at 242 above.

professional employee is rendered a supervisor within the meaning of the Act solely because he has the authority to hire and fire, as well as to direct, a secretary,"[150] the Board responded in the negative. In its decision to include the director of admissions in the bargaining unit, the Board noted that "the mere fact that professional employees have secretaries does not alone necessarily constitute them supervisors."[151]

THE CATHOLIC UNIVERSITY OF AMERICA, 201 NLRB 929 (1973)[152]

The Petitioner, seeking a unit of all full-time faculty of the law school, wished to exclude the associate dean and the assistant dean from the unit. The petitioning labor organization maintained that these two deans should be excluded from the unit because they were (1) supervisors and (2) lacked a community of interest with their faculty colleagues.

The record indicated that the assistant dean possessed full faculty status, attended faculty meetings and sat on faculty committees with full voting privileges. In addition, the assistant dean also taught a two-hour course each semester plus a summer session

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[151] Id.

[152] This case is discussed in chapter 4 at 157.

course. The assistant dean's primary responsibilities were in the area of recruitment and admissions. He did not substitute for the associate dean in the latter's absence nor did he make decisions which required the exercise of independent judgement.

The associate dean's primary responsibility was overseeing the implementation of the law school's academic programs, however, the associate dean taught two and one-half hours per week each semester. As with the assistant dean, the associate dean enjoyed full faculty status and participated as a voting member at faculty meetings and faculty committees. The associate dean received no additional compensation on account of his dean status and recommendations which he made regarding hiring, firing and promotion received no greater consideration than those of any other faculty members. Finally, very little authority was delegated to the associate dean in the dean's absence.

The Board determined that neither the assistant nor the associate dean were supervisors within the meaning of the Act and accordingly included in them in the unit.

SYRACUSE UNIVERSITY, 204 NLRB 641 (1973)[153]

The Employer contended that the associate dean of the law school should be excluded from a unit of faculty members because he exercised supervisory and management functions.

The petitioning Law Faculty Association wished to have the associate dean included in the faculty unit on the grounds that "his administrative functions are on behalf of the faculty, and that he is neither a supervisor nor member of management."[154]

The record showed that the associate dean established curriculum and scheduling for the summer sessions, met with university officials as a representative of the dean's office, substituted for the dean during the latter's absence and received and had access to policy and administrative information which was confidential. Additionally, the associate dean consulted with the dean "on matters relating to personal and confidential information regarding faculty members, particularly in matters that would not normally be submitted to faculty committees but would pertain to or affect the status of faculty members."[155] Based upon these

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[153]This case is discussed in chapter 4 at 158.

[154]Syracuse Univ., supra at 644.

[155]Id.

curcumstances, the Board held that the associate dean was a supervisor and excluded him from the unit.

UNIVERSITY OF SAN FRANCISCO, 207 NLRB 12 (1973)[156]

The Petitioner sought to exclude the assistant dean from a unit of all regular law school faculty members at the University of San Francisco. The Employer wished to include the assistant dean in the unit.

The record indicated that the assistant dean's primary responsibility was in the area of admissions and minority programs. The assistant dean was a member of the faculty with full-faculty status and voting privileges on faculty committees and also taught four hours per week per semester. The assistant dean did not substitute for the dean in the absence of the latter.

Based on the foregoing facts, the Board ruled that the assistant dean was not a supervisor and included him in the bargaining unit.

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[156]This case is discussed in chapter 4, "Professional Schools" at 164 and 181 under "Part-time Faculty Members."

Department Chairmen

C. W. POST CENTER, 189 NLRB 904 (1971)[157]

The Petitioner wished to exclude division and departmental chairmen from a unit of professional employees engaged in student instruction on the basis that they were supervisors. The Employer maintained that division and department chairmen were not supervisors and therefore, should be included in the unit.

The record indicated that division and department chairmen at the C. W. Post Center were generally selected by the dean. Occasionally, department faculty members elected a department chairman. Chairmen had some hiring responsibilities; they conducted interviews and discussed terms of employment with applicants for faculty positions. They also made recommendations to the dean regarding changes in the status of department members. Additionally, department chairmen hired and supervised all support personnel.

The Board found the department chairmen to be supervisors within the meaning of Section 2(11) of the Act[158] because they

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[157]This case is discussed in chapter 3 at 74, chapter 4 at 165 and above at 239.

[158]See page 249 above, note 148 for the text of this section.

exercised the authority to "make effective recommendations as to the hiring and change of status of faculty members and other employees."[159]

LONG ISLAND UNIVERSITY(BROOKLYN CENTER), 189 NLRB 909 (1971)[160]

All parties in this proceeding agreed to include department chairmen in the unit.

The record indicated that department chairmen were elected by the faculty, however, they exercised the same authority as the department chairmen in C. W. Post supra, having the authority to hire and discharge support personnel and to make effective recommendations regarding the status of faculty members. The Board ruled that the chairmen were supervisors under the meaning of the Act and accordingly excluded them from the unit.

FORDHAM UNIVERSITY, 193 NLRB 134 (1971)[161]

The Employer contended that all department chairmen were supervisors and therefore should be excluded from any faculty

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[159] C. W. Post, supra at 906.

[160] This case is discussed in chapter 4 at 167 and above at 248.

[161] This case is discussed in chapter 4 at 153 and 169; and above at 241.

bargaining unit. The petitioning AAUP chapter and the intervening Law School Bargaining Committee both maintained that chairmen should be included in the unit.

The record indicated that department chairmen were appointed for three-year terms by their respective deans, however, faculty members were consulted and faculty consensus recommendations for department chairmen were generally accepted.

With the advice and consent of the department members, chairmen made recommendations to the dean regarding the hiring of new faculty members. Likewise, the budget was prepared by the chairmen. Course offerings, class meeting times and the decision to split large class sections were made by the department chairman with the advice and consent of the other department faculty members. Promotion and tenure decisions were made by committees and, in both situations, the views of the department chairmen on these matters were not conclusive.

Department chairmen exercised no control over the day-to-day work of faculty members and had no authority to discharge a faculty member. Chairmen did select secretarial support personnel, however, once a secretary's probationary employment period ended, the terms of the contract between the university and the organization representing clerical employees became effective. Finally, the

various university catalogues listed department chairmen among members of the faculty rather than among members of the administration.

The Board included department chairmen in the unit, finding that they were not supervisors.

UNIVERSITY OF DETROIT, 193 NLRB 566 (1971)[162]

The petitioning AAUP sought to exclude department chairmen from the unit, contending that they were supervisors within the meaning of the Act. The university contended that department chairmen should be included in the unit because they lacked "any indicia of statutory supervisory authority."[163]

The record indicated that department chairmen were appointed to maximum four-year terms by the dean. A department chairman appointee did receive a reduced teaching load, however, such an appointment did not ordinarily mean an increase in compensation. Chairmen retained their faculty status and represented their departments in the university senate.

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[162]This case is discussed in chapter 4 at 170.

[163]Univ. of Detroit, supra at 568.

The chairman was required to request the authority to employ additional faculty members in the department. Department chairmen, department faculty members and the dean each separately reviewed prospective candidates. The chairman discussed remuneration with prospective faculty members, however, the actual salary was determined by the vice president. Tenure and promotion recommendations were made separately by the chairman and individual department members. The chairman was responsible "for the academic excellence of his department and the professional competence of the faculty"[164] and he consulted with the faculty and made informal reports to the dean if a department member was performing unsatisfactorily. In some departments the chairmen assigned courses, however, no chairmen directed the classroom work of other faculty members. Course scheduling was also a chairman's responsibility but the actual work was performed by other personnel. Finally, department chairmen directed and evaluated the work of department clericals, however, the university determined their hours.

Based on these facts the Board ruled to include department chairmen in the unit because the chairmen did not effectively

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[164] Id. at 568.

recommend the hiring, termination, tenure or promotion of faculty members and, further, because the university considered department chairmen as faculty members not as administrators.

ADELPHI UNIVERSITY, 195 NLRB 639 (1972)[165]

The petitioning AAUP chapter and the intervening AFT sought to include department chairmen in the unit; the university maintained that department chairmen possessed supervisory status and therefore should be excluded from the unit.

Department chairmen at Adelphi were appointed by the president after consultation with the department and related departments. Chairmen recruited, screened and recommended applicants for appointment and reappointment to new faculty positions. Most of these functions were performed in consultation with the other faculty members in the department. In the hiring and compensation of part-time faculty members, the chairmen had the authority to act on his own subject only to the approval of the dean and the vice president for academic affairs.

Department chairmen prepared the department's annual budget, made course assignments within the department and made initial determinations of whether part-time faculty in the department

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[165]This case is discussed at 242 above and at 249.

would be reappointed. Finally, the chairman recommended merit raises for members of the department.

The Board excluded department chairmen from the bargaining unit finding that they had supervisory authority. FLORIDA SOUTHERN COLLEGE, 196 NLRB 888 (1972)[166]

The Petitioner sought to include departmental executive officers (department chairmen) in a unit of all professional full-time faculty members employed by Florida Southern. The college also maintained that fifteen of the eighteen departmental executive officers did not exercise supervisory authority and should be included in the unit.

The record showed that departmental executive officers were appointed annually by the college president and their primary function was to serve as the department coordinator and as the liasion person between the dean's office and the department. The position carried no reduced teaching load or additional compensation; departmental officers did not prepare budgets, assign or schedule courses or approve expenditures made by other faculty members in the department. The recommendations of department executive officers

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[166]This case is discussed in chapter 4 at 122 under "Multi-campus Units" and at 174.

regarding prospective department faculty members received no more consideration than the views of any other department member and executive officers did not discuss contract terms with the other faculty in their departments.

Citing its decision in Fordham Univ., supra, the Board ruled that the departmental executive officers were not supervisors and therefore included them in the unit.

ROSARY HILL COLLEGE and NEW YORK STATE TEACHERS ASSOCIATION, APRIL 17, 1973. 202 NLRB 1137 (1973)

The petitioning labor organization sought a unit of all full-time faculty employees including fourteen concentration chairmen (department chairmen) and seventy-three full-time faculty members. Although the labor organization did not request the inclusion in the unit of the thirty part-time faculty members, the Regional Director included all regular part-time faculty who taught at least three semester hours per week.

The Employer, appealing the decision of the Regional Director, maintained that "its department chairmen [were] an integral part of the college administration and that they [were] the only line of supervision between administrative officials and the faculty."[167] Further, the Employer urged that because of the contrasts between

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[167] Rosary Hill College, supra at 1137.

the educational environment and the industrial environment, the Board should establish criteria for determining the supervisory status, or lack thereof, of department chairmen that took into account the varied organizational structures that existed on college and university campuses.

The organizational structure at Rosary Hill was as follows: the Board of Trustees appointed the president who consulted with an administrative council composed of the vice president and academic dean, the treasurer, the director of development, the dean of student affairs and other members appointed by the president. Additionally, a faculty senate, composed of approximately eleven members elected by their division or the full faculty advised and consulted with the president on behalf of their faculty constituents. The vice president and academic dean exercised general supervision over the faculty and such teaching matters as curricula, courses offered, grading practices, etc. Recommendations regarding the replacement and addition of faculty made by department chairmen required the approval of the vice president and academic dean. Appointments, evaluations, promotions and dismissals of faculty and some administrative personnel were made by the vice president and academic dean.

Concentration chairmen (department chairmen) were appointed by the president for a three-year term upon the recommendation of the academic dean and all department faculty members with at least two years of teaching experience in the department. Appointments were not made on the basis of academic ranking although three years of teaching in the concentration was one criteria generally used to establish eligibility for appointment. Concentration chairmen received a reduced teaching load and, at one time, also received additional stipends.

Faculty appointments were made by the president of the college in consultation with the academic dean and the concentration chairman. The concentration chairman's role in hiring consisted of determining in consultation with department members, whether a need for additional faculty existed and then screening for qualifications and compiling a list of potential applicants. Candidates were interviewed by students and faculty in the concentration field and a hiring committee which had veto power over the hiring decision of a concentration chairman.

Termination decisions were made by a faculty committee and the administrative council. Tenure and promotion decisions were initiated by individual faculty members who submitted their requests for either promotion or tenure to the concentration chairman. Such

requests were forwarded with the chairman's recommendation to the faculty promotion and tenure committee who in turn forwarded appropriate documentation and recommendations to the tenure committee where the final decision was made.

Department chairmen evaluated the performance of faculty members within their concentration on an annual basis. Additionally, chairmen were required to attend the dean's advisory committee meetings and presided over monthly meetings of a faculty policy committee within the concentration.

The Board held that faculty personnel decisions were made on a collegial basis, involving fellow faculty members or specifically appointed committees. Recommendations made by concentration chairmen were considered along with those received from other faculty members and students. Based on this, the Board ruled that chairmen were not supervisors and included them in the unit.

SYRACUSE UNIVERSITY, 204 NLRB 641 (1973)[168]

The petitioning AAUP chapter sought a unit of all full-time faculty members including department chairmen. The university contended that department chairmen were supervisors within the meaning of the Act and as such should be excluded from the unit.

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[168]This case is discussed in chapter 4 at 158 and above under "Administrative Officials" at 252.

The record indicated that department chairmen were appointed by the dean of the college for an indeterminate term. Department chairmen made final salary recommendations to the dean after discussing salaries on an individual basis with the faculty member involved. Employment decisions were occasionally made by department chairmen without prior discussion with members of the department. Group faculty interviews were conducted, but if a chairman's recommendation was contrary to the recommendation of the committee, the recommendation of the chairman was sustained. Letters of appointment were sent out over the name and title of the chairman and terminations of nontenured faculty were generally handled by the chairman after consultation with college officials who drafted and signed the termination letter. Department chairmen received substantial compensation and appeared to be in a permanent status; some did no teaching at all. A line of progression from the position of department chairman into a college or university executive position was evident. Finally, chairmen controlled support personnel, authorized leave and travel and allocated budget funds.

Based on these facts, the Board ruled that department chairmen exercised "the authority to make effective recommendations

as to the hiring and change of status of faculty members"[169] and controlled the day-to-day operation of the department. Citing C. W. Post, supra, the Board found that department chairmen at Syracuse exercised supervisory authority and accordingly excluded them from the unit.

NEW YORK UNIVERSITY, 205 NLRB 4 (1973)[170]

The university maintained that any faculty bargaining unit determined by the Board should exclude department chairmen. The petitioning AAUP chapter sought to include chairmen in its requested unit of all full-time faculty and half-time dental school faculty.

The record indicated that chairmen acted "primarily as instruments of the faculty"[171] in appointment, salary, promotion and tenure decisions and that chairmen were in theory and in practice considered coequal with their faculty colleagues in the departments, acting as spokesmen for the faculty on decisions arrived at through a collegial process.

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[169] Syracuse, supra at 642.

[170] This case is discussed in chapter 4 at "Professional Schools," at "Part-time Faculty" and above at 245.

[171] New York Univ., supra at 9.

In this case, department chairmen did have the authority to hire, reappoint, terminate, promote or determine the salary of part-time faculty employed in their departments. Further, the record showed that their supervisory responsibilities did not demand even fifty percent of their time. The Board was not persuaded that the chairmen were supervisors within the meaning of the Act and included them in the unit.

FAIRLEIGH DICKENSON, 205 NLRB 673 (1973)[172]

Both petitioning labor organizations requested units which would include department chairmen. The university maintained that department chairmen were supervisors and should be excluded from the unit.

Department chairmen were appointed by the university for a specific term, however, many chairmen throughout the university had been nominated by the department members and some departments provided for a rotating chairmanship. Department chairmen had substantial responsibility in the hiring of new faculty and the re-appointment of faculty who had not attained tenure. The chairman's recommendation for appointment was the one forwarded to the dean for final approval.

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[172]This case is discussed in chapter 4 at 123, 162 and 180.

Citing C. W. Post, supra, the Board ruled that chairmen were supervisors within the meaning of the Act because they made effective recommendations regarding the hiring and change of status of faculty members. Accordingly, the Board excluded the department chairmen from the unit.

LORETTO HEIGHTS COLLEGE and LORETTO HEIGHTS COLLEGE FACULTY EDUCATION ASSOCIATION, SEPTEMBER 7, 1973. 205 NLRB 1134 (1973).

Loretto Heights College, a private nonprofit institution located in Denver, Colorado instituted a change in its organizational structure just prior to its Board-ordered representation election. Since the reorganization had created the new position of program director, the petitioning labor organization sought clarification of the faculty unit previously certified to determine whether these program directors would be included or excluded from the unit. The college maintained that the program directors were supervisors within the meaning of the Act and should be excluded from the unit.

The College Reorganization Plan designated the vice president for academic affairs as the academic dean and distributed the functions of the old divisional chairmen and the director of the University Without Walls among the seven newly created program director positions. Three of these positions were considered full-time ones because they required the complete attention of the

directors. These were the director of nursing, the director of teacher education and the director of the University Without Walls. The four part-time directorships, so-called because they did not require 100 percent of the incumbent's time, were the director of social studies, the director of natural sciences, the director of arts and the director of humanities.

Program directors prepared unit budgets and exercised budget control, established intra-program policies, including the implementation of directives from the academic dean or the president. They were directly responsible to the academic dean. Additionally, program directors made recommendations in the screening and selection of employees for their units, supervised all unit personnel and evaluated their performance. Further, they were charged with the responsibility of conducting studies related to the grading of students, the independent studies option and the inter-disciplinary program. The record further showed that both the full-time and the part-time program directors received additional compensation for their positions.

The Board considered the full-time and part-time program directors individually and concluded that in each case the duties performed and the authority to make effective recommendations regarding the hiring and the status of program employees made the

program directors supervisors within the meaning of the Act. Accordingly, the Board ruled that they should be excluded from the unit.

Miscellaneous Supervisors

LONG ISLAND UNIVERSITY (BROOKLYN CENTER), 189 NLRB 909 (1971)[173]

The parties disagreed as to the supervisory status of the directors of the library, placement office, education and communications center and office of admissions as well as the registrars and associate registrars. The Petitioner wished to exclude these employees from the unit. The intervening AAUP chapter sought to exclude all except the director of the library. The Employer wished to include all in the unit.

The record established that all of these individuals had the authority to hire and discharge employees and/or direct the work of clerical and other employees working in their offices. Accordingly, the Board excluded all of the questioned individuals from the unit.

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[173]This case is discussed in chapter 4 at 167 and above in the section "Administrative Officials" at 248.

ADELPHI UNIVERSITY, 195 NLRB 639 (1972)[174]

The petitioning AAUP chapter and the intervening AFT local sought to include various program directors and coordinators in a unit of all full-time and regular part-time faculty. Additionally, both labor organizations sought to include the faculty members who served on the university's personnel and grievance committees.

The Employer maintained that the program directors and coordinators in question possessed supervisory status but took no position on the faculty members of the personnel and grievance committees. It did point out to the Board that these committee members collectively possessed and exercised supervisory authority. The specific positions in question were: the directors of field work, social work services, undergraduate field work, programs, and admissions; the directors of the instructional media center, motion picture studies program, accounting program, black studies program, graduate sociology program, institute for advanced psychological studies and the coordinator of the center of foreign languages. The Board considered each of these positions individually to determine whether they exercised supervisory authority.

