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Appropriate Bargaining Units in Non-Profit Hospitals

APPROPRIATE BARGAINING UNITS IN NON-PROFIT HOSPITALS

Congress enacted the National Labor Relations Act (the Act)[1] to protect concerted activities in which employees engage for their mutual benefit.[2] Section 7 of the Act protects the right to form, join, or assist labor unions, to bargain collectively through representatives, and to engage in concerted action for mutual benefit or protection.[3] To administer the Act, Congress created the National Labor Relations Board (the Board).[4] The Board's two primary functions are supervising the selection of bargaining representatives for employees[5] and overseeing the on-going relationship between the employer, the union, and the employees.[6]

Congress entrusted the Board with selecting the "unit appropriate for the purposes of collective bargaining" with the employer.[7] An employee, labor organization, or employer may petition the Board to determine

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[1] 29 U.S.C. § 151-69 (1976).

[2] 29 U.S.C. § 157 (1976). The National Labor Relations Act (the Act) was a response to state courts' proclivity toward enjoining picketing and other forms of employee activity. *See, e.g.*, Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077, 1077-78 (1896). In deciding whether to enjoin union acitivity, state courts tended to evaluate the objectives of the union activity. *See. e.g.*, United Shoe Machinery Corp. v. Fitzgerald, 237 Mass. 537, 130 N.E. 86, 88 (1920) (attempting to enforce collective bargaining held unlawful objective); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011, 1014-15 (1900) (union's request that employer ask employees to join union held unlawful objective). Following enactment of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), federal courts began to treat unions as combinations in restraint of commerce or trade. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908). The Norris La Guardia Act, 29 U.S.C. §§ 101-110, 113-115 (1976), passed in 1932, severely restricted the ability of federal courts to issue injunctions in labor disputes. 29 U.S.C. § 101 (1976). Furthermore, the Norris La Guardia Act declared that the public policy of the United States allows individuals full freedom of association, self organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment. 29 U.S.C. § 102 (1976).

[3] 29 U.S.C. § 157 (1976). The Supreme Court declared the Act constitutional in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), despite the Act's original application only to employer practices and not to union practices.

[4] 29 U.S.C. § 153(a) (1976). The National Labor Relations Board (the Board) consists of five members appointed to five year terms by the President with the advice and consent of the Senate. *Id.* The Board may delegate powers under the Act, including the power to determine appropriate bargaining units, to the regional directors. 29 U.S.C. § 153(b) (1976).

[5] *See* 29 U.S.C. § 159 (1976); text accompanying notes 7-28 *infra.*

[6] *See* 29 U.S.C. § 158 (1976). *See generally* R. GORMAN, LABOR LAW (1976) [hereinafter cited as GORMAN].

[7] 29 U.S.C. § 159(b) (1976). A bargaining unit is composed of a group of jobs which are sufficiently similar that the employees performing the jobs have many interests and needs in common. *See* GORMAN, *supra* note 6, at 66. The bargaining unit does not change when one employee quits and a new employee is hired. *Id.* Furthermore, any collective bargaining agreement between the employer and the duly designated unit representative binds new employees who were not unit members at the time the agreement was made. *Id.*

whether a majority of the employees desire a collective bargaining representative.[8] Before ordering a representation election, the Board holds a hearing to evaluate whether the members of the proposed bargaining unit have sufficiently similar needs and desires or a "community of interest."[9] The size and composition of the bargaining unit is important because the representative, or union, must be able to represent all the unit members without undue conflicts of interest. Conversely, excluding employees with interests substantially similar to the interests of employees in the unit may force the employer to bargain with two units where one would be sufficient.[10] To determine the appropriateness of a unit, the Board considers the similarity of wages, hours, benefits,[11] qualifications,[12] training and work performed,[13] interaction among employees,[14] common supervision and determination of labor relations policy,[15] bargaining history,[16] employee preference,[17] and extent of organization.[18] The community of in-

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[8] 29 U.S.C. § 159(c) (1976).

[9] 29 U.S.C. § 159(b) & (c) (1976); Allegheny General Hosp., 239 N.L.R.B. no. 104, 100 L.R.R.M. 1030, 1934-37 (1978); Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 136, 49 L.R.R.M. 1715, 1716 (1962); Note, *National Labor Relations Act—History and Interpretation of the Health Care Amendments*, 60 MARQ. L. REV. 921, 944 (1977) [hereinafter cited as *History and Interpretation*]. The Act forbids the Board from finding certain units appropriate. For example, the Board may not certify a unit containing both guards and non-guards, nor may the Board certify a union to represent a guard unit if the union has any non-guard members. 29 U.S.C. § 159(b) (3) (1976).

[10] *See* GORMAN, *supra* note 6, at 68-69.

[11] N.L.R.B. v. Bayliss Trucking Corp., 432 F.2d 1025, 1028 (2d Cir. 1970); Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715, 1716 (1962). *See generally* GORMAN, *supra* note 6, at 70-86.

[12] Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715, 1716. *see* Trustees of Columbia University, 222 N.L.R.B. 309, 91 L.R.R.M. 1276, 1277-79 (1976).

[13] 136 N.L.R.B. at 137, 49 L.R.R.M. at 1716.

[14] *Id.* The extent of contact and exchange among employees frequently influences bargaining unit determinations for stationary engineers, boiler operators, and power house employees. *See, e.g.*, B.P. Alaska, Inc., 230 N.L.R.B. 986, 986-88, 95 L.R.R.M. 1555, 1555-56 (1977) (separate unit of powerhouse employees appropriate because little interchange or overlap between powerhouse employees and other employees); Empire State Sugar Co., 166 N.L.R.B. 31, 34, 65 L.R.R.M. 1591, 1592 (1967), *enforced*, 401 F. 2d 559 (2d Cir. 1968) (separate unit for powerhouse employees appropriate, despite high degree of plant intergration); Georgia-Pacific Corp., 156 N.L.R.B. 946, 948, 61 L.R.R.M. 1155, 1155-56 (1966) (power group employees constitute separate bargaining unit).

[15] Kalamazoo Paper Box Corp. 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715, 1716 (1962). Determination of labor policy involves handling collective bargaining negotiations and grievance arbitrations. *See* GORMAN, *supra* note 6, at 69-70.

[16] An otherwise inappropriate unit may be certified if a prior bargaining relationship with that particular unit exists. *See, e.g.*, St. Louis Indep. Packing Co., 100 N.L.R.B. 1149, 30 L.R.R.M. 1427 (1952). The Board, in an effort to maintain stability in labor management relations, attempts to maintain units where successful bargaining has occurred. *See* Bay Medical Center, 218 N.L.R.B. 620, 89 L.R.R.M. 1310 (1975), *enforced* 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979).

[17] Employee preferences become important where either a plant-wide unit or a craft unit would be equally appropriate. The Board will order a "*Globe* election" to determine the preferences of the employees affected. Globe Machine & Stamping Co., 3 N.L.R.B. 294, 1A

terest is an amorphous concept, and sifting out an appropriate bargaining unit from among many possible bargaining units involves a subjective judgment by the Board.[19] Rarely is one particular unit clearly *the* appropriate unit.[20]

The Board's task of choosing an appropriate bargaining unit is further complicated by the unit's function as an election unit.[21] Because only employees in the bargaining unit designated by the Board may vote in the initial representation election determining whether a union will represent the employees for collective bargaining purposes,[22] the make-up and size of the bargaining unit are the subject of union and employer pre-election strategy.[23] The union will petition for the largest unit in which it has or-

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L.R.R.M. 122 (1937). A *Globe* election is a two step election in which the employees in the craft unit may choose between representation as a separate craft unit or as part of a plant-wide unit. Employees in the plant who are not members of the proposed craft unit may choose between the union or no union. Parke Davis & Co., 173 N.L.R.B. 313, 314-15, 69 L.R.R.M. 1336 (1968). The *Globe* election procedure has been criticized as increasing fragmentation of bargaining units thereby increasing the risk of work stoppages and strikes. Allis Chalmers Mfg. Co., 4 N.L.R.B. 159, 175-77, 1A L.R.R.M. 275, 280-81 (1937) (Member Smith, dissenting).

[18] Congress has forbidden the Board to allow extent of organization to be controlling in bargaining unit determinations. 29 U.S.C. § 159(c)(5) (1976). The Board may, however, consider the extent to which a union has organized a plant as one factor in bargaining unit determinations. N.L.R.B. v. Metropolitan Life Insurance Co., 380 U.S. 438, 441-42 (1965). If the Board articulates reasons for the appropriateness of a unit, the unit determination will not be struck down solely because the unit is the same as the extent of organization. *Id.* at 442-43.

[19] *See* GORMAN, *supra* note 6, at 69-70.

[20] The bargaining unit designated by the Board need not be the only possible unit. Section 9(a), 29 U.S.C. § 159(a) (1976), states that the representative of *a* unit appropriate for the purposes of collective bargaining shall be the exclusive representative of the employees in that unit. *See also* Note, *The 1974 Health Care Amendments to the National Labor Relations Act: Jurisdictional Standards and Appropriate Bargaining Units*, 5 FORDHAM URB. L.J. 351, 356-57 (1977) [hereinafter cited as *Jurisdictional Standards*]. The considerations favoring one unit may balance the considerations favoring a different unit. In *Globe Machine and Stamping Co.*, 3 N.L.R.B. 294, 1A L.R.R.M. 122 (1937), the factors favoring a craft unit (i.e., lack of interchange among workers, separate working area, higher degree of skill needed) about equally balanced the factors favoring a plant-wide unit (all goods flowed through several departments, the skilled work could be easily learned). *Id.* at 299-300, 1A L.R.R.M. at 125-26.

[21] 29 U.S.C. § 159(b) and (c) (1976). The election process begins with a petition to the Board requesting or questioning recognition for a given union. The Board then investigates the petition and directs a secret ballot election upon a finding that a substantial question of representation exists. 29 U.S.C. § 159(c)(1) (1976). The representatives are selected by a majority of employees in the unit designated by the Board. 29 U.S.C. § 159(a).