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[174]This case is discussed above at 242, 249, and 259.

The record revealed that the directors of the field work, undergraduate and social work services programs had authority effectively to recommend the hiring of part-time faculty members and guest lecturers and to adjust grievances, therefore, the Board excluded them from the unit.

The director of admissions assigned and reassigned work to the twenty faculty members involved in the admissions program but performed no supervisory functions. The director of admissions had the authority to recruit, select and recommend for hire a full-time secretary for the admissions office, however, the Board noted that it was well settled "that the mere fact that professional employees have secretaries does not alone necessarily constitute them supervisors."[175]

In considering the remaining directors and coordinators, the Board excluded the director of the instructional media center citing the following: the director's authority to hire, direct, discipline and terminate the center's part-time employees; the budget preparation responsibilities of the position; the fact that most of the director's time was spent providing and servicing audio-visual equipment for the university community; and the fact that the director worked

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[175] Adelphi Univ., supra at 643.

directly for the vice president for academic affairs. The Board felt that the director of the instructional media center shared a "greater community of interest with the university's administrative personnel."[176]

Also excluded from the unit was the director of the black studies program. The director worked on an eleven-month administrative contract and recruited, hired and negotiated and fixed the salaries of new faculty appointees in the program. The director also had the dominant role in initiating, securing and implementing the various black studies programs. The Board ruled that "the director's overall responsibility for the black studies program, its contents, and its staff, and particularly the recruiting and hiring of part-time faculty members and lecturers, [was] like that of a department chairman"[177] and therefore excluded him from the unit.

The remaining directors and the coordinator of the center of foreign languages were included in the unit because their primary functions were academic, and they did not exercise supervisory responsibilities in performing these duties.

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[176] Id. at 645.

[177] Id. at 646.

Faculty members serving on the university's personnel and grievance committees were included in the unit. The record indicated that faculty members on this committee were elected at large for three-year staggered terms, were ineligible for re-election and were not permitted to serve concurrently on any other university committee. The committee considered and voted on all matters of tenure, hiring, promotion, sabbatical leave, suspension and termination. Although this committee was required to pass its recommendations on to the board of trustees for final action, the record showed that in the two year period preceeding the case, no personnel action recommended by the committee had been rejected by the the board of trustees. The Board noted that the committee exercised "considerable and effective authority with respect to a wide range of actions affecting the status of the university's professional personnel."[178] Nonetheless, citing C. W. Post, supra, the Board noted that such consensus authority was not sufficient to render the members of the group supervisors. The Board re-emphasized this opinion, stating that "we are not disposed to disenfranchise faculty merely because they have some measure of quasi-collegial authority

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[178] Id. at 648.

either as an entire faculty or as representatives elected by the faculty."[179]

TUSCULUM COLLEGE, 199 NLRB 28 (1972)[180]

The Petitioner sought a unit of all full-time and regular part-time faculty including the faculty members of the executive committee. The Employer maintained that these faculty members should be excluded from the unit.

The record indicated that the six faculty members of the executive committee were elected by the faculty for three-year terms. The principal function of the executive committee was the evaluation of classroom teachers. Additionally, the committee acted "for the faculty between regular faculty meetings and wherever problems require immediate faculty attention."[181] The committee also prepared agendas for faculty meetings and nominated members of other faculty committees. The executive committee made tenure and promotion recommendations as well as sabbatical and other leave recommendations. Although such recommendations required the final approval of the board of trustees, the record showed that there was

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[179] Id.

[180] This case appears here for the first time.

[181] Tusculum College, supra at 29.

little or no chance of promotion if the executive committee recommended against it.

Citing its decision in Adelphi, supra, the Board concluded that the executive committee, as a group had some supervisory authority but that no individual member of the committee was a supervisor. Accordingly, they were included in the unit.

ANALYSIS

In the process of determining college and university faculty bargaining units, the Board has consistently faced the problem of deciding questions of supervisory status. Because faculty members perform their academic and scholarly tasks with considerably more autonomy than virtually any industry employee, determining supervisory functions is often a complicated task. Even faculty members in positions which are ostensibly administrative ones often do not exercise supervisory authority as it is defined by the Act and interpreted by the Board. Further, the Board must strive to determine bargaining units which consist of appropriate groups of employees. Placing dissimilar groups of employees together in a bargaining unit can result in the disruption and possible collapse of the bargaining process. The present Board Chairman, Betty Southard Murphy, has

relied upon the text of a 1962 Board decision to describe the Board's responsibility in determining precise units:

> "...Section 9(b) of the Act gives the Board responsibility for determining the unit of employees which is appropriate for collective bargaining purposes. In this connection, the Board has stated:
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> "In performing this function (unit determination), the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time, it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered (emphasis added)."[182]

This applies particularly in the matter of supervisory status questions. If a unit does not encompass employees perceived by other employees in the unit to be peers or if a unit includes employees perceived by the other employees in the unit to be supervisors, then

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[182]Betty Southard Murphy, Letter to Jerry C. Lee, dated January 19, 1977, page 3. The case citation to which Chairman Murphy refers is Kalamazoo Paper Box Corp., 136 NLRB 134 (1962) at 137.

clearly effective bargaining cannot be accomplished by either labor or management.

Status of Faculty Collectively

One of the first questions the Board had to decide in its consideration of the issue of supervisory status among academic was whether faculty members should be considered employees. C. W. Post, 189 NLRB 904 (1971) was the first case in which the Board was asked to make a unit determination involving a university teaching staff. In this decision, the Board was convinced that although faculty members exercised considerable power and responsibility with regard to both academic matters such as curriculum decisions, admissions standards, student rules, etc., and personnel matters such as hiring, promotion, reappointment and tenure decisions, these duties and responsibilities were "reviewable by university officials and finalized by the board of trustees,"[183] and were exercised by the faculty as a group. The Board was, therefore, convinced that the faculty were professional employees of the university, enjoying an employer-employee relationship with the institution and, as such, were entitled to all the benefits and protection of the Act.

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[183] C. W. Post, supra at 905.

The next case to test the collective status of faculty as employees and then attempt to determine which, if any, of the faculty members in question were supervisors, was Fordham Univ., 193 NLRB 134 (1971). In this case the university maintained that all faculty members were supervisors and therefore no bargaining unit could be appropriate. Noting that the "ultimate authority in the university is possessed by an independent and self-perpetuating board of trustees, which appoints the president, the chief executive officer,"[184] the Board rejected the university's contention that all faculty members were supervisors. Relying upon its decision in C. W. Post, supra, the Board felt that the fact that the faculty exercised policy-making authority was an insufficient basis for a supervisory ruling since such authority could be exercised only as a group. Later in a second decision involving Fordham University, the Board re-emphasized this attitude in a lengthy footnote comment on the matter of faculty freedom of action and authority:

> "We are not here dealing with a production assembly line in an industrial environment where "first-line" supervisors are either needed or required.... each faculty member because of the nature of the work, must of necessity, retain not only a great deal of freedom in the conduct of courses but also in the pursuit

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[184] Fordham Univ., supra at 135.

> of academic objectives.... In our opinion in a university faculty setting [ratios of supervisors to employees] have little relevancy."[185]

Thus the Board had taken a strong position on the right of faculty members to engage in union activities and collective bargaining despite the fact that their positions and status as faculty members accorded them a significant amount of job independence and authority. Decisions in Manhattan College, supra and Adelphi Univ., supra relied upon the precedent established in C. W. Post and the first Fordham decision and in both cases the Board affirmed the employee status of faculty members who were engaged in the usual employer-employee relationship with their respective universities.

When New York University argued that its faculty were not employees "but rather, either collectively or individually,... independent agents or supervisors,"[186] the Board dismissed the argument noting that such a contention amounted to nothing less than a request that the Board reconsider its decisions on the status of faculty collectively in C. W. Post, supra and Fordham Univ., supra. The university maintained that its position as a mature university rather than a teaching institution placed its faculty in a different status

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[185] Fordham Univ., 214 NLRB 971 (1974) at 973, note 11.

[186] New York Univ., 205 NLRB 4 (1973) at 4.

than the faculties at either C. W. Post or Fordham. The Board reacted to the contention thusly:

> "...we are unable to detect any critical distinctions between the faculty role here and that in other cases where we have rejected such arguments. The role of the faculty in the university senate, and faculty council, and with respect to hiring, promotion, salary increase, and the granting of tenure, does not vary markedly from what it was in those cases. The faculty is not in the position of management relative to these personnel decisions and is not the final authority."[187]

The Board's position in all of these decisions was consistent, and makes clear the fact that it is unlikely that the Board will look favorably on any argument that attempts to place faculty members as a group outside the protection of the Act. Some faculty members may be supervisors, however, all faculty members are not. Rather, in the eyes of the Board, they are professional employees entitled to the protection of the Act, "thus, the Board has consistently held that faculty members are employees and not supervisors, managers or independent contractors."[188]

Administrative Officials

In the organizational structure of any educational institution the status of various administrative officials is often a vague one.

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[187] Id., at 5.

[188] Betty Southard Murphy, Chairman, National Labor Relations Board in letter to Jerry C. Lee dated January 19, 1977, p. 4.

Since the majority of campus administrators are drawn from the ranks of the teaching faculty and generally possess the equivalent professional qualifications of the teaching faculty, questions of their supervisory status were, in the early days of Board involvement in educational institutions, often given individual considerations. The Board has approached the matter of whether deans, assistant and nonacademic deans, admissions directors and various other administrative officials should be included in faculty bargaining units on a case-by-case basis, and has used its customary supervisory guidelines to reach its decisions.

In Syracuse Univ., supra, the Board excluded the Associate Dean of the Law School from a unit of law school faculty members because it was convinced that the dean exercised supervisory authority and was a member of management. The facts that the associate dean maintained a very close relationship with the dean, had access to confidential or personal information regarding faculty members "particularly in matters that would not normally be submitted to faculty committees but would pertain to or affect the status of faculty members;"[189] and acted as the dean in the absence of the

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[189] Syracuse Univ., supra at 644.

latter convinced the Board that, in this instance, the associate dean exercised supervisory authority.

In two other cases[190] also involving law school faculty members, however, the Board found that neither the assistant dean of the law school at the University of San Francisco nor the associate dean at Catholic University Law School exercised supervisory authority. In both cases, the subordinate deans did not serve as the law school dean in the absence of same. Both subordinate deans enjoyed full faculty status, continued to teach although their teaching loads were reduced, and attended and participated in faculty committee meetings with full voting privileges. The Board felt that a substantial community of interest existed between deans such as these and the rest of the law school teaching faculty, and that these deans did not exercise supervisory authority within the meaning of Section 2(11) of the Act.[191]

In Long Island Univ., supra the Board concluded that the academic deans and division chairmen of the various schools or colleges within the university were supervisors and as such, were

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[190] Univ. of San Francisco, supra and The Catholic Univ. of America, supra.

[191] See page 248 above for the text of this section.

excluded from a unit of faculty members. The record indicated that the authority exercised by the academic deans and division chairmen at Long Island included budgetary authority, and the power to make effective recommendations regarding hiring, promotion, tenure and other personnel actions. These personnel also carried reduced teaching loads. The Board therefore found them to be supervisors within the meaning of the Act. This decision clearly demonstrates the Board's reliance upon a showing of the authority to make effective recommendations regarding personnel actions involving other employees as the foundation for supervisory status. In short, any employee who acts in the interest of the employer in making effective recommendations to hire, fire, promote, or in any way alter the employment status of another employee is considered to be a supervisor. The critical test, however, is whether such recommendations are usually accepted, whether they are truly effective ones that are tantamount to ordering the change.

In Adelphi Univ., supra, the Board included the director of admissions in a unit of faculty members on the basis of the fact that he was a professional employee sharing a community of interest with the faculty. The university and the petitioning labor organization wished to exclude the director from the unit because he exercised the authority to recruit and hire a full-time secretary.

At issue then, was the question of whether the authority to hire, direct and terminate the activities of a secretary automatically rendered a professional employee a supervisor. The Board's answer was a resounding one:

> "The issue of supervisory status usually arises where authority is regularly exercised on the employer's behalf, over employees sought by the union, such as foremen in a production and maintenance unit.... This does not mean, however that a ... conflict of interest is necessarily created whenever persons occasionally exercise some authority over other employees of the employer...where professionals regularly (more than 50 percent of their time) supervised nonunit employees, they [are excluded] from a unit of professional employees..."[192]

The Board here was referring to its fifty percent standard meaning that in cases where professional employees spent more than fifty percent of their time supervising nonprofessional employees, the Board found them to be supervisors and excluded such professionals from bargaining units with other professionals because "the principal interests of the excluded professionals were so allied with management as to establish a differentiation between them and other employees in the unit."[193] Noting that the Board could not, by law, determine units which included supervisory and nonsupervisory

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[192] Adelphi Univ., supra at 644.

[193] Id. at 644.

personnel because of the conflict of interest such a mix would create, it went on to state:

> "The underlying rationale of this body of precedent is that an employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest... (emphasis added)"[194]

Thus the Board was clearly demonstrating its determination to find the most appropriate units possible. The fact that professionals may exercise some supervisory authority over nonprofessionals is insufficient grounds to exclude them from a bargaining unit of professionals if such supervisory activites are performed less than fifty percent of the time.

Department Chairmen

Whether department chairmen should be included or excluded in bargaining units composed of faculty members has been one of the most litigated issues in academic collective bargaining to date. As with every other issue, the Board's approach has been on a case-by-case basis resulting in decisions which seem inconsistent.

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[194] Id. at 644.

In C. W. Post, supra, the first case involving a faculty unit determination, the Board excluded department chairmen from the unit because the Board was convinced that they performed supervisory functions, namely the hiring of some new faculty and the recommendations they made regarding faculty status.

Two more cases heard in 1971, Fordham Univ. and Univ. of Detroit, supra reversed this decision because in both cases, the Board included department chairmen in the unit. At Fordham University the Board noted first that department chairmen did not exercise sufficient supervisory authority over other professionals in the unit and then stated:

> "...it is significant that the department chairmen consider themselves, and are considered by faculty members to be representatives of the faculty rather than of the administration. There is some indication that the university views them similarly. Thus, the catalogues of the various schools refer to chairmen as members of the faculty rather than as part of the administration."[195]

The Board seemed to be saying here that it was placing some significance on the fact that department chairmen themselves as well as the university administration considered them faculty members rather than representatives of management.

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[195] Fordham Univ., supra at 139.

In Univ. of Detroit, the Board again referred to the fact that the university apparently regarded chairmen as faculty members not administrators, and noted that chairmen did not sign administrative agreements upon appointment, received no additional compensation for the position and represented the faculty, not the administration, at university senate meetings. The Board was convinced that no department chairmen at Detroit exercised effective supervisory authority and noted that "the chairman's recommendation, if any, [in the case of faculty personnel action] is just one of several made to the appropriate university official or body which has the authority to make a binding decision for the university."[196]

In Long Island Univ., supra, however, the Board ruled that department chairmen were supervisors within the meaning of the Act despite the fact that all the university and the petitioning union requested that department chairmen be included in the unit. This decision was also handed down in 1971 and highlighted the inconsistency which seems to mark many of the early cases. Although the record of this case is not extensive, the Board was convinced that even though chairmen were elected by the faculty members in their department, they were involved in the exercise of supervisory

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[196] Univ. of Detroit, supra at 568.

authority and empowered to make effective recommendations regarding the personnel actions of other faculty members and were therefore supervisors within Section 2(11) of the Act. Although the position of both the university and the union in this case seemed to indicate that the institution viewed department chairmen as a part of the faculty and the faculty felt that chairmen represented them and not management, the Board nevertheless excluded the chairmen, a contradition to at least one of the reasons indicated in the two preceeding cases for including chairmen in a unit.

In two later cases, Florida Southern, supra and Rosary Hill College, supra, the Board included chairmen in units with other faculty members. The opinion in Florida Southern was brief, relying upon Fordham, supra, however, the Board elaborated on its 1973 decision in Rosary Hill. Stating that "we are not persuaded on the basis of one experience to date with university cases in which [department chairmen's] 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 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 Section 2(11) or that their recommendations

affecting personnel status are relied on and generally followed."[197] Thus, the Board was stating that either the indicia spelled out in Section 2(11) must be present or that the department chairmen must have the power to make effective recommendations that truly influenced personnel actions taken by other administrators.

In Adelphi Univ., supra, the record showed that department chairmen clearly did exercise supervisory authority and as such were excluded from the unit. The decision hinged on the fact that department chairmen recruited, screened and recommended applicants for appointment and reappointment to full-time and part-time faculty positions. Although, in the case of full-time positions, these functions were performed in consultation with the faculty, the chairman had the authority to perform these functions virtually on his own in the case of part-time faculty. The chairman also made the initial reappointment decision on part-time faculty members, and prepared the annual budget. Since these functions were clearly within the parameters of Section 2(11), the Board excluded the chairmen from the unit.

In Syracuse, supra and Fairleigh Dickenson, supra and Loretto Heights, supra, the Board ruled that department chairmen

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[197] Rosary Hill College, supra at 1137.

should be excluded from units of faculty members. In all cases, the decisions turned on the fact that the chairmen at these institutions exercised supervisory authority and included the ability to make independent judgements regarding confidential information, the authority to make effective recommendations regarding personnel actions and the authority to make employment decisions which contravene the wishes of the other members of the department.

It seems clear that the Board will almost authomatically exclude department chairment when they are appointed by the administration rather than elected by the faculty and when their status as chairmen ordinarily indicates that they will progress into the administrative ranks of the institution.

Miscellaneous Supervisors

The Board has considered the supervisory status of such academic personnel as library directors, registrars, admissions officers, various program and field work directors and other personnel whose functions involve considerable dealings with faculty members and students, who may or may not be considered professional employees and who are not in positions which can clearly be defined as staff support personnel functions rather than faculty adjunct positions. In each instance, the Board has considered the facts of each position separately and used the supervisory status

guidelines established by the Act to guide its decisions. In cases, such as Long Island Univ., supra where none of the involved parties contended that such employees as the graduate admissions officer and the education and communication center were professional employees, the Board excluded such employees from the unit. For those employees whom all parties considered professional, such as the director of the library, the registrars, the director of admissions and the director of the education and communication center, the Board then considered the matter of their supervisory status using its standard criteria.