[22] *See generally*, GORMAN, *supra* note 6, at 67-68.

[23] *See* Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO ST. L.J. 235, 283-87 (1975). [hereinafter cited as Feheley]. Before the Board will order an election, the union must produce a substantial showing of interest. The employees in the unit designated by the Board are the only employees to vote in the representation election. To be the designated representative for collective bargaining, the union must win a simple majority of votes in the representation election. Therefore a union requests a bargaining unit in which over half the employees are union supporters. *Id.* at 285.

ganized 30 percent of the employees and in which it believes a majority of employees will vote for the union in a representation election.[24] The employer will seek to increase the size of the unit in the hope that the union will be unable to organize a majority of unit members.[25]

Although the size of a bargaining unit may be significant in affecting the outcome of a representation election, after a bargaining representative has been selected the composition of the unit continues to influence the administration of the collective bargaining relationship. An employer may have to bargain separately with each of several small units. Thus, the employer whose employees are organized into numerous small units may face more frequent negotiations and the potential of more frequent work slowdowns and disruptions.[26] Smaller units may also expose the employer to extended work stoppages when non-striking units honor the pickets of striking units within the same plant.[27] Larger units, while more convenient for the employer to administer, are more difficult for the union to manage, since a larger unit will encompass conflicting interests which the union must harmonize when representing the unit in a collective bargaining context. Although the extent of organization may not control appropriateness of a bargaining unit,[28] it is essential to a union's efforts to organize a plant and to the employer's efforts to circumvent union organization.[29]

The choice of an appropriate bargaining unit in non-profit hospitals differs from the choice of appropriate units in other industries. Before the passage of the 1974 Health Care Amendments (the Amendments),[30] the

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[24] GORMAN, *supra* note 6, at 67-68.

[25] *Id.*

[26] *See* Feheley, *supra* note 23, at 285-86.

[27] *See* GORMAN, *supra* note 6, at 67-68.

[28] *See* note 18 *supra.*

[29] One of the employer's major weapons in stopping a union drive is delay, and contesting the appropriateness of the bargaining unit is an effective source of delay. Neither the union nor the employer can appeal the Board's designation of an appropriate unit in federal court until after the representation election. To contest appropriateness, the employer refuses to bargain with the newly elected union on the ground that the bargaining unit is improperly constituted. The union must then file an unfair labor practice charge with the regional director claiming that by refusing to bargain the employer is violating Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1976). The regional director's staff investigates the charge and may eventually, after notice and hearing, issue a bargaining order requiring the employer to bargain with the union. 29 U.S.C. § 160(b), (c) (1976). The Board does not have the power to enforce its bargaining orders, but must petition a United States Court of Appeals for enforcement of the bargaining order. 29 U.S.C. § 160(e) (1976). The court may take additional evidence and hear arguments before deciding whether to enforce the Board's order. *Id.* If the court of appeals enforces the Board bargaining order, the employer must bargain with the elected union. If, however, the court refuses to enforce the Board order, the election is voided and the entire process, beginning with selection of an appropriate unit, must begin again. *See generally,* I. ROTHENBERG & S. SILVERMAN, LABOR UNIONS, HOW TO AVERT THEM, BEAT THEM, OUT-NEGOTIATE THEM, LIVE WITH THEM, UNLOAD THEM (1973).

[30] PUB. L. No. 93-360, 88 Stat. 395 (1974) (codified in scattered sections of 29 U.S.C. § 151-69).

National Labor Relations Act expressly excluded non-profit hospitals from the Act's coverage.[31] Prompted by increasing unrest in the health care field,[32] Congress enacted the Amendments to bring hospital labor disputes under the uniform coverage and restrictions of the national labor regulatory scheme.

The Amendments did not alter Section 9 of the Act, which gives the Board the duty of designating an appropriate bargaining unit.[33] As originally proposed, the Amendments would have changed Section 9 to limit the total number of allowable bargaining units in a non-profit hospital to four.[34] Rejecting a specific numerical limit, Congress inserted an advisory paragraph in the Conference Report directing the Board to prevent "proliferation of bargaining units in the health care industry."[35]

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[31] Prior to the 1974 Amendments the definition of employers covered by the Act excluded "any corporation or association operating a hospital, if no part of a net earnings inures to the benefit of any private shareholder or individual." 29 U.S.C. § 152(2) (1970). Labor relations in non-profit hospitals were controlled by state law because non-profit hospitals were considered "local" in nature. Yet in 1972, 56% of all health care employees worked in non-profit hospitals and hospitals' net revenue approached $19,000,000,000. *See* Feheley, *supra* note 23, at 241.