In Adelphi Univ., supra the question arose of whether faculty members who served on the institution's personnel and grievance committee were supervisors. The record showed that this committee, through its members, exercised considerable and wide-ranging authority with respect to personnel actions. Citing its decision in C. W. Post, supra that authority exercised "as the result of collective discussion and consensus was not sufficient to render individual members of such [a] group supervisors,"[198] the Board then turned to the question of collegiality. "The difficulty both here and in Post may have potentially deep roots, stemming from the fact that the

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[198] Adelphi Univ., supra at 648.

concept of collegiality, wherein power and authority [are] vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which the Act was designed to cope in the typical organizations of the commercial world. The statutory concept of "supervisor" grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual to managers and supervisors."[199] This was the first time the Board acknowledged the difference between the authority and organizational structure of an industry and a university. This decision also pointed out the fact that the Board understood the concept of collegiality and the nuances of faculty organization, at least at Adelphi University. Noting that "a genuine system of collegiality would tend to confound us"[200] because it would not conform to the pattern for supervisory exclusion designed by the Act, the Board was convinced, however, that ultimate authority at the university rested not with the faculty peer group but rather with the board of trustees. Thus, although the Adelphi personnel and grievance committee exercised substantial power "the board of trustees (the top of the Pyramid) has seen fit to

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[199] Id. at 648

[200] Id. at 648

seek, in a formalized manner [through the personnel and grievance committee], the advice of the faculty (the base of the pyramid), and the faculty, by agreement with the trustees, has seen fit to channel its collective advice through the elected committees."[201] The Board was not convinced, then, that a true collegial system of authority existed which would justify excluding the faculty members of these elected committees from a bargaining unit of their peers. The Board wrote:

> "It is therefore apparent that these faculty bodies... are not quite either fish or fowl. On the one hand they do not quite fit the mold of true collegiality. But on the other, surely they do not fit the traditional role of "supervisor" as that term is thought of in the commercial world or as it has been interpreted under our Act."[202]

The Board included these faculty members in the unit because it was not convinced that authority was sufficient to render them supervisors and, as such, disenfranchise them because they possessed some quasi-authority as the result of their election, by their peers, to a representative office.

Tusculum College, supra reaffirmed the Board's decision in Adelphi, supra. In this case, the Board again refused to find faculty

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[201] Id. at 648.

[202] Id. at 648.

members of the executive committee supervisors simply because as members of this committee they exercised certain supervisory authority.

David W. Leslie, assistant professor of education at the University of Virginia and author of "NLRB Rulings on the Department Chairmanship,"[203] has stated that it is his opinion that the Board's case-by-case adjudication method is preferable to a rule-making approach.[204] Considering the diverse and seemingly anarchial character of college and university faculty organization arrangements, it is Mr. Leslie's belief that an individual approach permits the Board to retain flexibility in its rulings and the ability to accommodate the peculiarities of the various institutions involved. Because the roles of department chairmen vary so drastically from institution to institution, Leslie noted that Board's rules could not yet be drafted to justly and adequately apply to all existing situations, in part, because not enough time has elapsed to permit the development of a body of common law.

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[203] Educational Record, Vol. 53, No. 4 (Fall 1972) 313-320.

[204] Personal interview with Mr. Leslie conducted in Charlottesville, Virginia, November 19, 1976.

When questioned about the problems created by the Board when it applies its industrial models to the academic environment, Leslie likened the result to attempting to use a beachball to play a basketball game. In other words, the Board must develop distinct academic models and the evidence seems to indicate that such development is occurring.

In terms of the impact that Board decisions have had upon academic administration, Leslie noted that Board intervention particularly effected inter and intra department relationships. For instance, it would clearly be beneficial to a faculty union to have department chairmen included in a bargaining unit thereby eliminating personnel who could be used by management as front line supervisors in every academic department. Such actions force institutions and their faculties to clearly delineate lines of supervision in an industrial and therefore, alien fashion. Leslie did not think that faculty unionization had, as yet, effected traditional modes of government.

Finally, Leslie noted that on many campuses, faculty members tended to think of themselves as free agents, engaging in negotiation with the administration on an individual basis. Such attitudes, he felt, prevented the development of strong pro-union sentiment.

SUMMARY

The Board has considered the following questions in its decisions involving supervisory status among faculty members:

1. whether professional faculty members can be considered employees within the meaning of the Act. Yes, they are employees.
2. whether all faculty members can be considered independent agents or supervisors because of the independent judgement and freedom of activity associated with the exercise of their profession. No, they share an employer-employee relationship with an institution.
3. whether personnel decisions regarding tenure, promotion, appointment and reappointment made by a faculty collectively render all faculty supervisors. No, they do not.
4. whether associate, assistant and nonacademic deans are automatically supervisors. No, they are supervisors only if they meet the definition for supervisor according to the Act.

5. whether a professional employee is rendered a supervisor solely because he or she exercises the authority to hire, fire and direct the activities of a secretary. No, this authority alone is not sufficient to render an employee a supervisor.

6. whether department chairmen are, by definition, supervisors. No, only if they meet the test for supervisors.

7. whether faculty members elected to positions on personnel, grievance and other committees having collective supervisory authority are themselves supervisors within the meaning of the Act. No, they are not if they do not exercise supervisory authority in a non-collective setting.

Chapter 6

ANCILLARY SUPPORT PERSONNEL

Many of the bargaining unit determination cases which have come before the Board have included questions of whether various non-teaching academic support personnel should be included in the bargaining unit. This chapter will examine the important Board decisions regarding such ancillary support personnel as librarians, research associates and laboratory technicians, students who are employed in full or part-time positions on campuses and such miscellaneous classifications as guidance and placement counselors, admissions officers and athletic coaches. These questions will be considered under the following four classifications: (1) librarians, (2) research associates and laboratory technicians, (3) students and (4) miscellaneous support personnel.

Librarians

C. W. POST CENTER OF LONG ISLAND UNIVERSITY, 189 NLRB 904 (1971)[205]

The Petitioner sought a unit of all professional employees at the C. W. Post Center of Long Island University including

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[205] This case is discussed in chapter 3 at 74, chapter 4 at 165 and chapter 5 at 239 and 254.

librarians. The Employer maintained that the librarians should not be included in a unit with the full-time faculty members.

The record showed that C. W. Post employed twenty-seven librarians independently of the graduate school of library science. All of the librarians were designated in the university catalogue as having the rank of instructor or assistant professor and all of the librarians had the same salary, benefits and privileges of faculty members of similar rank. No librarians except the director of librarians had a rank higher than assistant professor and none of the librarians received tenure or sabbatical leave. Librarians participated in faculty meetings and, despite regulations barring them from voting at such meetings, there was evidence to indicate that the librarians, in fact, participated in the voting.

Aside from performing standard librarian duties, they worked with students individually, providing assistance with library problems and conducting sessions on the effective use of the library. At least one librarian had served on a student's thesis committee at the university's graduate school of library science. In addition, the librarians worked closely with the university's faculty to insure that the library would be able to obtain and supply books required for courses.

Based on these facts, the Board found that the librarians at C. W. Post were professional employees within the meaning of the Act,[206] and further determined that they performed functions closely related to teaching, shared many of the same benefits as the teaching faculty and therefore should be included in the unit.

LONG ISLAND UNIVERSITY (BROOKLYN CENTER), 189 NLRB 909 (1971)[207]

The Petitioner sought a unit of all professional employees engaged directly or indirectly in student instruction including librarians but excluding the director of the library. As in C. W. Post, supra, the university maintained that a separate unit should be established for employees other than full-time faculty and would include the director of the library in such a unit.

Citing the similarity between Long Island University and the C. W. Post Center, the Board included the librarians in the same unit with the faculty. However, the Board ruled that the director of the library should be excluded from the unit. Citing the fact that the director hired, terminated and directed the work of librarians and

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[206] See 327 infra for the text of Section 2(12) regarding professional employees.

[207] This case is discussed in chapter 4 at 167 and in chapter 5 at 248.

other employees, the Board ruled that the director was a supervisor within the meaning of the Act. Accordingly, the director was excluded from the unit.

FORDHAM UNIVERSITY, 193 NLRB 134 (1971)[208]

The petitioning AAUP chapter sought a unit of all full-time and regular part-time faculty including professional librarians. The Employer contended that all professional librarians should be excluded from such a unit.

The record showed that librarians at Fordham University did not possess faculty status and there was insufficient evidence presented to determine whether any of the librarians were supervisors or whether they were professionals.

The Board, citing C. W. Post, supra, stated that "it is clear that some of them [the librarians] are professional employees and should be included in the unit."[209] Because of its inability to determine which librarians were professionals and which librarians were supervisors, the Board ruled that all such be included in the unit and allowed to vote in a representation election stating that "any

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[208]This case is discussed in chapter 4 at 153 and 169 and in chapter 5 at 241 and 255.

[209]Fordham Univ., supra at 139.

librarian whose status either as a professional employee or as a supervisor is in dispute may vote subject to challenge."[210]

FLORIDA SOUTHERN COLLEGE, 196 NLRB 888 (1972)[211]

The Petitioner sought a unit of all professional, full-time faculty members employed by Florida Southern College. The Petitioner took no specific position on whether librarians should be included in the unit. The Employer maintained that the librarians should be included in the unit.

The record showed that the seven librarians in question possessed master's degrees in library science and had advanced training. Additionally, the librarians were eligible for, and in some cases possessed, tenure and attended and voted at faculty meetings. In their interaction with students, the Board felt that the librarians made substantial contributions to the education of students. Based on this information and again citing its decision in C. W. Post, supra the Board included the librarians in the unit.

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[210] Id. at 139.

[211] This case is discussed in chapter 4 at 174 and in chapter 5 at 260.

TUSCULUM COLLEGE, 199 NLRB 28 (1972)[212]

The Petitioner sought a unit of all full-time and regular part-time teaching faculty and the Petitioner and the Employer disagreed over the placement of the librarians, the assistant librarian and the assistant to the librarian in the unit.

The record showed that the librarian had an advanced degree in library science and that the assistant librarian had academic training in library science. Both attended and voted at faculty meetings and received the same fringe benefits as other faculty members. Both employees were under the immediate supervision of the dean of the college. The librarian advised the curriculum committee as to available library resources and both the librarian and the assistant librarian assisted faculty members and students in the use of the library and provided research instruction to students.

The Board found that both the librarian and the assistant librarian were professionals within the meaning of the Act because both utilized advanced training in a specialized field - namely library science - in their daily work. Accordingly, they were included in the unit based under the rationale used in C. W. Post, supra, and Fordham Univ., supra. Since all parties agreed that the assistant

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[212]This case is discussed in chapter 5 at 275.

to the librarian was a clerical employee, the Board excluded this employee from the unit.

THE CATHOLIC UNIVERSITY OF AMERICA, 201 NLRB 929 (1973)[213]

The Petitioner sought a unit of all full-time faculty of the law school including the head librarian. The Employer maintained that the head librarian was a supervisor and as such should be excluded from the unit.

The record showed that the librarian was a member of the faculty, holding the rank of assistant professor of law. The librarian attended and voted at faculty meetings and was active on faculty committees. Additionally, this employee assisted and directed students in the research and preparation of papers.

The head librarian made decisions regarding the hiring, termination, promotion and evaluation of subordinate members of the library staff. However, these decisions were made only after consultation with the associate dean and the head librarian did not provide any supervision whatsoever to any members of the requested bargaining unit.

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[213]This case is discussed in chapter 4 at 157 and in chapter 5 at 250.

Based on this evidence, the Board determined that the head librarian clearly shared a community of interest with the other members of the law school faculty. Additionally, the Board determined that the head librarian did not possess supervisory status and therefore included the head librarian in the unit.

NEW YORK UNIVERSITY, 205 NLRB 4 (1973)[214]

The petitioning AAUP chapter sought a unit of all full-time and half-time faculty including professional librarians. The second petitioner, the Faculty Law Association, sought a unit of all full-time faculty members of the law school including the law librarian. The Employer contended that an appropriate unit should exclude regular librarians and the law librarian claiming that the librarians lacked "a community of interest with faculty and that they [exercised] sufficient supervisory authority to compel their exclusion."[215]

The record showed that the librarians were titled curator, associate curator, assistant curator and library associate in descending order of rank and that they were not considered faculty members. The work week, retirement age, tenure requirements and

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[214]This case is discussed in chapter 4 at 161 and 177, in chapter 5 at 245 and 266.

[215]New York Univ., supra at 8.

grievance procedures for librarians differed from those of the faculty. Additionally, the librarians were not proportionally represented in the faculty senate.

Noting that the librarians were a "closely allied professional group whose ultimate function [was the] aiding and furthering of the educational and scholarly goals of the university,"[216] the Board ruled that the librarians should be included in the unit.

Commenting upon the university's contention that the professional librarians should be excluded because they were supervisors, the Board stated that "we reject the Employer's contention that all professional librarians possess supervisory authority over nonunit employees to a degree requiring their exclusion."[217] Citing Adelphi, 195 NLRB 639 (1972),[218] the Board noted that the supervisory exclusion was aimed primarily at situations where supervisory authority was regularly exercised over employees who were included in the unit sought by the labor organization, and that "where professional employees have spent less than fifty percent of their time

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[216] Id. at 8.

[217] Id. at 8.

[218] See chapter 5 at 242, 249, and 271.

supervising nonunit employees, they have been included in the unit."[219] Relying upon this standard, the Board excluded as supervisors those professional librarians who supervised other employees in the unit or who spent more than fifty percent of their time supervising nonunit employees.

UNIVERSITY OF SAN FRANCISCO, 207 NLRB 12 (1973)[220]

The Petitioner sought a unit of all regular members of the law school faculty excluding the law school librarians. The Employer contended that the law school librarians should be included in the unit.

The record showed that the law library staff consisted of the law librarian and two additional professional librarians. They did not have law degrees and did not teach any courses.

Citing its decision in New York Univ., supra, the Board found that a sufficient community of interest existed between the law library professional staff and the law school faculty to indicate that the two assistant librarians should be included in the unit. The law librarian was excluded because it was determined that the law librarian supervised the two professional librarians.

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[219] Id. at 8.

[220] This case is discussed in chapter 4 at 164 and at 181 and in chapter 5 at 253.

POINT PARK COLLEGE, 209 NLRB 1064 (1974)[221]

The Petitioner sought a unit of full-time faculty including librarians and the director of the library. The Employer maintained that the director of the library should be excluded from the unit on the grounds that she was a supervisor.

The record showed that the director of the library was also a member of the English department faculty, but in the recent past, she had spent all of her time administering the library. This administrative function included interviewing and effectively recommending librarians for hire as well as recommending the hire of nonprofessional library assistants. In addition, the director of the library served, along with other department chairmen, on the Academic Council.

Based on this evidence, the Board concluded that the director of the library was a supervisor within the meaning of the Act and accordingly excluded her from the unit.

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[221]This case appears here for the first time.

Research Associates and Laboratory Technicians

C. W. POST CENTER OF LONG ISLAND UNIVERSITY, 189 NLRB 904 (1971)[222]

The Petitioner sought to include laboratory assistants and research personnel in a unit of all professional employees at C. W. Post. The Employer maintained that a separate unit should be established for all professionals other than full-time faculty.

The record showed that a research associate in the biology department possessed a doctor's degree, had the rank of associate professor and was eligible for tenure. This researcher did no teaching. The Board ruled that the research associate was a professional employee who shared a sufficient community of interest with other faculty members to be included in the unit.

The record further showed that the biology laboratory and the chemistry laboratory employed lab managers whose primary duties were to see that the laboratories were properly stocked and to oversee the maintenance and repair of laboratory equipment. Additionally, these lab managers prepared slides and specimens and assisted faculty members in demonstrations and experiments in connection with classes. These employees were salaried, did not

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[222]This case is discussed in chapter 3 at 74, chapter 4 at 165 and chapter 5 at 239 and 254. See also page 299 above.

receive faculty privileges or responsibilities and were not considered faculty members. The work performed by these employees did not require advanced degrees in their respective fields and when they were called upon to assist or substitute for faculty members, they exercised technical functions which did not appear to require discretion or judgement of a professional nature. Based on these facts, the Board ruled that these employees were not professional. Accordingly, they were excluded from the unit.

FORDHAM UNIVERSITY, 193 NLRB 134 (1971)[223]

The petitioning AAUP chapter sought to include in a unit of all full-time and part-time teaching faculty all ancillary support personnel were professional employees. Noting that "precise meaning of the term [ancillary support personnel] is unclear,"[224] the Board stated that it appeared to encompass laboratory technicians. Since the Board was unable to determine whether these laboratory assistants had professional status, it ruled that they should be included in the unit and allowed to vote subject to challenge. This meant that either the Employer or the labor organization could later

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[223]This case is discussed in chapter 4 at 153, and 169 and in chapter 5 at 241 and at 255. See also page 302 above.

[224]Fordham Univ., supra at 139.

question the validity of the voting privileges extended to the laboratory assistants.

COLLEGE OF PHARMACEUTICAL SCIENCES IN THE CITY OF NEW YORK, 197 NLRB 959 (1972)[225]

The Petitioner sought a unit of full-time and regular part-time faculty excluding laboratory technicians and extension laboratory assistants. The Employer agreed that laboratory technicians should be excluded but maintained that the evening extension laboratory assistants should be included in the unit.

The record showed that the extension laboratory assistants prepared demonstrations and experiments to be used by extension faculty members in course lectures. These employees did not lecture themselves and their duties were similar to those of the laboratory assistants that both Petitioner and Employer agreed should be excluded from the unit. Based on this evidence, the Board found that these assistants were not professionals and excluded them from the unit.

POINT PARK COLLEGE, 209 NLRB 1064 (1974)[226]

The Petitioner sought to exclude one part-time laboratory associate from a unit of full-time faculty members. Two intervening

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[225]This case is discussed in chapter 4 at 175.

[226]This case is discussed in chapter 5 at

parties and the Employer maintained that this employee should be included in the unit. The record showed that this lab associate was not a member of the faculty and therefore was not entitled to faculty benefits or privileges.

The Board found that the lab associate did not share a sufficient community of interest with the other members of the unit because the position was not full-time nor did it carry faculty status.

Students

ADELPHI UNIVERSITY, 195 NLRB 639 (1972)[227]

The Employer sought to include graduate teaching and research assistants in a unit of all full-time and regular part-time faculty. The Petitioner maintained that graduate assistants should not be included in the unit.

The record showed that Adelphi employed 125 graduate assistants, approximately 100 of whom were teaching assistants with the remainder working as research assistants. All were graduate students pursuing advanced degrees. They did not have faculty rank, benefits or privileges, had no vote at faculty meetings and were not covered by the university's personnel plan. They were expected to devote twenty hours per week to their assistantships for which they

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[227]This case is discussed in chapter 5 at 249 and 271.

received stipends in varying amounts plus free course tuition. Their continued employment was dependent upon their continuing status as graduate students.

The Employer maintained that a "community of interest existed between the regular faculty and the graduate research and teaching assistants based upon their academic qualifications, functions, and remuneration (which, with tuition, was sometimes greater than that of regular part-time faculty members)."[228]

The Board noted that "unlike faculty members, graduate assistants are guided, instructed, assisted and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned."[229] In addition graduate assistants were sometimes elected by students as student representative on faculty-student committees. The Board rejected the Employer's argument that a community of interest existed between the graduate assistants and the faculty, stating that although these assistants performed some faculty-related tasks, a sufficient community of interest did not exist. Accordingly, the Board excluded them from the unit.

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[228] Adelphi Univ., supra at 640.

[229] Id. at 640.

COLLEGE OF PHARMACEUTICAL SCIENCES IN THE CITY OF NEW YORK, 197 NLRB 959 (1972)[230]

The Petitioner sought a faculty unit which would include teaching assistants. The Employer maintained that teaching assistants should be excluded from the unit.

The record indicated that the teaching assistants were graduate students working toward their own academic degrees and receiving a stipend and remission of tuition fees in exchange for their assistance. They worked sixteen to twenty hours a week performing lab experiments, preparing demonstrations, grading students' lab work and otherwise assisting the faculty member to whom they were assigned.

The Board ruled that graduate teaching assistants were primarily students. Citing its decision in Adelphi Univ., supra, the Board found that a sufficient community of interest did not exist between graduate assistants and faculty members or to warrant including them in the unit. Accordingly, they were excluded.

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[230]This case is discussed in chapter 4 at 175 and above at 312.

THE PRESIDENT AND DIRECTORS OF GEORGETOWN UNIVERSITY, 200 NLRB 215 (1972)[231]

The Petitioner sought a unit of full-time and part-time service and maintenance employees including students. The Employer maintained that students should be excluded from the unit.

The record showed that students employed in maintenance and service positions were paid differently than other part-time employees, depending upon the amount of financial aid they were receiving. They were generally not permitted to work more than twenty hours per week and their employment was usually for less than nine months each academic year.

The Board ruled that "since students have many facts peculiar to themselves"[232] and did not appear to share a community of interest with the other members of the unit they should be excluded from the unit.

CORNELL UNIVERSITY, 202 NLRB 290 (1973)[233]

The Petitioner sought a unit of all full-time and part-time employees, including students, working at the dining facilities

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[231]This case is discussed in chapter 4 at 145.

[232]Georgetown Univ., supra at 216.

[233]This case is discussed in chapter 4 at 126.

operated by Cornell on its Ithaca, New York campus. The Employer maintained that student employees should be excluded from the unit.

The record showed that while students often performed the same jobs under the same working conditions as non-student employees, they were treated differently by the university. Students were not hired through the personnel office, they worked on a semester basis and were paid differently and at a lower wage and they did not receive the same benefits as non-student employees. Also in most cases, student employees had supervisors who were also students.

The Board ruled that, in most cases, the student employees had no intention of remaining permanently in their present jobs and that their employment was incidental to their academic objectives. Citing its decision in Georgetown Univ., supra the Board ruled that the students did not share a sufficient community of interest with the other members of the unit and excluded them from the unit.

BARNARD COLLEGE and DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA, JULY 17, 1973. 204 NLRB 1134 (1973)[234]

This case reviewed and reversed the decision of a Regional Director to include six graduate assistants in a unit of office clerical and other nonprofessional administrative staff employees.

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[234]This case has not been briefed before.

The record showed that the position occupied by these students were reserved for graduate assistants, that they received a stipend and free room for their services, that they did not receive the fringe benefits enjoyed by regular part-time and full-time permanent employees and that they were not employed through the college personnel office.

The Board, citing the precedent established in Cornell Univ., supra and Georgetown Univ., supra ruled that these students should not be included in the unit because they shared a community of interest with other student employees and not with the regular full-time and part-time college employees in the unit.

THE LELAND STANFORD JUNIOR UNIVERSITY and THE STANFORD UNION OF RESEARCH PHYSICISTS, NOVEMBER 4, 1974. 214 NLRB 621 (1974).

The Board affirmed the ruling of the Hearing Officer.

The Petitioner sought a unit of research assistants (RA's) in the department of physics, maintaining that the "RA's are student employees who are paid through Stanford's normal payroll machinery for the work they are required to perform in order to obtain their salaries and that as such they [were] within the protection of the Act."[235]

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[235] Leland Stanford Junior Univ. at 621.

The Employer maintained that the RA's were students not employees and that the monies they received through the institution's normal payroll machinery were "in the nature of stipends or grants to permit them to pursue their advanced degrees and [were] not based on the skill or function of the particular individual or the nature of the research performed."[236]

The record showed that Stanford employed eighty-three student research assistants in five separate locations. All of the RA's were graduate students enrolled in the physics department and all were candidates for the Ph. d degree in physics. The university bulletin and its supplement "How to Get an Advanced Degree in Physics" clearly stated that physics Ph. d candidates were required to complete eight to twelve quarters of research and dissertation work.

The funds for RA payments were obtained through government grants or contracts or from other third party sources. These funds represented tax exempt income for the RA's and the RA's did not receive any of the fringe benefits extended to non-student employees.

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[236] Id. at 621.

The Board stated that the RA's were primarily students, not subject to discharge whose research tasks were not " grounded on the performance of a given task where both the task and the time of its performance [are] designated and controlled by an employer. "[237]

Miscellaneous Classifications

C. W. POST CENTER OF LONG ISLAND UNIVERSITY, 189 NLRB 904 (1971)[238]

The Petitioner sought to include guidance, admissions and placement counselors in a unit of all professional employees engaged directly or indirectly in teaching. The Employer maintained that a separate unit should be established for employees other than full-time faculty.

The record showed that counselors employed at the Guidance Center were qualified psychologists with psychology degrees. These counselors taught and also assisted students with emotional problems. The director of the center had the rank of associate professor.

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[237] Id. at 623.

[238] This case is discussed in chapter 4 at 165, chapter 5 at 239 and 254 and above at 310.

The admissions counselors had little contact with the faculty, did not have faculty rank or privileges and did not teach. They did not possess a degree above the bachelor's degree.

The academic counselors performed the function (formerly done by the faculty) of assisting and counseling undergraduate students in arranging their courses and academic programs. They did not have faculty rank or privileges and received salaries lower than those paid to instructors. While most possessed master's degrees, only a bachelor's degree was required for the position.

The Board excluded the admissions and academic counselors from the unit, finding that the functions they performed did not require advanced knowledge related to a discipline or field of science. Further, the Board did not feel that their jobs demanded the performance of intellectual and varied tasks requiring advanced knowledge as outlined in Section 2(11) of the Act.[238] Accordingly, they were excluded from the unit. In contrast, the duties of the guidance counselors, the Board felt, did require advanced knowledge and the

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[238] This section is the definition of the term "professional." For the text see page 327 infra.

MANHATTAN COLLEGE, 195 NLRB 65 (1972)[239]

The Petitioner sought a unit of all full-time faculty members excluding R. O. T. C. officers and athletic coaches who did not teach. The Employer argued that they should be included in the unit but that faculty members on terminal contracts should be excluded from the unit.

The Board held that R. O. T. C. officers who were military personnel on specific teaching duty assignments, paid by and subject to the rules and regulations of the military, did not share a sufficient community of interest with the remainder of the faculty. They were excluded from the unit.

The record showed that of the ten coaches in the athletic department, three were full-time faculty members, four coached part-time and did not teach; two more were full-time coaches and one coached half of the time and taught the remainder of the time. All the coaches had academic degrees, at least one had a master's degree and they all engaged in teaching mental and physical skills. The Board noted that their jobs might be "characterized as the practice of a special form of physical education."[240] The Board was

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[239]This case is discussed in chapter 4 at 172 and in chapter 5 at 242.

[240]Manhattan College, supra at 66.

convinced that the coaches were professional employees and included them in the unit.

Faculty members on terminal contracts, the record showed, were those faculty who were without tenure and had been notified that they would not be rehired at the end of the expiration of their current contract. The Board ruled that the terminal contract status of these faculty members did not make them any less a member of the faculty until the expiration of their contracts. "While they remain on the faculty they have a substantial community of interest with their colleagues,"[241] and accordingly they were included in the unit. FLORIDA SOUTHERN COLLEGE, 196 NLRB 888 (1972)[242]

The Employer contended that R. O. T. C. officers should be included in a unit of professional, full-time faculty. The Petitioner wished to exclude the R. O. T. C. officers. Citing its decision in Manhattan College, supra the Board excluded these faculty personnel from the unit.

Further, the Employer maintained that certain "dual function" employees - those whose duties were divided between

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[241] Id. at 68.

[242] This case is discussed in chapter 4 at 174, chapter 5 at 260 and above at 303.

administrative functions and teaching functions - should be included in the unit. The Petitioner wished to exclude these employees. The Board considered each of the dual function employees separately, consistently placing those with faculty status in the unit and excluding those whose "entire work efforts are directed toward the administrative functioning of the college,"[243] and whose work did not require any advanced degree or specialized knowledge.

TUSCULUM COLLEGE, 199 NLRB 28 (1972)[244]

The Petitioner sought a unit of all full-time and regular part-time teaching faculty. The Petitioner and the Employer disagreed over the placement of certain administrative personnel in the unit. These personnel included the dean of administrative services, the dean of students, the director of college relations and development, the business manager, the director of admissions, the director of information services and the associate for alumni affairs.

The record showed that none of these personnel taught at the college. They did attend and vote at faculty meetings and the dean of administrative services served as ex officio secretary of the faculty. although, unlike the faculty, they were paid for a twelve-month

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[243] Florida Southern College, supra at 890.

[244] This case is discussed above at 303.

employment year. The college catalogue listed all of these employees as members of the administration and they were supervised directly by the president of the college. Additionally, the college policy manual described the duties of these personnel under the heading "administrative."

Based on these facts, the Board determined that these personnel were administrative, that their primary functions were administrative and that they were viewed as such by the college. Accordingly, the Board ruled that a sufficient community of interest did not exist between the administrative personnel and the faculty to warrant including the former in the unit.

NEW YORK UNIVERSITY, 205 NLRB (1973)[245]

The Employer wished to exclude all faculty on terminal contracts from a unit of full-time faculty, arguing that they lacked a interest in the long-range responsibilities and relationships which unite[d] the remainder of the faculty."[246]

The Board, noting that faculty members could be in terminal contract status for as long as a year during which time they fully participated in all university activities, included them in the unit.

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[245]This case is discussed in chapter 4 at 161 and 177, in chapter 5 at 245 and 266, and above at 306.

[246]New York Univ., supra at 9.

Citing Manhattan College, supra the Board stated that "there [was] no evidence that terminal-contract faculty not hired as permanent employees subject to termination on the same basis as other employees in the unit,"[247] and therefore their status was no different than that of any other non-tenured faculty members except that they had already been notified of their termination.

POINT PARK COLLEGE, 209 NLRB 1064 (1974)[248]

The Petitioner and the Employer disagreed over the placement of various administrative personnel, program coordinators and coaches in a unit of full-time faculty.

The Board considered each category separately using the standards established in earlier cases to determine the inclusion or exclusion of the administrative personnel. Thus the director of continuing education, who would have been excluded by the Petitioner and included by the Employer was found to be performing full-time administrative functions and therefore was excluded. On the other hand, the coordinator of intra-collegiate programs was a position filled by a full-time faculty member who received some teaching

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[247] Id. at 9.

[248] This case is discussed above at 309.

release time to perform the duties of developing academic programs which involved serveral departments. The coordinator was included in the unit.

The record showed that the College employed three athletic coaches who taught physical education classes and coached varsity sports. They did not receive tenure and their reporting lines differed from that of the faculty. The Board ruled that they should be excluded from the unit.

ANALYSIS

In its determinations of cases involving questions of the placement of ancillary support personnel in or outside of a unit of faculty members, the Board has consistently relied upon the Act's definition of a professional employee as the standard for its decisions. The definition is as follows:

> The term 'professional employee' means (a) any employee engaged in work (i) predominently intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgement 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 (1) has completed the courses of specialized intellectual instruction and study and described in clause (iv) in paragraph (a), and (iii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."[249]

In conjunction with this standard for determining professional status, the Board also used the particular indicators of faculty status as they existed in specific campuses in question. For example, if a college or university accorded its librarians faculty status, albeit with some differences in benefits and privileges, then the Board has consistently included librarians in the unit. As with all units, librarians who were serving in a supervisory capacity were excluded.

In the C. W. Post Center, supra and Long Island Univ. (Brooklyn Center), supra cases the petitioning union sought units of all professional employees at two centers of Long Island University. Examining both the type and kind of work performed by the university's professional librarians and the status conferred on them by the institution i. e., as librarians with the rank of instructor or assistant professor, the Board held that these employees were "engaged in functions closely related to teaching"[250] and should, therefore, be

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[249]Section 2(12), National Labor Relations Act, 49 Stat. 449 as amended, 29 U. S. C., sec. 151-68.

[250]C. W. Post, supra at 906.

included in the unit. In the Long Island University case however, the director of the library, obviously also a professional employee was excluded from the unit because he supervised the activities of other professionals in the unit, and as a supervisor, was barred from inclusion according to the provisions of the Act.

In its Fordham Univ., supra decision the Board reiterated its C.W. Post decision with a slight reservation. The majority of the librarians at Fordham were, no doubt, professional employees, however, they were not accorded faculty status and insufficient evidence was presented to determine which librarians were professionals and which, if any, were supervisors. The Board ruled therefore that they should be allowed to vote in a representation election, but that their votes would be subject to challenge. This case clearly demonstrates the need to present sufficient documentation at bargaining unit hearings if the prospect of continued and costly litigation due to continued challenges of appropriate voters is wished to be avoided. The Board's decision in Florida Southern, supra and Tusculum College, supra relied upon the precedent established in C.W. Post, supra that the combination of advanced professional training and the participation in student education demonstrated a community of interest with the professional faculty members in other academic departments.

The three cases involving law librarians, Catholic Univ., supra, New York Univ., supra and the Univ of San Francisco, supra included law librarians in the unit with law school faculty members. The employers at both Catholic and NYU argued that the law librarians at their respective institutions exercised sufficient supervisory authority to warrant their exclusion from the unit and that the law librarians did not share a sufficient community of interest with the rest of the faculty. The Board summarily dismissed the latter contention claiming that the ultimate function of the law librarian as a professional group closely allied to the faculty "[converged] with that of the faculty, though pursued through different means an in a different manner."[251] This ultimate function was the futherance of the educational and scholarly goals of the university. In Catholic Univ., supra, the Board noted that the law librarian had faculty status and dismissed the supervisory status argument on the grounds that he did not supervise any members of the bargaining unit.

Elaborating upon the supervisory exclusion rule in New York Univ., supra, the Board noted that where professional employees spend less than fifty percent of their time supervising nonunit employees, they are included in a unit. Accordingly, professional

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[251] New York Univ., supra at 8.

librarians were excluded from the unit if their supervisory duties exceeded the fifty percent standard.

Another important point in the New York Univ. decision is the fact that even though the librarians at the university did not have faculty status or faculty titles, the Board determined that they were clearly professional employees and as such shared a sufficient community of interest with the faculty. The Univ. of San Francisco, supra decision simply reiterated the Board's position in New York Univ. and included the law librarians in the unit.

In Point Park College, supra the Board excluded the director of the library from a unit of faculty members despite her status as a member of the faculty of the English department. The record indicated that the director of the library exercised significant supervisory authority including the interviewing and hiring of librarians and library assistants. The Board did not deny either her status as a faculty member or her obvious professional status, however, since she was clearly a supervisor within the meaning of the Act, and spending all of her time administering the library and supervising other members of the unit, she was excluded from the unit.

Board determinations regarding the inclusion of research associates and laboratory technicians in faculty bargaining units also use the Act's definition of a professional employee as the basis for

the decision. In C. W. Post Center, supra a research associate was included in a unit of faculty members. The Board cited the fact that the research associate had a doctor's degree and status as an associate professor, eligible for tenure, as indicative of the employment interest he shared with other faculty members. Elaborating on this decision the Board noted that "the intellectual character of his duties and his qualifications"[252] were similar to those of other faculty members and clearly showed him to be a professional employee.

In this same case, however, the Board excluded two science laboratory managers because they performed technical functions which did not require advanced degrees. Citing the lack of evidence that either of these employees was in training for a faculty position, the Board determined that they were not professional employees.

In Adelphi Univ., supra the Board included a research associate because the evidence indicated the research associates were clearly professional employees and, as such, were entitled to collective bargaining representation and inclusion in a unit with other professional faculty members.

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[252] C. W. Post Center, supra at 906.

The laboratory assistants in College of Pharmaceutical Sciences, supra were excluded because they did not perform tasks requiring any advanced knowledge or expertise, nor did the tasks they performed require the exercise of professional judgement. Thus they were not professionals.

The critical factor for the Board in deciding on the placement of various academic research associates and laboratory assistants hinged on whether the functions performed by these personnel were merely technical ones and whether their relationship to the teaching faculty was a supportive, assistant role or otherwise that of a professional coequal. It is clear from these decisions that university employees with advanced degree who are engaged in scientific or other research and have faculty status will be included in the bargaining units provided they are not supervisors. Whether or not such employees are involved in actually teaching students is not the important factor. Faculty do not have to teach to be in a unit with other teaching faculty and academic professionals need not have faculty status to be included in faculty units.

In dealing with the placement of students in bargaining units, the Board has been consistent in excluding them from faculty and non-faculty bargaining units on college and university campuses. Beginning with its Adelphi Univ. decision in 1972, the Board has

disallowed student employees to participate in representative elections. In the Adelphi decision the Board was unwilling to accept the university's argument that its graduate assistants shared a community of interst with the faculty. In the Board's opinion the fact that graduate assistants performed some faculty-related functions was insufficient to overcome their primary status as students.

In three successive opinions, Georgetown Univ., supra, Cornell Univ., supra and Barnard College, supra the Board consistently held that students employed in the same campus jobs as full-time or part-time permanent, non-student employees did not share a community of interest with such employees. The Board held in Georgetown that students represented a class peculiar to themselves and that the temporary nature of their employment and the limits placed thereon by the institution negated any community of interest between them and non-student full and part-time employees.

The Board made its opinion in this regard most clear in its reversal of a Regional Director's decision to include students in a unit of clerical and other nonprofessional employees at Barnard College. Noting that "few if any student employees ever remain or are permitted to remain permanently in their present employment,

it is clear that their employment [at the college] is only incidental to their educational objectives."[253]

It is a reasonable assumption that the Board will continue to exclude students employed in full-time or part-time positions on campuses from units of either faculty members or other professionals and from units of nonprofessional clerical, service, maintenance and other employees.

The cases involving the placement of academic personnel employed in various miscellaneous categories again depended upon whether these personnel were considered professionals sharing a community of interest with faculty members.

In its unanimous decision in Leland Stanford Junior Univ. late 1974, the Board held that a unit of graduate research assistants inappropriate for purposes of collective bargaining. The Board ruled that the RA's were not employees within the meaning of Section 2(2) of the Act and accordingly no question of representation affecting commerce existed.

This was the first case in which the Board was presented with a petition for a bargaining unit composed solely of students. All the previous unit cases that involved students dealt with the question

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[253] Barnard College, supra at 1135.

of whether students should be included in units with professional, faculty employees or units of permanent, nonprofessional service and maintenance employees. In those cases, the Board had consistently found that students constituted a separate class sharing a community of interest peculiar to themselves and therefore, they could not reasonably be included in a bargaining unit with either professional or nonprofessional employees.

In its opinion, the Board noted that the record clearly showed that the doctoral degree in physics at Stanford University was clearly a research degree and that it was "clear that the policy of Stanford is to provide financial aid for its graduate students by means of a stipend for doing what is required of them to earn their degrees."[254] Further, the record indicated that there was no correlation between the kind of research a student was doing and the amount of the stipend the student received, nor was there a correlation between the hours a student devoted to research and the money the student received. The graduate assistants were entitled to student health care and insurance, and student housing and participated in campus activities. They did not receive any of the benefits extended to university employees.