[32] The potential for disruption of delivery of health care services was a major factor motivating the passage of the Amendments. *See* 120 CONG. REC. 6940 (1974) (remarks of Sen. Taft). The Senate Report on the proposed amendments specifically referred to a general hospital strike occurring in November of 1973. The strike caused discharge of patients, violence and vandalism directed toward non-striking hospital employees and property, arson, and sanitation hazards. S. REP. No. 93-766, 93d Cong., 2d Sess. 8, *reprinted in* 2 [1974] U.S. CODE CONG. & AD. NEWS 3946, 3953 (separate views of Sen. Dominick) [hereinafter cited as *Conference Report*]. *See generally,* Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis,* 70 N.W.L. REV. 202 (1975).

[33] 29 U.S.C. § 159 (1976).

[34] S. 2292, 93d Cong., 1st Sess. (1973). S. 2292 proposed amendment of § 9(b) of the Act, 29 U.S.C. § 159(b), to limit appropriate bargaining units in health care institutions to units of all professional employees, all clerical employees, all technical employees, and all other service and maintenance employees. *Id.*

[35] The paragraph in the conference report admonishing the Board to give due consideration to preventing proliferation of bargaining units cited with approval three Board hospital bargaining unit determinations. *Conference Report, supra* note 32, at 3950. In *Four Seasons Nursing Center,* 208 N.L.R.B. 403, 85 L.R.R.M. 1093 (1974), the union petitioned for a unit of two maintenance men in a nursing center employing 143 people. The Board decided that the petitioned-for unit did not comprise a distinct and homogeneous group of employees with interests separate from the other employees at the facility. *Id.* at 403, 85 L.R.R.M. at 1094. The Board looked to the similarity in methods of computing pay, contact with other workers, and sharing of facilities. *Id.*

In *Woodland Park Hospital, Inc.,* 205 N.L.R.B. 888, 84 L.R.R.M. 1975 (1973), the Regional Director directed a representation election among the x-ray technicians. *Id.* at 1076. Overruling the Regional Director, the Board determined that the x-ray technicians spent substantial amounts of time in other areas of the hospital working with other employees and that they enjoyed the same fringe benefits as other employees. *Id.* at 889, 84 L.R.R.M. at 1076-77. The Board, finding that the x-ray technicians did not have a community of interest sufficiently separate from the other employees, designated the appropriate bargaining unit as all employees at the hospital, excluding professionals, registered nurses, dieticians, pharmacists, guards and supervisors. *Id.*

Before the enactment of the Amendments, the Board generally recognized five basic units in the health care field.[36] In evaluating the appropriateness of a given unit in the health care field, the Board looked to traditional community of interest criteria.[37] The Board analyzed the appropriateness of a requested unit in terms of the pattern of facts and operating procedures of the particular health care facility under consideration.[38] State labor relations boards, however, which regulated private non-profit hospitals prior to the Amendments,[39] recognized units substantially more fragmented than the units generally approved by the Board.[40]

In the year immediately following passage of the Amendments, the Board appeared to follow the congressional directive to avoid undue proliferation of bargaining units.[41] In *Shriner's Hospital*[42] the Board considered the propriety of a requested unit of five stationary engineers. The Board ruled that the petitioned-for unit did not have a sufficiently separate and distinct community of interest to justify a separate unit.[43] The Board noted that under similar circumstances outside the hospital context, the requested unit might have been found appropriate.[44] In hospital

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In *Extendicare of West Virginia, Inc.*, 203 N.L.R.B. 1232, 83 L.R.R.M. 1242 (1973), the union sought three units, licensed practical nurses (LPN's), technical employees, and service and maintenance employees. The Board found a separate unit of LPN's appropriate because of their special training and higher salary. The employer sought a combined unit of clerical, maintenance, service and technical employees. The Board rejected the employer's proposed group and directed an election in a unit including technical, maintenance, and service employees, but excluding clerical employees. *Id.* at 1233, 83 L.R.R.M. at 1244.

In a cryptic footnote to the Conference Report, Congress did not approve all the holdings of the *Extendicare* case. *Conference Report, supra* note 32, at 3950 n.1. The footnote generally has been interpreted to refer to the Board's determination of the appropriateness of a separate unit for LPN's in the *Extendicare* decision. *See* Feheley, *supra* note 23, at 288; *Jurisdictional Standards, supra* note 20, at 358.

[36] *Jurisdictional Standards, supra* note 20, at 357; *see* Madiera Nursing Center, Inc., 203 N.L.R.B. 323, 83 L.R.R.M. 1033, 1934 n.2 (1973).

[37] *See* text accompanying notes 7-20 *supra.*

[38] *See generally Extendicare of West Virginia, Inc.*, 203 N.L.R.B. 1232, 83 L.R.R.M. 1242 (1973).

[39] *See* note 31 *supra.*

[40] *See, e.g.*, Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 269 N.E.2d 682 (1972) (separate unit of skilled tradesmen of maintenance department is appropriate); Local 1199, Drug and Hosp. Employees Union v. Mountainside Hospital, 121 N.J. Super 221, 296 A.2d 541 (1972) (separate groups of hospital maintenance employees appropriate).