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[254] Leland Stanford Junior Univ., supra at 622.

This decision re-emphasized the Board's position that students working in any capacity at the educational institution in which they were concurrently enrolled as students could not be considered employees within the meaning of the Act.

Two cases, Manhattan College, supra, and Florida Southern College, supra, dealt, in part, with the question of whether Reserve Officer Training Corps (R. O. T. C.) officer instructors should be included in a unit of professional, full-time faculty. In Manhattan College, the petitioning AAUP chapter wished to include in the unit the Air Force officers who were instructors in the aerospace studies department. Classes in that department were attended by students enrolled in the R. O. T. C. program. The Board rejected the Petitioner's bid for inclusion of these instructors in the unit because the instructors were military personnel, paid by the Air Force and subject to its control and discipline. The Board did not believe that a sufficient community of interest existed between the Air Force R. O. T. C. instructors and other faculty members on the campus. The reasoning was stated in Florida Southern, where the Board again rejected the proposal to include Army officer R. O. T. C. instructors in a unit with the non-R. O. T. C. faculty. Citing the primary responsibilities of these officer-instructors had to the U. S. Army and the fact that they were subject to the control of the Army,

the Board was not convinced that a community of employment interest existed between the R. O. T. C. instructors and other instructors on the campus to justify including them in the unit.

Both of these decisions emphasize the Board's approach to establishing units of professional employees based upon factors other than advanced academic knowledge and training although such training is certainly a major consideration. The Board did not question the professionalism of military officer R. O. T. C. instructors. In this case the attachment such instructors had to the service was the over-riding factor which prevented a sufficient community of interest from existing between R. O. T. C. teaching officers and the rest of the academic teaching faculty. The R. O. T. C. instructors were clearly professional military officers, but their professional identity and their primary duties and responsibilities were to the services of which they were members.

On the issue of whether athletic coaches should be included in faculty bargaining units the Board has been consistent. In a 1972 decision, Manhattan College, supra, the Board ruled that nonteaching athletic coaches were "engaged in substantial part in teaching physical and mental skills, utilizing educationally acquired knowledge of their speciality... The fact that their activities relate to an extra-curricular matter [college sports], while perhaps of some importance

to the students, is less significant in classifying the nature of the work."[255] Again significant consideration was whether the coaches were professional employees according to the definition of Section 2(12) of the Act. In this case, the Board was convinced of the professional status of the coaches. However, in Point Park College, supra, the Board excluded coaches from a unit of full-time faculty and other academic professionals because they did not receive tenure and their lines of supervisory authority and organization differed from the line of reporting for the faculty. An interesting aspect of this inconsistency is the fact that the coaches at Point Park taught physical education classes and were still excluded from the unit while four of the ten coaches at Manhattan College did no teaching at all and were included in the unit. The Board noted in Point Park College, supra that the record was unclear "as to the extent to which coaches teach physical education and as to whether they are part-timers."[256] There was obviously a very clear explanation of coaches duties and status presented in Manhattan College. Since the Board did not provide any more detailed explanation for the inconsistency of its decision, these cases emphasize the importance

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[255] Manhattan College, supra at 66.

[256] Point Park College, supra at 1066.

of providing the Board with a clear and detailed record so that bargaining unit determinations can be made based upon all the pertinent information. In Point Park College, the Employer wished to have the coaches included in the unit. Quite possibly, this could have been accomplished had the college supplied more information to the Board regarding the coaches' teaching duties.

In the case of other support personnel such as admissions officers, guidance and other counselors, program directors and coordinators, the Board ccnsistently approached the issues by first determining whether the specific employee was in a professional position. Thus in C. W. Post Center, supra the Board decided that admissions and academic counselors were not professionals and did not share a sufficient community of interest with the faculty. Counselors working in the guidance center were professional employees because of their status as qualified psychologists and as members of the faculty. In all cases involving ancillary support personnel, the Board looked for an indicator of professional status and used this as the key determinant in deciding whether to include or exclude personnel in the unit.

The question of whether faculty employees in terminal contract status with a college or university should be allowed to vote in a representation election has been consistently answered in the

affirmative. Obviously, it is in the interest of an institution not to have employees voting in a union representation election who have already been notified that they will not be re-employed. However, the Board has consistently held that such employees were members of the faculty for the duration of their contracts, had been hired as such and therefore shared a community of interest with the tenured and other non-tenured contract employees. It is a safe assumption that the Board will continue to include terminal contract faculty members in any faculty unit.

SUMMARY

In summation, the Board has been asked to consider the following questions regarding the placement of ancillary support personnel in academic bargaining units:

1. whether librarians are to be considered professional employees. Yes, they are professionals, generally have faculty status and are appropriately included in a unit of full-time teaching faculty.
2. whether law school librarians shared a community of interest with the law school faculty sufficient enough to be included in a unit of law school faculty. Yes, they do.

3. whether the authority that librarians exercised over non-librarian clerical staffs made them supervisors per se and as such necessitated their exclusion from any bargaining unit. No, it does not.

4. whether research associates and laboratory assistants should be excluded from a unit of full-time faculty employees. Yes, they are not faculty members.

5. whether graduate teaching and research assistants could properly be included in a unit with faculty members. No, they are not members of the faculty.

6. whether graduate assistants were employees within the meaning of the Act and whether they were entitled to select a bargaining agent and engage in collective bargaining as employees of an academic institution. No, they are not considered employees.

7. whether guidance, admissions and placement counselors were professionals within the meaning of the Act and whether they could be appropriately included in a unit of faculty members. While they may be professionals they do not share a sufficient community of interest with faculty members.

8. whether R. O. T. C. officer-instructors shared a sufficient community of interest with the non-R. O. T. C. academic instructors to warrant inclusion in a faculty bargaining unit. No, they do not.

9. whether athletic coaches were professional employees sharing a sufficient community of interest with a faculty to warrant inclusion in a faculty unit. It depends on whether the coach has faculty status.

10. whether certain academic administrative personnel including non-academic deans, program directors, business manager, various public relations personnel and the director of admissions should be included in a unit with the faculty. To date, they have not been included.

11. whether faculty members on terminal contracts continued to share a community of interest with the faculty through the duration of their contract sufficient enough to allow them to vote in a bargaining representation election. Yes, they do.

Chapter 7

UNFAIR LABOR PRACTICES

The procedure by which the Board decides unfair labor practice cases differs from the procedures used in other cases. A Board appointed Administrative Law Judge[257] takes the testimony of the Complainant[258] and the Respondent[259] and considers the briefs filed by the involved parties. Upon completion of this process, the Administrative Law Judge issues a written decision which includes a statement of the case, findings of fact, conclusions of law and a remedy, if appropriate. Exceptions to the decision of the Administrative Law Judge may be filed with the Board. In such cases, the Board relies upon the evidence included in the record of the hearing before the Administrative Law Judge and such supporting and reply briefs as are filed. Often the General Counsel of the Board will file a brief either supporting or objecting to the decision of the Administrative Law Judge.

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[257] Prior to August 19, 1972, Administrative Law Judges were known as Trial Examiners.

[258] The party alleging that an unfair labor practice has been committed.

[259] The party accused of the unfair labor practice and responding to the complaint.

As with preceding chapters, the cases presented here are those that have come before the Board because one or another of the parties involved objected to the decision of the Administrative Law Judge.

The Board decisions of the unfair labor cases considered in this chapter also have a different format from other cases. The Board's decision and order, with its supporting rationale, appear first followed by a transcript of the Administrative Law Judge's decision and findings of fact. Because of this differing format, the style of the briefs presented in the chapter will also be altered. The facts of the case and the decision of the Administrative Law Judge appear first, followed by the Board's decision in the case. The details of the Board's decision-making processes will be considered in the "Analysis" section of the chapter.

To date, there have been relatively few unfair labor practice cases involving private institutions of higher education to come before the Board. The majority of these cases have involved non-faculty labor organizations. The cases briefed below will be considered in chronological order according to the date of the Board's decision. None of these cases have been reviewed in previous chapters.

UNFAIR LABOR PRACTICES

LAWRENCE INSTITUTE OF TECHNOLOGY and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, APRIL 3, 1972. 196 NLRB 28 (1972)

Three members of the faculty at the Lawrence Institute of Technology (L. I. T.) located in Southfield, Michigan, alleged that they had been discriminated against and denied reappointment at the institution for the academic year 1971-72 because of their union activities. L. I. T. was an educational institution of higher learning with primary emphasis on engineering and technical subject matters related to engineering.

L. I. T. contended that beginning in 1969, at approximately the same time that union activities among faculty members began occurring on the campus, the administration decided to take positive steps to improve the quality and effectiveness of the institution. Part of this decision was manifested in a reassessment of the tenure system and a determination to prevent the automatic promotion and tenure of mediocre faculty members. Beginning in the fall of 1970, a part of this program was the requirement, for the first time, that department chairmen prepare detailed, written evaluations of the faculty members in their departments.

The record revealed that the terminated faculty members had been active in the AAUP activities on the campus and actively supported the AAUP's efforts to organize the L. I. T. faculty for purposes of collective bargaining.

Two of the three alleged discriminatees had been employed at L. I. T. for three years prior to their termination (since 1967), both received negative evaluations in the fall of 1970 and both were informed that students had objected to and complained of the quality of their teaching.

The third dismissed faculty member testified that he had never received any written warnings regarding his work performance and further, was not given any reason for his nonreappointment. When he requested a written explanation of his termination, he was informed that it was the policy of L. I. T. "not to make the reason for nonreappointment a matter of public record."[260]

Lengthy testimony detailing conversations and events was offered by the complainants and the respondent, with the respondent contending that the termination of the three complainants was not as a result of union involvement but only coincidental with that involvement. Further, the respondent maintained that the three

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[260] Id. at 36.

complainants were not performing their teaching duties at L. I. T. at an acceptable level.

The Administrative Law Judge, concurring with the respondent's contention that the issues to be decided in the case were factual rather than legal, stated the following:

> "I have no basis for making an informed judgement whether...in the normal course of events and in the absence of the recent policy of the AAUP to engage in collective bargaining and the active involvement of the three individuals therein, would have been reappointed. From the available evidence before me, I must ascertain, as best I can, whether their concerted activity was in whole or in part a factor in the decision of the Institute not to renew their contracts."[261]

The Administrative Law Judge found that Lawrence Institute of Technology had engaged in an unfair labor practice and had unlawfully terminated the three professors involved. Accordingly, the L. I. T. was ordered to reinstate the three faculty members with back pay plus interest.

In reviewing this case the Board reversed the Administrative Law Judge's findings, contending that L. I. T. had not unlawfully "intimidated, coerced or restrained other members of the faculty in their support of the AAUP"[262] and dismissed the complaint in its entirety.

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[261] Id. at 40.

[262] Id. at 33.

DUQUESNE UNIVERSITY OF THE HOLY GHOST and LOCAL 249, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and EMPLOYEES COMMITTEE OF DUQUESNE UNIVERSITY, PARTY IN INTEREST, AUGUST 14, 1972. 198 NLRB 891 (1972)

The university was charged with assisting, supporting, dominating and interfering with the administration of the Employees Committee in violation of Section 8(a)(2)[263] of the Act.

The Employees Committee at Duquesne was formed at the suggestion of the university president and with the assistance of the director of personnel services for the purpose of electing a "voice" for all nonexempt employees not already represented by the custodial and building maintenance union on campus.

The record showed that the Employees Committee consisted of the elected representatives, had no constitution or bylaws and collected no dues. The weekly committee newsletter was printed by the university, and other committee material was prepared on university stationery, copied on university machines and charged to

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[263] "It shall be 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: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay..." Section 8(a)(2), National Labor Relations Act, 49 Stat. 449 as amended.

the personnel director's budget. The committee meetings were held on university time in a room provided by the university. Committee members were not docked for time spent in these meetings. Further, the university established a Staff Relations Committee (SRC) comprised of six administrators and the personnel director, to discuss, consider and act as intermediary between the Employees Committee and the Administrative Council (the governing body of the university) on the plans and proposals of the Employees Committee. Members of the Employees Committee sat on the SRC but did so under protest. Because of these protests, the SRC was eventually dissolved. The Employees Committee never negotiated with the university for a collective bargaining agreement.

In the spring of 1971, the Employee Committee and Teamsters affiliated Local 249 began soliciting authorization and Local 249 filed two representation petitions with the Board. The Employees Committee intervened in these proceedings.

The university's response to the charge of interference and domination was that although the university recognized that the Employees Committee was a labor organization, it maintained that it recognized and supported many student, faculty and staff committees on the campus but that it had never dominated nor attempted to dominate any of these committees. Noting that "unlike industry

and commerce, committee participation is an integral part of academic administration... and their recommendations are given serious consideration"[264] Duquesne maintained that they had not treated the Employee Committee any differently from numerous other committee groups on campus.

The Administrative Law Judge found that the Respondent had interfered with the administration of the Employee Committee because it attempted to control the committee and made financial contributions to support it in violation of Section (a)(2) and (1) of the Act. Accordingly, the Respondent was ordered to cease and desist such practices and disestablish the Employee Committee.

The Board agreed that the Respondent had unlawfully assisted and financially supported the Employees Committee, however, the Board did not agree that the Respondent had dominated the committee. Accordingly, the Board ordered that the Respondent cease and desist financial or other support and assistance and withhold recognition of the committee until such time as the committee was certified by the Board as the bargaining agent for the nonexempt employees in the unit.

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[264] Duquesne Univ., 198 NLRB 891 (1972) at 898.

MONMOUTH COLLEGE and ARTHUR S. WEINBERG, JUNE 27, 1973. 204 NLRB 554 (1973)

Weinberg, a former instructor of economics in the department of business administration at Monmouth College, contended that the nonrenewal of his teaching contract was a discriminatory action and was a result of his union and anti-administration activities.

Weinberg began teaching at Monmouth in the fall of 1969. During that year the chairman of the department assigned him the administrative task of scheduling the curriculum for the department. His contract was renewed for the academic year 1970-71 with a salary increase and the additional responsibility of assisting the chairman in processing written applications and interviewing those applying for positions within the department. The department chairman testified that Weinberg was "a very articulate, bright, young man, had good rapport with his students..."[265] however, Weinberg's teaching contract was not renewed for the academic year 1971-72. Previously, Weinberg had become an elected member of the executive committee of the Faculty Association of Monmouth College (FAMCO). FAMCO was a labor organization seeking to represent the Monmouth faculty for purposes of collective bargaining.

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[265] Id. at 556.

Weinberg was also actively supporting the cause of two faculty members who had engaged in an anti-war protest at a recent college convocation. At a joint faculty meeting to discuss plans to defend these two professors, Weinberg had proposed that the faculty take "strong united action by voting no-confidence in the administration"[266] of the college's president and further accused the college president of ignoring the faculty bylaws and procedures in instituting termination actions against the two professors.

The department chairman testified that Weinberg was not reappointed because he had failed to make sufficient progress on the completion of his doctorate degree. He further stated that an abundance of applicants holding the Ph. d degree in economics offered him the opportunity "to improve the academic quality of his department... [and] increase the percentage of doctorates inasmuch as accredited membership in the American Collegiate Schools of Business required 40 percent of the teaching staff to be holders of doctorates."[267] In 1970 only twenty percent of the faculty in the business administration department at Monmouth College had doctorate degrees. The chairman also acknowledged some

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[266] Id.

[267] Id. at 556.

subjective factors in his evaluation of Weinberg including "a personality difference... lack of rapport"[268] and his knowledge that Weinberg's car had been repossessed by the Sheriff. The record indicated that Weinberg was pursuing his doctorate degree at New York University and taking the maximum number of courses allowable for a part-time student. He would have completed all the course requirements for the degree in June 1972.

The Administrative Law Judge found that the college had engaged in an unfair labor practice by its termination of Weinberg. The college was ordered to cease and desist and to take affirmative action to reinstate Weinberg with back pay and expunge his personnel records of all derogatory or disparaging statements.

The Board, however, was not convinced that the nonrenewal of Weinberg's contract was due to discriminatory labor practices on the part of the college and the Board dismissed the complaint, thereby reversing the findings of the Administrative Law Judge.

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[268] Id.

UNIVERSITY OF CHICAGO LIBRARY and ROBERT S. MCGEE AND LOCAL 103 A, NATIONAL COUNCIL, DISTRIBUTIVE WORKERS OF AMERICA, ALA, UNIVERSITY OF CHICAGO LIBRARY PROFESSIONAL STAFF ORGANIZING COMMITTEE: LOCAL 103 B, NATIONAL COUNCIL, DISTRIBUTIVE WORKERS OF AMERICA, ALA, UNIVERSITY OF CHICAGO LIBRARY NON-PROFESSIONAL STAFF ORGANIZING COMMITTEE, AUGUST 3, 1973.
205 NLRB 220 (1973).

McGee, the individual named in this case, filed a charge alleging that the University of Chicago had committed an unfair labor practice because several of its supervisors were active and influencial in union activities and organizations. The Office of the General Counsel of the Board, upon examining the charge, issued a complaint alleging that nine individuals with supervisory status had assisted the union in its overall efforts to organize the library's employees, and therefore, the university had violated Section 8(a)(2) of the Act. This section states that "it shall be 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..."[269]

The University of Chicago, the Respondent, did not deny that the nine individuals named by the General Counsel were supervisors

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[269]Section 8(a)(2) National Labor Relations Act, 49 Stat. 449 as amended.

nor that these individuals had assisted in organizing the library employees.

In March 1971, two years before this case was heard, the National Council of Distributive Workers, staff, Union Local 103 had filed a representation petition seeking a unit of all employees of the University of Chicago Library and including clericals and professionals in the same unit. At the hearing, evidence was presented concerning the professional and supervisory status of some of the librarians, and the Regional Director determined that supervisors were active and supporting Staff Union Local 103. Because of this determination, the petition was dismissed. Seven months later, in December 1971, the union split into two locals to accommodate both the professional employees and the clerical employees. Thus Local Local 103 A became the union for the professionals at the University of Chicago Library and Local 103 B became the union for the clerical employees.

At issue in the instance case was the question of whether professional employees and members of Local 103 A should be excluded from the union if they supervised nonprofessional employees who were members of Local 103 B. The Distributive Workers of America, National Council and Locals 103 A and 103 B maintained that none of the nine individuals in question were supervisors within

the meaning of the Act and therefore, because they were not supervisors, no unfair labor practice had been committed by their activity in and support of union organizing activities.

Although this case involved an unfair labor practice charge, the basic issue which needed to be resolved was whether the individuals in question were, in fact, supervisors and if so, whether their union activities had violated Section 8(a)(2) of the Act. The peculiar aspect of this case was the fact that both the General Counsel and the University of Chicago were in agreement against the union that an unfair labor practice had been committed because the individuals concerned possessed supervisory status.

In his general consideration of the case, the Administrative Law Judge noted a distinction between technical direction and supervision and stated that "the fact that some librarians...make effective recommendations on how to organize their departments or sections, what type of employees to hire for one aspect of work or another... or even what wage scale would be justified...proves only their professional status, and serves not at all to prove they are supervisors in the statutory sense."[270]

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[270] Univ. of Chicago Library, 205 NLRB 220 (1973) at 229.