[41] *See, e.g.*, St. Catherine's Hosp., 217 N.L.R.B. 787, 89 L.R.R.M. 1070 (1975); Shriner's Hosp., 217 N.L.R.B. 806, 89 L.R.R.M. 1076 (1975); Barnert Mem. Hosp. Ass'n., 217 N.L.R.B. 775, 89 L.R.R.M. 1038 (1975); Mercy Hosp. of Sacramento, 217 N.L.R.B. 765, 89 L.R.R.M. 1083 (1975); Newington Children's Hosp., 217 N.L.R.B. 793, 89 L.R.R.M. 1108 (1975). *See also Jurisdictional Standards, supra* note 20, at 358-63. In general, the Board recognized four basic bargaining units for non-profit hospitals, professionals, office clericals, service and maintenance employees, and technical employees. *See Jurisdictional Standards, supra* note 20, at 358-59; note 35 *supra.*

[42] 217 N.L.R.B. 806, 89 L.R.R.M. 1076 (1975).

[43] *Id.* at 807, 89 L.R.R.M. at 1078-80.

[44] *Id.* at 808, 89 L.R.R.M. at 1079. The common terms and conditions of employment of

bargaining unit determinations, however, the congressional directive in the Committee Report required the Board to place special emphasis on the high degree of operational integration in a hospital.[45] The Board decided that in the health care industry the only appropriate unit containing stationary engineers would be a broad unit consisting of all service and maintenance employees.[46] In other decisions the Board recognized the appropriateness of four units, a combined service and maintenance unit, a unit of business-clerical employees, a unit of technical employees (including licensed practical nurses), and a unit of registered nurses.[47] The Board, however, would make an exception to these four categories if a prior bargaining relationship existed between the parties[48] or if the employer and the union agreed to a stipulated unit.[49]

Recently the Board has departed from the earlier trend exemplified by *Shriner's Hospital* of limiting the total number of bargaining units. The Board has returned to the traditional community of interest test relied upon in non-hospital bargaining unit determinations.[50] Under the traditional test the critical issue is whether the employees are an identifiable group with a community of interest sufficiently separate from that of

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the petitioned-for unit, fringe benefits, insurance plans, retirement programs, personnel policies and other working conditions were sufficiently related to qualify for a separate unit under the community of interest test. *Id.; see* text accompanying notes 7-20 *supra.*

[45] *Id.* at 1079. The Board in *Shriner's Hospital* discussed the admonitory paragraph in the Conference Report directing the Board to avoid proliferation of bargaining units in the health care field. 217 N.L.R.B. at 808, 89 L.R.R.M. at 1079. *See* note 35 *supra.* The Board emphasized that it was following the congressional directive by emphasizing the high degree of integration of operations in the hospital under consideration. 217 N.L.R.B. at 808, 89 L.R.R.M. at 1079-80.

[46] 217 N.L.R.B. at 808, 89 L.R.R.M. at 1080.

[47] *Jurisdictional Standards, supra* note 20, at 358-59; *see* Samaritan Health Serv., Inc., 238 N.L.R.B. No. 56, 99 L.R.R.M. 1551 (1978) (professionals); McLean Hosp., 234 N.L.R.B. 424, 97 L.R.R.M. 1322 (1978) (service and maintenance employees); Pontiac Osteopathic Hosp., 227 N.L.R.B. 1706, 94 L.R.R.M. 1417 (1977) (technical employees); St. Luke's Episcopal Hosp., 222 N.L.R.B. 674, 91 L.R.R.M. 1359 (1976) (office clericals).

[48] A prior bargaining relationship, one of the factors to be considered under the community of interests test, is generally given great weight by the Board in making bargaining unit determinations. *See* note 16 *supra.* The courts tend to uphold Board determinations where a prior bargaining relationship can be established. *See* Bay Medical Center, Inc. v. N.L.R.B., 588 F.2d 1174 (6th Cir. 1978).

[49] An employer and a union may voluntarily agree that a unit, called a stipulated unit, is appropriate for bargaining and begin to bargain collectively without Board action. The Board generally will not disturb such voluntary arrangements unless the union does not represent the majority of the employees in the stipulated unit. *See* Otis Hosp., Inc., 219 N.L.R.B. 164, 89 L.R.R.M. 1545 (1975); *Jurisdictional Standards,* supra note 20, at 363. Alternatively, the employer and the union may stipulate an appropriate unit and the Board will conduct a representation election to determine whether the union will be the collective bargaining agent for the unit. 29 U.S.C. § 159(c)(5) (1976).

[50] *See, e.g.,* Mary Thompson Hosp., Inc., 241 N.L.R.B. No. 119, 103 L.R.R.M. 1572 (1979), *enforcement denied* 621 F.2d 858 (7th cir. 1980); Allegheny Gen. Hosp., 239 N.L.R.B. No. 104, 100 L.R.R.M. 1030 (1978), *enforcement denied* 608 F.2d 965 (3d Cir. 1979).

other employees to warrant separate representation.[51] A subcategory of the community of interests test, sometimes applied to determine whether a deviation from the traditional hospital units is appropriate, analyzes whether the proposed unit is composed of licensed craftsmen engaged in traditional craft work performed in separate and distinct locations apart from other employees in the health care facility.[52] Employees in such a unit would not perform other services throughout the hospital and there would be little job transfer between unit and non-unit personnel.[53] Applying these standards, and analyzing bargaining unit determinations case by case on the individual facts of each hospital situation, the Board has been more willing to allow separate units for maintenance workers,[54] powerhouse employees,[55] and stationary engineers or boiler operators.[56] Thus, recently the Board has tended to allow six units, physicians, registered nurses, all other professionals, combined service and maintenance employees, clerical employees and technical employees, with occasional exceptions allowing separate units for various types of maintenance workers.[57]

St. Vincent's Hospital[58] exemplifies the Board's departure from the *Shriner's Hospital* standard for bargaining units. The union petitioned for a seven-man unit consisting of four boiler operators and the three other maintenance employees of the hospital. Applying the community of interests criteria used in evaluating non-hospital bargaining units, the Board found that the boiler operators did not possess a sufficient community of interest with the other maintenance workers to be included in the petitioned-for seven-man unit.[59] The Board severed the boiler operators from the larger unit and formed a separate bargaining unit of the four boiler operators.[60] The Board's decision in *St. Vincent's Hospital* was consistent with the Board's traditional treatment of boiler operators in

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[51] *See* text accompanying note 7 *supra*.

[52] *See* American Cyanamid Co., 131 N.L.R.B. 909, 48 L.R.R.M. 1152 (1961).

[53] Allegheny Gen. Hosp., 239 N.L.R.B. No. 104, 100 L.R.R.M. 1030, 1036 (1978).

[54] *Id. See also,* Jewish Hosp. Ass'n of Cincinnati, 223 N.L.R.B. 614, 91 L.R.R.M. 1499 (1976).

[55] *See, e.g.,* St. Vincent's Hosp., 223 N.L.R.B. 638, 91 L.R.R.M. 1513 (1976).

[56] *Id.* at 638, 91 L.R.R.M. at 1513.

[57] Allegheny Gen. Hosp., 239 N.L.R.B. No. 104, 100 L.R.R.M. 1030, 1037 (1978). *See generally* Ohio Valley Hosp. Ass'n., 230 N.L.R.B. 604, 95 L.R.R.M. 1430 (1977) (physicians and RN's); St. Luke's Episcopal Hosp., 222 N.L.R.B. 674, 91 L.R.R.M. 1359 (1976) (technicians); Jewish Hosp. Ass'n of Cincinnati, 223 N.L.R.B. 614, 91 L.R.R.M. 1499 (1976) (service employees); Kaiser Foundation Hosp., 219 N.L.R.B. 325, 89 L.R.R.M. 1763 (1975) (pharmacists); Mercy Hosp. of Sacramento, Inc., 217 N.L.R.B. 765, 89 L.R.R.M. 1097 (1975) (clerical); New York Univ. Medical Center, 217 N.L.R.B. 522, 89 L.R.R.M. 1045 (1975) (psychiatrists). *See also History and Interpretations, supra* note 9, at 944-49.

[58] 223 N.L.R.B. 638, 91 L.R.R.M. 1513 (1976).

[59] *Id.* Although the boiler operators shared the same time clock and supervision with other maintenance employees, the Board emphasized that the boiler operators spent 90% of their time apart from other employees, were separately licensed by the state of New Jersey, and did not perform jobs performed by other hospital employees. *Id.*

[60] *Id.*

non-hospital cases,[61] but was a departure from the Board's holding in *Shriner's Hospital.*[62] The employer, St. Vincent's Hospital, challenged the Board's ruling in *St. Vincent's Hospital v. NLRB.*[63] The Board cross-claimed for enforcement of its bargaining order.[64] Denying the Board's cross-claim for enforcement,[65] the Third Circuit held that the fact that employees are licensed by the state may not control bargaining unit determinations in non-profit hospitals[66] because such a practice would un-

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[61] *See, e.g.,* New England Confectionary Co., 108 N.L.R.B. 728, 34 L.R.R.M. 1043 (1954). In cases involving powerhouse employees the Board looks to the licensing requirements of the state where the employees work, the type of shifts worked by the employees, and the amount of contact and interchange between the powerhouse employees and other maintenance employees. *Id.* at 728-31, 34 L.R.R.M. at 1043-44. Furthermore, the Board will favor separate representation of powerhouse employees if a union traditionally has represented that particular type of employee. *Id.*

The Act makes a special provision for the special needs of employees practicing a craft. Under § 9(b)(2), the Board may not decide that a craft unit is inappropriate on the grounds that a broader unit has been established by a prior Board determination unless the craft employees vote against separate representation. 29 U.S.C. § 159(b)(2) (1976). Section 9(b)(2) reflects a long history of Board decisions on the propriety of craft units as opposed to a plant-wide unit. The section also reflects the early antagonism between the American Federation of Labor which represented only craft employees, and the Congress of Industrial Organization which sought to represent unskilled employees on an industry-wide basis. *See* GORMAN, *supra* note 6, at 82-86. The *Globe* doctrine also reflects the tension between craft and plant-wide units. *See* note 16 *supra.*