The Administrative Law Judge then considered each of the nine individuals separately, finding that four of the nine were supervisors within the meaning of the Act. In considering the allegations that some of these individuals assisted the union, the Judge pointed out that these individuals did not believe they were supervisors and had "a right to dispute the contrary assertion of [their] employer."[271] Maintaining that the basic dispute - the questions of the supervisory status of these and other librarians - needed to be resolved by the Board first, the Administrative Law Judge dismissed the unfair labor practice complaint. In supporting his finding to dismiss the complaint, the Judge noted that the first representation petitions filed in the case had been dismissed when it appeared that there were supervisors among the union activists even though no unfair labor practice charge had been filed and stated:

> "If this procedure was correct, it... [would mean] that in every representation case when the employer would exclude particular employees from the bargaining unit on the ground they were supervisors and the evidence [indicated that they were] supervisors and [had participated] in the organizational campaign, the entire proceeding must be terminated. This is neither Board law nor Board practice."[272]

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[271] Id. at 234.

[272] Id. at 235.

The Administrative Law Judge further noted that the nine individuals in question had the right to have the questions of their supervisory status decided by the Board in a representation proceeding and on that basis dismissed the unfair labor practice charge in its entirety.

The Board reversed the dismissal of the charge. Noting that it agreed with the Administrative Law Judge that a representation proceeding was the preferred method of determining supervisory status, the Board stated that:

> "...we cannot ignore the fact that a charge alleging unlawful domination and interference on the part of the Employer was filed, the General Counsel issued a complaint, and a hearing was held at which issues were litigated. In these circumstances, we can perceive no justification for dismissing the complaint without reaching the merits."

The Board determined that all nine individuals involved in the complaint were supervisors within the meaning of the Act and ordered the university to cease and desist from interfering with the formation and administration of the involved labor organization and any other labor organizations at the University of Chicago.[273]

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[273] Id. at 222.

UNIVERSITY OF THE PACIFIC and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 22, OCTOBER 25, 1973. 206 NLRB 606 (1973).

The Board adopted the recommended order of the Administrative Law Judge.

The complaint alleged that several supervisory employees of the University of the Pacific, the Respondent, interrogated, threatened, made benefits promises and otherwise intimidated employees to persuade them to vote against the union.

The evidence presented by the General Counsel revealed that the superintendent and assistant superintendent of all building and maintenance employees approached several gardeners and custodians in the days prior to the union election and engaged them in conversations about the union. Specifically, the employees were told that if the union was voted in, the university would have to lay off employees and that gardeners and other employees who worked outdoors would no longer be allowed to engage in indoor work on rainy days thus losing many work hours for which they would not be paid.

The Respondent did not deny that several of its supervisors had questioned employees concerning their attitudes toward the union. However, the Respondent maintained that these statements were not the official views of the university but the personal opinions of the speakers. The Administrative Law Judge noted that the language

problem created by the fact that some employees spoke little English greatly increased the possibility that "a prediction of what could happen, vis-a-vis what would happen (in the absence of an abundance of explanatory language) might very easily have been misunderstood."[274]

Accordingly, the Judge concluded that the University of the Pacific had committed unfair labor practices under Section 8(a)(1) of the Act [275] and ordered the university to cease and desist from such practices.

THE UNIVERSITY OF CHICAGO and COLLEGE, UNIVERSITY AND SCHOOL EMPLOYEES' UNION LOCAL 321, SERVICE EMPLOYEES INTERNATIONAL UNION, AND LOCAL 1657, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES UNION, APRIL 26, 1974. 210 NLRB 190 (1974).

The Board adopted the recommended order of the Administrative Law Judge.

The issue in the case was whether the University of Chicago, while under contract with Local 321, could unilaterally transfer

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[274] Univ. of the Pacific, 206 NLRB 606 (1973) at 610.

[275] "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." Section 8(a)(1), National Labor Relations Act, 49 Stat. 449 as amended.

nineteen custodians in that union to another union, Local 1657, where they would be working under different contract provisions and at a lower rate of pay.

Local 1657 was a unit of about 900 employees, 200 of which were assigned to the Biological Sciences Division (BSD) in such capacities as housekeeping, general and food service, nursing assistants, animal caretakers and various other jobs.

Local 321, a unit of about 300 employees was comprised of such physical plant service and maintenance workers as store room attendants, janitors, athletic field maintenance workers, building engineers and mechanics and other positions. Both unions had a twenty-five year bargaining history with the university. Nineteen custodians in Local 321 were employed in the Biological Sciences Division (BSD).

The nineteen custodians involved were assigned to clean certain portions of the medical-academic complex in the BSD. They functioned under the supervision of the dean of the BSD although their compensation was a part of the physical plant budget which was re-allocated to the dean's office for distribution as custodial salaries. These custodians performed certain janitorial services in all designated areas of the medical-academic complex. They did not clean any areas devoted principally to patient care, operating rooms

or bedrooms. Also, the level of the cleaning performed by members of Local 321 was of lower quality than that performed by Local 1657 personnel. Local 321 employees wet-mopped, stripped and waxed floors, picked up debris, emptied trash and ashtrays but they did not wash walls or wet-mop as frequently nor use germicidal detergents as did the members of Local 1657 working in BSD. The BSD areas cleaned by each union's members were clearly designated.

In July 1971 the Director of Personnel informed Local 321 that the university was "experiencing organizational difficulties stemming from the maintenance... of two bargaining units of janitorial employees" and therefore, the Medical School cleaning activities were being reorganized which would result in reducing fourteen of Local 321's nineteen members working in the hospitals, seven of whom would be laid off (those with seniority) and seven of whom would be displaced. Laid off and displaced Local 321 members were urged by the university to change over to Local 1657 where they would be given, in order of seniority the first opportunity at the jobs open in the unit as the result of the consolidation. In August 1971, fourteen members of Local 321 were laid off; twelve sought and obtained employment in the Local 1657 unit. Three of these employees received approximately the same wages after the change over as before, the remainder suffered wage reductions.

The Respondent was charged with a violation of Section 8(d) of the Act which states in part:

> "Provided, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract..."[276]

The Administrative Law Judge found that the university had simply substituted "the lower contract rates for custodial work found in another contract which the university had negotiated with another union in another unit."[277]

The Respondent maintained that Local 321 had agreed to a waiver of its contract because of a statement made by the secretary-treasurer that the local would not fight the university on this matter. However, the record showed that Local 321 had clearly stated its objection to the change over.

The Administrative Law Judge found that the university had engaged in an unfair labor practice and recommended affirmative action to remedy the wrong.

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[276] Section 8(d), National Labor Relations Act, 49 Stat. 449 as amended.

[277] Id. at 198.

TRUSTEES OF BOSTON UNIVERSITY and BUILDING AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 254, APRIL 29, 1974. 210 NLRB 330 (1974).

The Board adopted the recommended order of the Administrative Law Judge.

The union maintained that Boston University had failed to perform its statutory bargaining obligation because it has refused to provide the union with information it requested. The union alleged that this information was relevant and essential to a grievance.

The record showed that the university had eliminated the Paint Shop from its Physical Plant Department, citing budget reductions as the cause for this action. The closing of the Paint Shop on the grounds that it provided the least essential service, caused the lay off of six of the seven painters employed there.

In accordance with the grievance procedure prescribed in the contract between the union and the university, the union initiated grievance procedures, and requested information on the amount of painting work which the university had been letting to subcontractors. The Assistant Business Agent for the union asserted that the university could not be acting in good faith if it eliminated its Paint Shop but continued to provide substantial painting work for outside contractors. In order to determine whether this was the case, the

union requested copies of the subcontractor painting contracts for 1972, 1973, and 1974. The university refused to supply the union with these copies.

The Administrative Law Judge found "that such information has potential relevance to the grievance in question and should therefore be produced."[278] This information would, the Judge maintained, provide some insight as to whether the university acted arbitrarily, capriciously or in bad faith when it eliminated its Paint Shop. Accordingly the Judge ordered that the university furnish the union with the requested materials.

ANALYSIS

The Board's decisions in unfair labor practice cases involving colleges or universities have been limited. However, those decisions in which the Board's findings differ in whole or in part from the findings of the Administrative Law Judge are the most instructive and illuminating cases for the educational administrator dealing with campus labor relations. These differing conclusions

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[278] Boston Univ., 210 NLRB 330 (1974) at 333.

and the Board's explanation thereof provide insight into those practices and actions the Board considers to constitute unfair labor practices.

In Lawrence Inst. of Tech., supra the Board ruled that the institution had not committed an unfair labor practice when it terminated three instructors. At the heart of the complaint was the fact the timing of the terminations coincided with the increased participation of the complainants in faculty organization and union activities on the campus.

The record revealed that Lawrence Institute had begun an active campaign to upgrade the quality of its educational offerings and the effectiveness of its instruction in 1969. To reinforce this administrative commitment to improvement, the institute began, in the fall of 1970, a system of formal written faculty evaluations and adopted a formal policy for granting tenure as well. During this same period, the AAUP began an effort to organize the institute's faculty and achieve recognition as the faculty's collective bargaining representative. The three faculty members involved in this complaint - one assistant professor and two instructors - were quite active in AAUP organizing activities on the campus.

The record indicated that a significant number of complaints from students and faculty colleagues had been lodged against the three instructors. These complaints addressed both the quality of the Complainant's teaching and the inadequate preparation their courses provided for more advanced courses at the institute. Student dissatisfaction with these faculty members was reflected in the increasing failure of students to register for courses taught by the Complainants. Complaints of poor class preparation on the part of the instructors and inadequate presentation or explanation of materials, as well as reports of unprofessional deportment were made to department chairmen. The institute was able to convincingly document these complaints and demonstrate that such complaints provided an adequate basis for the individual department decisions to terminate these faculty members. The fact that the newly adopted tenure policy that was designed to insure that "only the fittest of the fit"[279] remained at Lawrence Institute also lent support to the Respondent's position.

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[279]Lawrence Inst. of Tech., supra at 28.

In its consideration of the testimony, the Board was not convinced that a discriminatory motive existed and was unwilling to accept the simultaneous timing of the rise of union activity and the documentation of poor teaching as premeditated action designed to provide the foundation for discriminatory action. Noting that "if a finding of discriminatory motive is to rest almost entirely on the timing of Respondent's conduct in relation to [Complainant's] union activities," the Board pointed out that it was essential "to establish the sequence of events with sufficient clarity to support such a finding."[280] The Board further viewed the decision by department personnel to begin and update files of complaints regarding the teaching performance of the faculty members as a sound personnel action.

The Board's decision to dismiss the complaint was further buttressed by the fact that while the timing of the dismissals may have coincided with more active participation by the Complainants in union organizing activity, the notices of termination were made in all departments at the same time each year and the timing of the decisions appeared to "bear a stronger relationship to the schedule

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[280] Lawrence Inst., supra at 29.

established in the faculty handbook"[281] than to concerted union activity on the part of the faculty members bringing the complaint. In addition, the record showed that numerous other instructors, some in the same instruction departments as the Complainants, were engaged in union activities and were not terminated.

Finally, the Board was convinced that the individual evaluations of the Complainants' clearly demonstrated a standard performance below that of other members in their respective departments. In the instant case, one of the instructors had clearly refused to cooperate with other members of the department or comply with established department policies. When a reduction in the number of teaching faculty in the department became necessary because of economic and other administrative considerations, the Board found the termination of an instructor whose performance was poor and who demonstrated a continued lack of cooperation to be a logical decision.

This early unfair labor practice decision indicated an unwillingness on the part of the Board to accept the coincidental timing of faculty termination and faculty participation in union activity as the sole basis for an unfair labor practice, particularly

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[281] Id. at 31.

when ample evidence existed which demonstrated that the reasons for the termination were based upon poor performance. Further, the Board was clearly stating that institutions had the right to upgrade the quality of their teaching staffs based upon evaluations of performance and other criteria as long as involvement in labor organizing activities was not a factor in deciding what constituted less than an acceptable performance.

In Monmouth College, supra, another case involving the dismissal of an instructor, the Board again rejected the Administrative Law Judge's conclusion that an unfair labor practice had been committed. As in Lawrence Inst., supra, an instructor alleged that his teaching contract had not been renewed because of his activity in a labor organization seeking to represent the Monmouth College faculty for purposes of collective bargaining.

In discussing the Administrative Law Judge's finding that the attitudes of the Complainant's department chairman inferred hostility toward the Complainant's prounion and anti-administration activities, the Board stated that:

> "We cannot hold, on inference alone, that the nonrenewal of the contract was based upon a discriminatory motivation. We are unwilling to presume that Respondent harbored unionanimus

based upon an expression of opinion by the Chairman of the Department... that he felt [a union]... would be 'bad' for the College."[282]

The Board elaborated on the statement, pointing out that such expressions of opinion when they are unaccompanied by threats, promises or coercive statements did not, in and of themselves, prove that the college's hostility toward a faculty union was so strong as to cause the college to deny reappointment to an instructor with a pro-union philosophy.

There was no evidence in this case to indicate that other pro-union faculty members had been terminated. In fact, a letter sent by the college administration to the Monmouth faculty clearly stated the college's recognition of the right of its faculty to select a collective bargaining agent. This letter indicated the college's preference that its faculty not select a union to represent it, however, the letter also stated that "if a majority of the full-time faculty who vote want a union here that is their right. The administration respects that right, and will abide with their wishes if a union is selected."[283]

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[282] Monmouth College, supra at 554.

[283] Id. at 555.

The Monmouth College decision again pointed up the Board's unwillingness to accept the coincidental occurrence of pro-union activity and termination of a union-activist faculty member as proof that an unfair labor practice had been committed, particularly if it could be demonstrated that ample, objective reasons for dismissal existed based upon unsatisfactory performance. In this case, the college was attempting to upgrade the quality of its departments primarily by increasing the number of faculty members holding the Ph. d degree. The Complainant did not have a Ph. d degree. Since the department was required to have 40 percent Ph. d's on its teaching staff in order to maintain accredited status and since only 20 percent of its faculty held Ph. d's there was a concerted effort to bring in new faculty who had completed their doctoral degrees. The Complainant's department chairman testified that there were an abundance of qualified applicants holding Ph. d degrees in economics and that in view of the fact that the Complainant had not yet completed his degree and was not in the chairman's opinion making sufficient progress to complete such degree, he recommended termination.

In this decision the Board reiterated its earlier position that college administrators could effectively terminate faculty employees for poor performance or because of efforts to upgrade

the type and quality of the educational programs offered as long as these terminations were not the result of union animus of discrimination against faculty members because of union activities.

In another early decision, Duquesne Univ., supra, the Board considered the question of whether the university had interfered with or unalwfully assisted the Employees Committee, a group established for the purposes of organizing and acting as the bargaining representative of the university staff. In this case the Board agreed with that part of the decision of the Administrative Law Judge, which held that the university had unlawfully assisted and supported the Employees Committee. However, the Board did not find that the university had dominated the committee and disagreed with the Administrative Law Judge's conclusion that the Employees Committee should be disestablished.

The Board based its decision that an unfair labor practice had been committed in violation of Section 8(a)(2) of the Act[284] on the fact that Duquesne's personnel director provided advice and counsel to the Staff Relations Committee (SRC). The SRC was designed to act as a liasion between the Employees Committee and the Administrative Council which the governing body of the university.

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[284] See page 349 above, note 263 for the text of this section.

In the capacity of chairman of the SRC, the university's personnel director recommended changes, rewrites and other modifications to proposals submitted by the Employees Committee prior to the submission of these proposals to the Administrative Council. The fact that the SRC functioned as an advisory body to the Employees Committee and that even after its disbandment due to employee protest, a university vice president presented himself as the advisor who would carry the Employees Committee's proposals to the Administrative Council were construed by the Board to be evidence of unwarranted interference by the university in the affairs of the Employees Committee.

The record also showed that the Employees Committee was completely dependent upon the university for numerous financial and administrative assistance. The committee used university meeting rooms and mailing and printing facilities and committee members were not docked for time spent at Employees Committee meetings. It is important to note the Board's statement that use by an employees' organization of the employer's services, facilities and time do not per se constitute an unfair labor practice on the part of the employer. In fact the Board noted that "we have sometimes characterized benefits of the type found herein merely as friendly

cooperation growing out of an amicable labor-management relationship."[285] However, the Board qualified this statement with the caveat that such amicable relationships are only permissible when it is clear that "an employer [following recognition of a bargaining agent] deals with that representative at arm's length."[286]

Another factor in the Board's determination that Duquesne had committed an unfair labor practice hinged on evidence that the university's personnel director had recommended an attorney to the Employees Committee, suggesting that such attorney be used to represent the committee in upcoming representation proceedings. These proceedings involved another labor organization, Local 249, which was also trying to represent the university staff employees. In fact, it was this organization which had filed the unfair labor practice charge against the university. The Employees Committee selected the suggested attorney. Since there was no treasury and therefore clear that the Employees Committee was unable to pay an attorney, it was reasonable to assume that the university was supporting the Employees Committee in its upcoming representation proceeding over another union that was also seeking election as the

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[285] Duquesne Univ., supra at 891.

[286] Id. at 891.

sole bargaining representative for the university's employees. This reinforced the Board's conviction that the university was assisting and supporting the committee and to some extent supported the inference that the Employees Committee was, in some respects, a "company union."

The Board was not, however, convinced that the university had dominated the Employees Committee. The lack of evidence of domination led the Board to the conclusion that it was not necessary to disband the committee. In essence, the Board was saying that even though Duquesne had made financial and other unlawful contributions to the Employees Committee, the committee had maintained its integrity as an employee organization. It had not become a company union and there was no necessity to disestablish the committee. The Board did not believe that the SRC had been created to impede or frustrate the committee, particulary in view of the fact that the Employees Committee continued to function independently both during and after the existence of the SRC. The fact that the SRC was disbanded because of Employees Committee opposition to it was, for the Board, acceptable proof that the university had not dominated the Employees Committee.

This decision illustrates the care with which the Board has considered individual unfair labor practice charges lodged against

colleges and universities. In this case the Board determined that Duquesne had violated the Act, however, its decision for corrective action differed both in extent and type from that proposed by the Administrative Law Judge. The Board's order stated that the university was to cease and desist from offering financial and other support to the Employees Committee, but the Board did not order the disestablishment of the committee. Instead, it recognized the committee as the potential representative for purposes of collective bargaining, pending certification as such pursuant to Board ordered and conducted elections.

Univ. of Chicago Library, supra involved the question of whether supervisors had assisted the union in its organization efforts. Because supervisors, by definition are representatives of management, participation by supervisors in union activities constitutes an unfair labor practice.

An interesting aspect of this case, however, was the fact that the union maintained that the nine individuals named in the complaint were not supervisors while the Respondent, the university, and the General Counsel of the Board contended that these individuals were supervisors. In this instance, it is obvious that it was beneficial for the university to have these employees identified as supervisors and thus acting as representatives of the university

rather than as representatives of the employees union. The unique aspect of this case was the union's contention that the university had not violated the Act while the university argued that through the actions of its supervisors, it had committed unfair labor practices.