Today the Board looks at six factors to determine whether a craft unit or plant-wide unit would be appropriate. *See* Mallinckrodt Chemical Works, 162 N.L.R.B. 387, 297-8, 64 L.R.R.M. 1011, 1016-17 (1966). The Board examines whether the unit consists of a distinct and homogeneous group of craftsmen or of employees working in a trade having a tradition of separate representation. *Id.* If there is a prior bargaining history at the employer's plant, the Board examines whether the craft employees have maintained their identity during the prior bargaining and evaluates the effect of certifying a separate unit on the stability of the established bargaining relationship. *Id.* The Board also looks at the employer's production processes to determine whether the processes are integrated and interdependent. *Id.* Finally the Board evaluates both the pattern of bargaining within the employer's industry as a whole and the qualifications and experience of the particular union seeking to represent the separate craft unit. *Id. See also* GORMAN, *supra* note 6, at 85.

[62] 217 N.L.R.B. 806, 89 L.R.R.M. 1076 (1970). *Shriner's Hospital* held that in hospitals, the only appropriate unit containing boiler operators would be a bargaining unit of all maintenance employees. *Id.* at 808, 89 L.R.R.M. at 1080.

[63] 567 F.2d 588 (3d Cir. 1977).

[64] *Id.* at 593.

[65] *Id.*

[66] *Id.* at 592. Although the Third Circuit claimed that the Board put undue emphasis on the fact that the boiler operators were licensed by the state, the Board mentioned state licensing only briefly in listing the factors favoring a separate boiler operator unit. *See* 223 N.L.R.B. 638, 91 L.R.R.M. 1513, 1513 (1976). The court in *St. Vincent's Hospital* examined the legislative history of the Amendments, stressing remarks that indicated congressional concern with proliferation of bargaining units in health care facilities. 567 F.2d at 590-91. *See* 120 CONG. REC. 22949 (1974) (remarks of Rep. Ashbrook); 120 CONG. REC. 12944-45 (1974) (remarks of Sen. Taft). During the floor debates, Senator Taft, co-manager of the bill proposing the amendments, stressed the importance of Board discretion in reviewing bargaining unit determinations in the health care area. *Id.* The Senator also cautioned the Board against using criteria developed for determining bargaining units in the construction

dermine the policy of national uniformity underlying the NLRA.[67] The court required the Board to set forth reasons for any future decision which departed from the Board's normal determinations in non-profit hospital cases.[68] The court proposed no guidelines other than forbidding the Board to certify a separate unit of boiler operators.

Shortly after the *St. Vincent's* decision, the Seventh Circuit denied a Board petition for enforcement of a bargaining unit in a similar case, *NLRB v. West Suburban Hospital.*[69] The Board had certified a separate unit of twenty-one maintenance employees at a hospital which employed 380 non-professional employees.[70] The Board discussed the congressional directive in the Conference Report[71] but emphasized the amount of time that the maintenance employees spent in the maintenance area of the hospital, as well as the amount of contact among maintenance employees and other employees during working hours.[72] When the employer, West Suburban Hospital, refused to bargain with the union certified to represent the twenty-one-man bargaining unit, the Board issued a bargaining order and sought enforcement in the Court of Appeals.[73]

The court in *West Suburban* denied enforcement of the Board's bargaining order because the unit determination had been made according to traditional non-hospital standards.[74] Characterizing the Board's discussion of the congressional directive as "mere lip-service mention,"[75] the Seventh Circuit disagreed with the Board as to the significant facts in the unit determination under consideration.[76] The court placed special em-

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trade in the health care field. *Id.*

[67] 567 F.2d at 591-92. Congress intended a uniform system of national labor policy. Because of the desire for uniformity, states have no jurisdiction over matters arguably protected or arguably prohibited by the Act. *See* San Diego Bldg. Trades v. Garmon, 359 U.S. 236 (1959). The so-called preemption doctrine does not apply to matters deeply rooted in local concerns. *See generally,* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 190 (1978) (state court has jurisdiction over trespass by non-employees where union has failed to file unfair labor practice charge); Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977) (state court has jurisdiction to hear claim of intentional infliction of mental distress); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966) (state court may give relief in defamation action); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (state court may enjoin violent or tortious conduct associated with labor dispute).

[68] St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 590 (3d Cir. 1977).

[69] 570 F.2d 213 (7th Cir. 1978).

[70] West Suburban Hosp., 224 N.L.R.B. 1349, 1351, 92 L.R.R.M. 1369, 1371 (1976).