The Administrative Law Judge in this case recommended dismissal of the complaint, determing that the questions of supervisory status had precedent over the unfair labor practice charge and prevented the resolution of the charges until the supervisory determinations were made.

The Board agreed that the threshold question was one of determining the supervisory status of the individuals involved, however, it did not consider this issue sufficient to justify outright dismissal of the complaint:

> "While we agree that a representation proceeding is the preferred method of determining supervisory status, we cannot ignore the fact that a charge alleging unlawful domination and interference on the part of the Employer was filed, the General Counsel issued a complaint and a hearing was held at which the issues were litigated. In these circumstances, we can perceive no justification for dismissing the complaint without reaching the merits."[287]

The Board considered the status of each of the individuals named in the complaint, determining that all nine individuals were supervisors. In its consideration of whether unfair labor practices had been

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[287] Univ. of Chicago Library, supra at 222.

committed, the Board examined the specific conduct alleged to have been a violation of Section 8(a)(2) of the Act. In this regard, the Board found that social functions hosted by supervisors were not violations because there had been no discussion of union business and because the affairs had been open to all employees of the library and not limited to those employees in the unit sought to be represented.

However, the appearances and participation of supervisors as employee representatives at meetings with management were considered unfair labor practices because "it is clear that an employer violates Section 8(a)(2) when it negotiates with a committee that has as a member a supervisor."[288]

Commenting on the participation of a supervisor in picketing, the Board pointed out that even though the supervisors did not intend it, their presence in the picket line "lent ostensible management support to their activities," and their picketing activities could have had a "coercive effect on those whom they supervise."[289] The Board was clearly saying here that supervisors have no more right to pressure employees, whether intentionally or

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[288] Id. at 224.

[289] Id. at 224.

not, into joining a union than they have to coerce or intimidate employees into refusing to join a union.

Because this case involved two separate units of the same unit - one for professional librarians and one for clerical staff at the library - the Board determined that some of the activities of the nine supervisors did or did not represent an unfair labor practice depending upon whether these supervisors supervised only professionals, only nonprofessionals or both. Thus the supervisors who were coeditors of the publication of Local 103 A, the union of professional employees, did not, in their capacity as supervisors cause the university to commit an unfair labor practice because these supervisor-editors only supervised nonprofessional employees and did not supervise any of the professional employees sought to be represented by Local 103 A.

However, another individual who supervised both professionals and nonprofessionals had caused the Respondent to violate the Act when she attended the union's national convention as a representative of Local 103 A, the professionals' union.

In this case the Board considered not only each supervisory status question but each allegation of unfair labor practices and issued cease and desist orders for all those actions it deemed violations of the Act. The most important observation to be made

about this case is that an employee's assumption that he or she is not a supervisor is of little importance to the Board if the evidence indicates otherwise. A supervisor's desire to be in the union and his or her assumption of an active role in organizing and sustaining the organization is not sufficient cause to be allowed to remain a member and can, as in this case, lead to the lodging of unfair labor practice complaints by employees who feel either that the integrity of the unit has been compromised by the presence of supervisors or that pressure is being exerted on them to join the union by supervisors who are union members.

In Univ. of the Pacific, supra, the Board affirmed the rulings, findings and conclusions of the Administrative Law Judge and adopted his recommended order.

This case involved the pre-election conduct of certain staff employee supervisors in the Physical Plant Department of the university. The record clearly showed that both the superintendent and the assistant superintendent of the building and maintenance employees had engaged in various employees in conversations regarding the impending union election. These conversations included statements by the supervisors that a union at the university inevitably would result in lay offs, that working hours would be

reduced in inclement weather and that employees who were not interested in losing money or their jobs should vote no-union.

In its argument, the university contended that it was "not unlawful for an employer to express views in opposition to the union and that the questioning was coercive,"[290] and that the supervisors were merely expressing their personal opinions and not the official views of the university. The Administrative Law Judge stated, and the Board affirmed, that such arguments "had some merit under limited or circumscribed situations."[291] However, in this instance the Board agreed with the Administrative Law Judge that the university had interfered with the Section 7 rights of the employee. This section of the Act states that:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment."[292]

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[290] Univ. of the Pacific, supra at 610.

[291] Id.

[292] Section 7, NLRA, 49 Stat. 449 as amended.

This finding was reinforced by the fact that the record revealed an apparent language problem with some of the university's building and maintenance employees. It was the feeling of the Administrative Law Judge that this communication problem easily would have caused employees to misunderstand the fine distinction their supervisors appeared to be drawing between what could happen if a union was voted in and what would happen if a union was voted in.

In terms of its contributions to an understanding of unfair labor practices on the campus, this case, almost a classic in terms of its obvious coercion, illustrates that a college or university administration is to be held responsible for the statements of its supervisors and for all untoward action taken by them in attempting to influence the outcome of a vote through the use of veiled threats or promises.

In a second University of Chicago case (210 NLRB 190), this one involving two separate service workers unions, the Board agreed with the Administrative Law Judge that the university had committed an unfair labor practice when it transferred custodial employees from one union to another. In its comments on the action taken by the university in transferring employees from one bargaining unit to another and reassigning job classifications, the Board

described this action as a direct repudiation of the university's contract with the union and the terms and conditions of employment contained therein.[293]

Continuing its comments, the Board noted the following:

> "Were an employer permitted to do what [the University of Chicago] did here, that is take work embodied in the bargaining history and recognized classifications of one union, assign it to other of its employees represented by another union at the same location and transfer to the latter unit or lay off the former unit's members who had been performing the work, contracts could be eviscerated at the employer's will."[294]

The Board made clear that management, in the interest of determining the allocation of the firm's capital investments, could lawfully terminate work being performed by union members, transfer the work elsewhere, subcontract it or introduce different methods of operation however, the employer did not have a managerial right to take work from one union and arbitrarily transfer that work to a different group of employees working at the same location particularly when the only significant difference in the work is that it would thereafter be performed pursuant to wages and working conditions set forth in a contract the university had negotiated with another union.

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[293] Univ. of Chicago, supra at 190.

[294] Id. at 190.

In this decision the Board clearly demonstrated that colleges and universities must deal separately with each union and bargaining unit on their campus. The Board will not allow any amalgation of unions by management even if such a move might lower costs or increase efficiency.

In Boston Univ., supra, the Board agreed with the Administrative Law Judge that Boston University "had refused to perform its statutory bargaining obligation by refusing to furnish... [the Building and Service Employees' Union]...with requested information alleged to be relevant and necessary to the processing of a grievance."[295]

In this case, the closing of the university's paint shop had caused the lay off of six union members employed in that shop. A grievance was filed. The union maintained that the university had acted in bad faith when it closed the paint shop because it continued to provide substantial painting work to outside contractors. In order to determine whether this was the case, the union requested access to the university's painting subcontract records. Such access was denied.

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[295]Boston Univ., supra at 330.

The General Counsel maintained that the information sought by the union was "relevant and reasonably necessary for the proper performance of its statutory function to administer the bargaining agreement and intelligently to evaluate and process the layoff grievance thereunder."[296]

The university maintained that no work normally performed by its painters had been subcontracted out and thus the university had exercised its managerial rights in good faith. The university further maintained that the requested information would result in damage to the university if it were made public.

The Board agreed with the Administrative Law Judge that the university had not convincingly demonstrated the confidential nature of the requested information. Further, in determining that the university had committed an unfair labor practice by refusing to furnish information the Administrative Law Judge noted the following:

> "Since the 'duty to bargain,' as the Supreme Court has observed, 'unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement,' the employer's obligation to furnish information extends with equal force to material needed by the

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[296] Id. at 333.

union for the effective administration of an existing contract and the processing of grievance thereunder even through arbitration."[297]

Thus the Board made clear that the institution had the responsibility to supply information to the union if such information was essential to the union in processing and attempting to resolve employee grievances.

SUMMARY

To date, the unfair labor practice cases to come before the Board involving private colleges and universities have been charges levelled at the institutions, not the unions, and have involved the following questions:

1. whether an institution acted in a discriminatory manner by terminating faculty employees coincidentally with the active involvement by those faculty employees in union activities on the campus. No, as long as the employer can demonstrate sufficient reason for termination based on performance.
2. whether an institution assists, supports, dominates and interferes with a labor organization if that institution

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[297] Id. at 333.

provides financial, clerical, administrative or other support to the union members in their exercise of union activities. Yes, unless such support is offered merely to foster good union-university labor relations.

3. whether an academia institution had dominated and interfered with the formation and administration of a labor organization because some of its supervisory employees were active in organizing and supporting the union. Yes, this was considered domination and interference.

4. whether an institution, through its line supervisors, had threatened and intimidated its employees to persuade such employees to vote against a union by expressing anti-union views and implying possible personnel cut-backs and layoffs as the result of unionization. Yes, this action constituted intimidation.

5. whether an institution could layoff employees in a union with whom it held a negotiated contract, transfer these laid off employees to another union to work and force these employees to work under the terms of a contract negotiated with the second union and never

approved by the transferred employees. No, such action is disallowed as it violates the terms of a negotiated contract.

6. whether an institution could withhold information regarding the kind and amount of work let to nonunion subcontractors if such subcontracting appeared to be undercutting the need for the institution's own unionized employees, thereby precipitating the layoff. No, not if there was reason to believe that such information would provide a definitive answer to the charges.

Chapter 8

CONCLUSIONS

The impact of the National Labor Relations Board upon private college and university administration began in 1970 when the Board decided to exercise its discretionary authority and assert jurisdiction over private, nonprofit educational institutions. The immediate effect of this decision upon private educational administration was that colleges and universities lost the discretionary option of deciding whether to recognize and negotiate with employee groups organized for the purpose of bargaining over hours, wages and conditions of employment. Suddenly college and university administrators and their employees were liable to the provisions of the National Labor Relations Act and all of its subsequent amendments as well as to the procedures established by the National Labor Relations Board to enforce the Act. Colleges and universities were suddenly subject to the dictates of a federal regulatory agency, at least in the area of labor relations. Traditionally, private educational institutions in the United States had managed their internal affairs with relatively little interference by agencies of the Federal government. Bargaining units had existed on some private campuses prior to the Board's assertion of jurisdiction

(Harvard University, for instance, recognized staff bargaining units as early as the 1940s), and at other institutions such organizations as the faculty senate, which dealt with the administration on matters of faculty employment conditions, might have been considered a kind of bargaining unit. However, the new position of the Board vis-a-vis institutional labor relations meant that formally recognized bargaining units would now become a reality. It also meant that colleges and universities could become the object of an employee strike and they could also be charged with unfair labor practices. Educational administrators had to recognize and prepare themselves and their institutions for a professional, informed approach to employee relations. Haphazard personnel policies and practices suddenly needed to be re-examined and clarified. Finally, colleges and universities were forced to realize the need for sophisticated legal assistance in their dealings with the Board and the prospect of lengthy and expensive litigation in resolving labor disputes.

Based upon this analysis of the cases that have come before the Board to date, it is possible to promulgate several tentative answers to the questions posed in chapter 1.

How actively has the Board been involved in administrative matters, i.e., determining supervisory versus non-supervisory status and personnel management practices at private colleges and universities?

With the exception of the unfair labor practice cases, virtually every case the Board has heard posed an internal aminis-trative question for the involved institution. In determining which employees are to be included in the bargaining unit, the Board's determinations have often redrawn the institution's organizational chart. Board decisions have often viewed particular employees whom an institution administration assumed were supervisors and spokesmen for the administration as nonsupervisory employees. The clear delineation of supervisory authority and the power to exercise specific personnel functions which accrue to supervisors is a critical test used by the Board. An administration's assumption that department chairmen or division coordinators are represen-tatives of and spokesmen for the the administration by virtue of their titles or the social status of their positions is an incorrect one unless such status can be convincingly supported with proof of concrete powers such as the authority to hire, fire, promote or make effective recommendations on other personnel-action related changes.

In what specific administrative matters has the Board involved itself?

The Board has involved itself in issues of whether vendors under contract to an institution to provide essential support services such as dining or housing facilities are unique and separate, private industries subject to Board regulation or whether they share such an intimate connection to and relationship with a publicly financed institution as to be beyond the lawful jurisdiction of the Board.

The Board has made decisions regarding the integral separateness of various professional groups on campuses and consistently decided that such professional schools were unique entities with distinctly different concerns, qualifications and needs.

The Board has decided that certain private institutions which receive substantial funds from state or federal coffers are still private institutions. Although in at least one case involving Temple University, the Board was convinced that due to extenuating financial circumstances this particular private institution was public at least as far as an extension of Board jurisdiction was concerned.

Perhaps the most complex and direct administrative matter the Board has involved itself in has been the question of whether department chairmen and administrative officials such as

assistant and associate deans, and miscellaneous personnel are supervisors. In this area, the Board has been asked repeatedly to determine which of these type of employees are supervisors. In some cases the Board has found department chairmen to be a logical part of a faculty bargaining unit. If there are no administrative positions between the department chairmen level and the top administrative heirarchy, such Board decisions eliminate any or all of the institution's front line supervisors. When this happens there is no one to communicate the wishes and goals of the campus administration and the board of trustees to the faculty except the board of trustees and the top administrators themselves. The implications of this situation for university management are clear. Additionally, such a situation means that top administrative officials must spend vast amounts of their time functioning as line supervisors.

What type of unfair labor practice disputes has the Board heard?

To date, the Board has been involved in unfair labor practice cases that have ranged from questions of whether the institution engaged in a discriminatory action when it terminated activist, pro-union faculty members to whether an institution attempted to dominate, interfere with and influence an employee union forming or functioning on its campus.

The Board has dealt with the matter of supervisory interference in union activities, both against the union in a case of coercion of subordinate employees to join the union and in support of a union in a case of supervisors using threats, intimidation, and innuendo to influence a unit vote.

What criteria has the Board used in determining appropriate bargaining units? Has the Board been consistent in these determinations? If not, why not and how has this affected administrative policies?

The basic criteria the Board has used in determining an appropriate bargaining unit has been whether a distinct community of interest exists between groups of employees on a campus. Manifestations of this community of interest have centered in two primary areas - the collective interest of the employees in their working conditions and the administrative structure of the employer's organization. The Board has also used the following guidelines, developed for use in industrial situations to determine bargaining units: (1) prior bargaining history, (2) centralization of management particularly in regard to labor relations, (3) extent of employee interchange, (4) degree of interdependence or autonomy of departments, facilities, etc., (5) differences or similarities in skills and functions of employees and (6) geographical location of the facilities in relation to each other. The Board has been

consistent in applying these guidelines to educational institution cases although it has yet to prioritize these guidelines. In its case-by-case approach, the Board has often elected to emphasize one standard more than another depending upon the facts of the case. Based on the case analysis, it appears that a bargaining unit group must meet all the basic guidelines. Further, if one factor such as centralization of personnel policies overshadows another such as similarities of skills, the Board is likely to find that an appropriate unit for bargaining exist as long as the skill groups can be appropriately melded. The Board would not, for example, find a unit of clericals and custodians appropriate even if the personnel practices and policies of the institution were highly centralized and integrated because the Board has a long standing policy, developed from its experiences in the labor sector which disallows combining such skill groups as clericals and manual workers in the same unit. The community of interest between these two worker groups is not sufficient to warrant including them in the same bargaining unit regardless of other employment similarities.

How has the NLRB defined supervisor or manager and employee?

Questions of supervisory status are inherent in every bargaining unit determination. The Board has been clear and reasonably consistent in applying its supervisory standards. The

foundation of supervisory authority is whether one employee possesses the authority to make effective recommendations regarding such personnel actions as hiring, firing, promotion, merit increases or tenure decisions. If such authority is exercised over other members of the bargaining unit, for example, one professional librarian exercising authority over other professional librarians, the former employee is clearly a supervisor or representative of management in the eyes of the Board. Other factors in supervisory determinations include the receipt of additional compensation for performance of the job and a correlating decrease in the work performed by the individual to allow sufficient time for the completion of supervisory and administrative tasks. The Board's mandate is to preserve the integrity of bargaining units not to define such limited and exclusive bargaining units that employees entitled to the protective benefits of the Act are excluded.

How has the Board treated campus-wide bargaining units? Have they differentiated between professional or undergraduate and other school faculties and what are the effects of such differences?

On balance, the Board has treated all branches of an institution as a single, integrated entity provided that evidence indicates that the personnel policies and practices at the separate facilities are integrated and centralized with those of the parent institution. If there is no administrative or operational autonomy

intact at the branch facilities, the Board has uniformly treated all the physically separate facilities of an institution as a single entity for the purpose of collective bargaining.

Professional schools, on the other hand, consistently have been granted a separate bargaining unit on the basis of the fact that the professional employees at these schools share a community of interest different from their teaching colleagues at other schools or branches of the institution. The overwhelming effect of this differentiation is that it proliferates the number of units an administration must deal with and increases the number of contracts that must be negotiated.

The following nine charts based upon the conclusions derived from an analysis of all the relevant cases provide a decision-making model for the educational administrator faced with the possibility of collective bargaining on the campus. The charts list the criteria or factors used by the Board in determining whether various employee groups or institutions should be included or excluded from a bargaining unit. The criteria have been determined by selecting from each case those factors which the Board enunciated as the determinants for its bargaining unit, supervisory, jurisdictional and other decisions. This decision-making model does not purport to substitute for qualified legal advice and counsel,

however, it will allow an educational administrator to assess the possibilities for a bargaining unit determination based upon the relevant factors and the likelihood of whether department chairmen and other administrative, professional and support personnel will be included in the unit requested.

Table 3

NLRB/HIGHER EDUCATION DECISION-MAKING MODEL

JURISDICTION

BARGAINING UNIT SOUGHT	CRITERIA FOR AN ASSERTION OF JURISDICTION BY THE BOARD						
EDUCATIONAL INSTITUTIONS	Private, not subject to policy and fiscal control of state legislatures	Non-profit, primary purpose is promotion of educational goal and objective	Gross annual revenue of $1 million (Million Dollar Rule)	Lack of effective state regulation	Effect upon interstate commerce due to revenues, federal grants, investments, number of employees, assets, annual expenditures, purchases outside the state, facilities in other states or countries, receipts from university presses, sports events, radio stations, etc.	Involvement of Federal Government due to scholarship and loan funds, research and grant programs	
NON-EDUCATIONAL CONTRACTED SERVICES	Private corporation not owned by the institution	Engaged in activities of a commercial nature	Profit-making	Lack of evidence of intimate connection between the contractor and the public institution which it is operating	Facilities owned by the contractor	Degree to which contractor promulgates, controls and enforces personnel standards, regulations and operational standards	Services open to the general public
REGULAR AND PROFESSIONAL SCHOOL FACULTY	Professional employees as defined by the Act Section 2(12)	Usual employer-employee relationship	Dual professional standing, i.e. law school, medical school, dental school faculty				
PRIVATE INSTITUTIONS RECEIVING PUBLIC FUNDS	Private	Non-profit	Physical plant not owned by the state or Federal Government	Administrative independence	Complete authority over personnel practices and labor relations policies	Prior bargaining history that showed no involvement with or interference because of relationships with state of Federal Government	Lack of evidence that employees were public
MEDICAL TEACHING AND RESEARCH FACILITIES	Private, affiliated with a college or university	Non-profit	Personnel practices standardized with those of the parent institution				

Table 4
NLRB/HIGHER EDUCATION DECISION-MAKING MODEL

JURISDICTION

BARGAINING UNIT SOUGHT	CRITERIA FOR NON-ASSERTION OF JURISDICTION BY THE BOARD				
EDUCATIONAL INSTITUTION	Public-owned, controlled, funded by a state or any political subdivision thereof				
NON EDUCATIONAL CONTRACTED SERVICES	Owned, controlled, funded, operated by a state, institution or any other political subdivision thereof				
REGULAR AND PROFESSIONAL SCHOOL FACULTY	Public employees subject to regulation in matters of labor relations by state or federal statutes and labor regulatory agencies				
PRIVATE INSTITUTIONS RECEIVING PUBLIC FUNDS	Quasi-public status rendering the institution an instrumentality of the state or Federal Government; tuition, fee subsidies for state residents	Majority of budget funds received as the result of state appropriations; capital improvement funds received from legislative appropriations	Legislative designation of trustees; requisite transmittal of annual reports to governor and members of the legislature	Status as a public employer with specific exemptions granted for bond posting requirements	State power to audit expenditures
MEDICAL TEACHING AND RESEARCH FACILITIES	Publically owned and operated hospitals, clinics, research labs, etc., funded by a state or political subdivision thereof or the Federal Government				

TABLE 5

BARGAINING UNIT SOUGHT	BARGAINING UNIT SCOPE CRITERIA FOR INCLUSION IN A BOARD-DETERMINED BARGAINING UNIT					
MULTI-CAMPUS UNITS	Standardized personnel functions; centralized personnel and management practices to foster and reinforce a community of interest among the employees on all of the separate campuses	Operations integrated between all the various facilities; interdependence of facilities; supplementary course offerings at branch facilities	Lack of significant degree of administrative, operational or fiscal autonomy; similarities in skills and functions of employees involved	Significant degree of interaction and employee interchange between the facilities; geographical location of the facilities in regard to each other	Proportional representation in campus governing bodies such as the faculty senate	Lack of prior bargaining history or a prior history of separate, distinct units
NON-PROFESSIONAL DEPARTMENT UNITS	Evidence of community of interest manifested by similarity of job classifications throughout all facilities, divisions and departments of an institution, wages, working conditions	Centralized and integrated personnel and labor policies, procedures	Similarity of job skills; degree of employee transfer and interchange between positions at an institution	Similar supervisory lines of authority with ultimate responsibility traced to a single administrative office or department	Not a mix of manual (blue collar) and non-manual clerical, technical (white collar) workers	Prior bargaining history of university-wide units encompassing employees with similar job titles
PROFESSIONAL SCHOOLS	Personnel policies and practices applied to professional school faculty different from those in force elsewhere in the institution	Regulation of standards, policies and procedures by outside accrediting and regulatory agencies	Certification of employees by outside regulatory agency, i.e., bar association, medical association; dual professionals	Lack of movement into administrative hierachy of the institution from the ranks of the professional school	Primary allegiance to a particular discipline; evidence that such allegiance transcends mutual interest with other non-professional school employees	Lack of student movement from parent institution into professional schools
PART-TIME FACULTY MEMBERS	Substantive mutuality of interest with full-time faculty members; part-time employment which constitutes primary work interest which is teaching	Eligibility for tenure; proportionally comparable salary scales	Evidence of participation in institutional governance on an effective, ongoing basis.	Academic or institutional responsibilities beyond teaching and grading	Active participation in appointment, promotion, tenure decisions; curriculum development, degree requirements, selection of chairman and other related personnel actions	

Table 6
NLRB/HIGHER EDUCATION DECISION-MAKING MODEL

BARGAINING UNIT SCOPE

BARGAINING UNIT SOUGHT	CRITERIA FOR EXCLUSION IN A BOARD-DETERMINED BARGAINING UNIT				
MULTI-CAMPUS UNITS	Lack of standardized personnel functions and centralized, integrated management and labor relations practices throughout all facilities; differing pay scales and benefits	Lack of daily supervision by parent institution administrators; evidence of administrative and operational autonomy	Lack of interaction between faculty on parent campus and faculty at branch facility; no evidence of interchange between the two faculties		
NON-PROFESSIONAL DEPARTMENT UNITS	Work performed is separate and distinct from that performed by other clerical, technical or manual employees on the campus; semi-professional	Community of interest separate from all other nonacademic, nonsupervisory and nonprofessional employees which overrides similarity of benefits, salaries, etc.	Lack of interchange or transfer of employees; separate shifts, locker, lunchroom facilities	Separate supervisory lines; functionally distinct work	No prior bargaining history
PROFESSIONAL SCHOOLS	No separate professional status, qualifications, regulations or accrediting evident				
PART-TIME FACULTY MEMBERS	Lack of substantive mutuality of interest with full-time faculty; part-time employment that does not constitute primary work interest	Lack of eligibility for tenure; differing salary and benefit scales	No academic or institutional responsibilities beyond teaching and grading	Lack of participation in institutional governance, curriculum developments, degree requirements, selection of chairmen	Lack of participation in appointment, tenure, promotion decisions

TABLE 7

EMPLOYEE GROUP INVOLVED	SUPERVISORS CRITERIA FOR INCLUSION IN A BOARD DETERMINED UNIT			
STATUS OF FACULTY COLLECTIVELY	Professional standing as determined by Section 2(12) of the Act; faculty status	Lack of supervisory authority over other professional members of the unit	Collective discussion and consensus decision making authority on academic administrative matters such as curriculum, grading, etc., policy matters	Participation in university senates or other body exercising quasi-collegial authority, the actions of which require ultimate authority from and approval of the board of trustees
ADMINISTRATIVE OFFICIALS (Academic deans, division chairmen, nonacademic deans)	Professional standing as determined by Section 2(12) of the Act; faculty status although clear professional status is the overriding consideration	Nonsupervisory responsibilities over other professional members of the unit; lack of authority to hire, discharge, effectively recommend various personnel action	Lack of access to confidential information; lack of authority to make independent judgements in absence of administrative supervisor or substitute for administrative supervisor in absence of same; authority to hire and direct clerical help is not a basis for exclusion	Lack of additional compensation for administrative duties; inability to make budget recommendations or reject budget cuts; continued teaching responsibilities
DEPARTMENT CHAIRMEN	Professional standing as determined by Section 2(12) of the Act; faculty status with eligibility for tenure, faculty benefits and privileges; primary duties as academic not administrative	Election to position by faculty or appointment by President or other administrative officer in consultation with and upon recommendation of faculty; rotating position; institution designation as faculty member not administrator	Nonsupervisory authority evidenced by inability to make effective recommendations for hiring new faculty, changes in status of department members, promotion and tenure decisions, merit increase decisions, and other personnel actions. Lack of evidence that department chairmen progressed into the administrative hierachy of the institution	No increased compensation for position; lack of authority to make budget recommendations or reject budget requests; continued teaching responsibilities; evidence that chairmen act primarily as instruments of the faculty
MISCELLANEOUS SUPERVISORS (Directors of Libraries, placement, admissions, education and communications center employees, registrars, various directors and coordinators, faculty on executive personnel and grievance committees; faculty who supervise students)	Professional standing as determined by Section 2(12) of the Act	Lack of supervisory authority to direct the work of other professionals in their departments; inability to make effective hiring, promotion and other personnel recommendations	Exercise of consensus authority regarding personnel actions effecting other professionals in the unit such as promotion, tenure, and sabbatical decisions but requiring the approval of the board of trustees not considered supervisory so long as these are collective, peer group decisions	Continued academic responsibilities or affiliation; similar lines of supervisory authority to other members of the unit

TABLE 8

EMPLOYEE GROUP INVOLVED	SUPERVISORS CRITERIA FOR EXCLUSION IN A BOARD DETERMINED UNIT			
STATUS OF FACULTY COLLECTIVELY	Lack of professional standing as determined by Section 2(12) of the Act			
ADMINISTRATIVE OFFICIALS (Academic deans, division chairmen, nonacademic deans)	Professional standing as determined by Section 2(12) of the Act and supervisory status over other professionals in the unit.	Supervisory authority over other professionals or primary supervisory authority over and interaction with nonprofessionals providing support services to faculty. Authority to make effective recommendations regarding various personnel actions	Authority to act as administrative supervisor in absence of same; access to confidential information and authority to make independent judgments based on such information; decreased teaching responsibilities	Additional compensation for administrative duties performed; ability to make budget recommendations and cuts.
DEPARTMENT CHAIRMEN	Professional standing as determined by Section 2(12) of the Act and supervisory status over other professionals in the unit; placement in administrative versus faculty rank in official institution publications	Supervisory authority; evidence of ability to make effective recommendations regarding hiring, promotion, tenure, increases, and other personnel actions. Authority to make employment decisions contravening wishes of other department members	Allocation of budget funds; supervision of support personnel; authority to approve leave, travel and other requests. Control over day-to-day operations of the department; functions as instrument of the administration	Additional, increased compensation for duties as chairman; reduced teaching loads; evidence of progression from chairman position into administrative hierachy
MISCELLANEOUS SUPERVISORS (Directors of Libraries, placement, admissions education and communications center employees, registrars, various directors and coordinators, faculty on executive, personnel and grievance committees; faculty who supervise students	Lack of professional standing or employment on an administrative contract rather than a teaching contract	Individual supervisory authority over other professionals; ability to effectively recommend hiring, terminations, promotion and other personnel actions	Differing lines of supervisory authority; reporting to administrative rather than academic personnel	

Table 9
NLRB/HIGHER EDUCATION DECISION-MAKING MODEL

ANCILLARY SUPPORT PERSONNEL

EMPLOYEE GROUP INVOLVED	CRITERIA FOR INCLUSION IN A BOARD DETERMINED UNIT				
LIBRARIANS	Professional employee as defined by Section 2(12) of the Act especially advanced professional training	Faculty status or designation "with the rank of" instructor, assistant, associate, full professor	Nonsupervisory status or less than 50% of time spent supervising nonprofessional employees	Lack of faculty status but clear involvement in student education and the furtherance of scholarly goals	Community of interest with the faculty. This can transcend differences between teaching faculty and librarians in the areas salary and benefit scales, and tenure eligibility.
RESEARCH ASSOCIATES/ LABORATORY TECHNICIANS	Professional employee with advanced training engaged in work predominantly intellectual and varied in character	Faculty status and eligibility for tenure however faculty status is not a requirement for inclusion if other factors are present	Performance of tasks requiring the exercise of professional judgement	Teaching is not a requirement for inclusion in a faculty unit if the work performed is of a professional and academic nature	
STUDENTS	To date graduate teaching and research assistants have not been included in units with faculty and other professionals	To date student employees have not been included in units of nonprofessional clericals			
MISCELLANEOUS CLASSIFICATIONS (Academic, admissions, guidance counselors, ROTC faculty, terminal contract and dual function employees, athletic coaches, program coordinators, administrative assistants)	Professional employee as defined by Section 2(12) of the Act	Faculty status and eligibility for tenure; other factors demonstrating a sufficient community of interest	Similar lines of supervisory authority	Coaching activities requiring advanced training and teaching of physical and mental skills	Faculty on terminal contract determined to share community of interest with other faculty until expiration of contract

Table 10
NLRB/HIGHER EDUCATION DECISION-MAKING MODEL

ANCILLARY SUPPORT PERSONNEL

EMPLOYEE GROUP INVOLVED	CRITERIA FOR EXCLUSION IN A BOARD DETERMINED UNIT				
LIBRARIANS	Lack of professional status as defined by Section 2(12) of the Act	Supervisory status involving supervision of other professionals in the unit			
RESEARCH ASSOCIATES/ LABORATORY TECHNICIANS	Lack of professional status as defined by Section 2(12) of the Act	Performance of merely technical tasks	Lack of evidence that employee is involved in training to become a professional	Provision of technical support and assistance rather than co-professional roles	Supervisory authority over professional members of the unit
STUDENTS	Student status with employment contingent upon continued student status	Lack of faculty rank, benefits, privileges and lack of voting privileges at faculty meetings	Lack of coverage by existing college or university personnel plans designed for permanent professional and nonprofessional employees	Differing pay scales, supervisory lines of authority, restrictions placed upon number and length of hours worked per week and months worked per year	Community of interest with other students; lack of sufficient community of interest with professional and nonprofessional employees
MISCELLANEOUS CLASSIFICATIONS (Admissions, academic and guidance counselors; ROTC faculty, terminal contract, dual function employees, athletic coaches, program coordinators, administrative assistants)	Lack of professional status as defined by Section 2(12) of the Act	Current and ongoing membership in a U.S. military service. ROTC instructors share a community of interest with other service members not professional, non-military teaching faculty	Lack of tenure eligibility and differing lines of supervisory authority	Lack of community of interest based on tenure, compensation, participation in faculty governance, university designation as "administrator" rather than faculty	Supervisory authority over professional members of the unit; faculty in administrative positions excluded if they supervise other faculty but generally not if they supervise clerical, technical nonprofessionals 50% or less of the time.

TABLE 11

TYPE OF UNFAIR LABOR PRACTICE	UNFAIR LABOR PRACTICES BOARD CRITERIA FOR DETERMINING UNFAIR LABOR PRACTICES			
TERMINATIONS	Existence of a discriminatory motive; inference of a discriminatory motive when unaccompanied by threats, promises or coercive statements is insufficient evidence that employer refuses to recognize union	Documentation of discriminatory motive; coincidental timing of termination with pro-union activities insufficient evidence of discrimination if other objective factors for termination exist	Evidence that systematic termination of several pro-union activists occurred. Terminations based upon documented evidence of poor performance and attempts to upgrade academic quality through employment of more qualified employees are acceptable reasons	Evidence of sustained union animus on part of the institution
INTERFERENCE WITH AND DOMINANCE OF UNION ACTIVITIES	Provision of advice and counsel by management representatives; management representatives acting in liaison capacity between union and management; management recommendations to change, modify or otherwise redraft union proposals to be submitted to management	Provision of financial and administrative assistance such as mailing, printing, distribution facilities, meeting rooms and other use of an employer's services by labor organizations prior to official recognition of the bargaining agent; allowing employees to attend union meetings on employer's time	Selection and financing of an attorney for the union by the employer	Threats and coercion by supervisors prior to an election implying lay-offs, cutbacks, withdrawal of benefits or raises and promotions. Supervisors individually seeking out employees and attempting to influence their voting; using such barriers as language communication problems to reinforce tone and type of potential implications of unionism
SUPERVISORY INTERFERENCE WITH UNION ORGANIZATION AND ACTIVITIES; INTIMIDATION	Supervisors participating in meetings with management as representatives of the employees	Supervisors participating in picketing activities and the potential coercive effect such activities have upon employees	Supervisors attending national union conventions as representatives of the local union	Any other compromise of labor organization activities due to the participation in such activities by employees determined to be supervisors even if such participation occurs prior to clear board establishment of supervisory status
CONTRACT VIOLATION DUE TO EMPLOYEE TRANSFERS	Laying off or terminating employees in one union and recommending that they transfer to another union on campus	Reassigning job classifications and transferring work assignments to another union for performance by another group of workers on the same campus	Applying the terms of the contract negotiated with one union to the transferred members of another union thereby eviscerating and ignoring the terms of a standing contract	Amalgamating unions and altering union contracts or substituting one union contract for another.

SUMMARY

Although it has been more than six years since the Board asserted jurisdiction over the private educational institution, it is clear that the Board has had some problems accommodating its industrial models to the academic work environment. In the early years, the Board often had difficulty making up its mind. No sooner would one standard be articulated than a new decision would overrule it often by completely reversing the earlier rulings. Inconsistencies are likely to continue to occur as long as the Board relies on a case-by-case approach because the Board tailors its decisions to the individual and specific facts in each case. However enough varying cases have been heard to date that the overall foundation for the development of specific Board standards has begun to emerge. Over the past six years guidelines that are clear, reasoned and likely to remain intact regardless of the peculiar circumstances of a specific academic collective bargaining case have been developed by the Board. The Board has acknowledged the peculiarity of the academic working world as compared with industry and it has attempted to accommodate these differences within the framework of its established industrial models. For example, the Board has held that teaching and non-teaching faculty

members are employees within the meaning of the Act and therefore entitled to the protection of the Act despite the belief held by many academicians that faculty members are not employees but rather independent agents.

Determining bargaining units has been complicated by the nature of faculty personnel who are specialized professionals whose subject knowledge, teaching and research skills are best known to and most intelligently evaluated by their professional peers. Consequently, industry-type lines of supervision just do not exist. Academic deans and department chairmen are not, by definition, supervisors nor does the Board automatically consider them so. In short, faculty members generally do not have lower or middle-level supervisors and even when a department chairman does exercise traditional industry-type supervisory authority determining what that authority actually is and whether it's individual or collegial authority is often difficult. The Board has relied heavily upon the Act's definition of a professional employee to determine the composition of bargaining units. It has had difficulty grasping the functional and organizational structure of colleges and universities deciding whether various academic support personnel belong in units

of professional employees and the Board has not been as consistent in its approach to the professional status of other professional support personnel on campus.

Determining whether a sufficient community of interest exists between the potential members of a unit and using those mutual interests as the basis for drawing up bargaining units is a guideline that has been used consistently by the Board. The problem, however, is clearly grasping which factors the Board considers most important in deciding whether a community of interest exists. The Board seems to weigh one factor more heavily than another factor depending upon the facts of each case so that the priorities seem to change in kaleidoscope fashion.

The following opinion, expressed by current National Labor Relations Board Chairman, Betty Southard Murphy, provides the best summation of the Board's position on academic cases:

> "Although the Board's decisions must speak for themselves, I think it can be safely said that theBoard has reached general agreement regarding certain issues. Thus, the Board has consistently held that faculty members are employees and not supervisors, managerial employees or independent contractors. The Board has also generally recognized the appropriateness of general units for law schools and other professional schools. law is less well-settled in other areas such as whether part-time employees should be included in faculty units. In still

> other areas (the supervisory status of departmental chairmen is perhaps the best example), the Board's decision depends on the facts in each case."[298]

This is still a developing area of labor law, and the changes, reversals, new decisions will continue for at least several years more. Perhaps the best advice that can be offered to educational administrators who must deal with the Board is that they understand the precedents to date, and present their cases in complete detail on the assumption that Board members do not have prior understanding of the intricacy and uniqueness of academic organization and administration. Board decisions are made solely on the basis of the facts presented to the Board not on intuitive or prior considerations. In cases where institutions have provided accurate, convincing and plentiful detail to support their petitions, the decision has often favored the institution. It was Cornell University, not a labor union, that requested and won the landmark assertion of jurisdiction decision. Finally, an understanding of how the Board works its procedures and regulations and a knowledge of prior cases and decisions is essential to any educational administrator attempting to guide an institution through the murky waters of academic collective bargaining.

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[298] Betty Southard Murphy, Chairman, NLRB in letter to Jerry C. Lee, dated January 19, 1977.

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