[71] *Id.* at 1349, 92 L.R.R.M. at 1369; *see* note 35 *supra.*

[72] *Id.* at 1349-50, 92 L.R.R.M. at 1369-70. The Board discussed the responsibilities of the maintenance workers, the supervisory structure at West Suburban Hospital, the pay scale and fringe benefits of the maintenance employees, and the amount of contact between the maintenance employees and other hospital workers. *Id.*

[73] NLRB v. West Suburban Hosp., 570 F.2d 213, 214 (7th Cir. 1978); *see* note 29 *supra.*

[74] 570 F.2d at 216.

[75] *Id.*

[76] *Id.* The court in *NLRB v. West Suburban Hospital* looked at the similarity of fringe benefits, the manner of computing wages, the pay scale, grievance procedure, sharing of locker room and cafeteria facilities, and the allocation of parking spaces among employees.

phasis on the degree of integration of operations within the hospital,[77] and concluded that the Board had not paid sufficient heed to the congressional directive.[78] Like the Third Circuit in *St. Vincent's Hospital*,[79] the court in *West Suburban* required the Board to explain how any future bargaining units certified in non-profit hospitals would implement or reflect the congressional directive to avoid undue proliferation of units in the health care field.[80]

The Board challenged the Third and Seventh Circuits in *Allegheny General Hospital*.[81] In a lengthy opinion detailing the legislative history of the Amendments,[82] the Board certified a unit consisting of a portion of the housekeeping (service) employees.[83] The Board reasoned that the congressional directive did not preclude finding appropriate the unit peti-

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Id. at 216.

[77] *Id.*

[78] *Id.*

[79] St. Vincent's Hosp. v. NLRB, 567 F.2d 588 (3d Cir. 1977); *see* text accompanying notes 58-68 *supra*.

[80] 570 F.2d at 216.

[81] 239 N.L.R.B. No. 104, 100 L.R.R.M. 1030 (1978).

[82] *Id.* at 1032-1034. The Board in *Allegheny General Hospital* examined S.2292, the predecessor of the Amendments, and the admonitory paragraph inserted into the final Conference Report. 100 L.R.R.M. at 1032-33; *see* notes 34-35 *supra*. The Board placed special emphasis on the remarks of Senator Taft stating that the Board should be permitted flexibility in unit determinations. 100 L.R.R.M. at 1034. The Board also pointed to remarks of Senator Williams stressing the good judgment shown by the Board in past bargaining unit determinations and emphasizing that the Amendments do not preclude the Board from exercising its special expertise in making bargaining unit decisions in the health care area. *Id.* at 1034.

[83] 100 L.R.R.M. at 1038. In 1974 before non-profit hospitals were covered by the Act the Operating Engineers petitioned the Pennsylvania Labor Relations Board (PLRB) to represent the engineering and maintenance employees at Allegheny General Hospital. The PLRB ordered an election, which the union won, and certified the results in 1972. The hospital sought to overturn the election in the Pennsylvania state courts, but failed. Allegheny Gen. Hosp., 230 N.L.R.B. 954, 954, 96 L.R.R.M. 1022, 1023-24 (1977). The hospital then moved the PLRB to vacate its order, but the PLRB refused on the grounds that its jurisdiction had been preempted by the Amendments. *Id.* *See* note 67 *supra*. After the hospital appealed to the NLRB, the Board extended comity to the PLRB decision and ordered the hospital to bargain with the union. 230 N.L.R.B. at 958, 96 L.R.R.M. at 1028. In granting comity to the PLRB, the Board noted that the Third Circuit had held that the Board does not have authority to extend comity to a state labor board decision in *Memorial Hospital of Roxborough v. NLRB*, 545 F.2d 351 (3d Cir. 1976), but limited the *Roxborough* holding to its facts. 230 N.L.R.B. at 956, 96 L.R.R.M. at 1025. Six years had passed since the union had been certified, yet the affected employees remained unrepresented. *Id.* at 955, 96 L.R.R.M. at 1025.

The hospital appealed to the Third Circuit which remanded the case to the Board for reconsideration in light of *Memorial Hospital of Roxborough* and *St. Vincent's Hospital*. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 966 (3d Cir. 1979); *see* text accompanying notes 58-68 *supra*. On remand, the Board examined the legislative history and decided that the petitioned-for unit would be appropriate. 100 L.R.R.M. at 1038. Because the Board reached the same result as the PLRB, the Board again extended comity to the PLRB decision. 100 L.R.R.M. at 1037-38.

tioned for by the union,[84] because Congress did not intend to preclude the Board from certifying units limited to maintenance workers nor from relying on the traditional community of interest criteria.[85] Congress left unit determinations to the discretion of the Board, and rejected the absolute four unit limitation proposed by Senator Taft.[86] After discussing the general treatment of unit determinations in industry for professional,[87] service and maintenance,[88] clerical, and technical employees, and the specific treatment of such employees in the health care field, the Board concluded that past unit determinations in the health care field had prevented proliferation and did not resemble treatment of unit determinations in the industrial setting.[89] The Third Circuit, however, disagreed in *Allegheny General Hospital v. NLRB*,[90] and refused to enforce the Board's bargaining order.[91] Basing its decision on *St. Vincent's Hospital*[92] and a prior case, *Memorial Hospital of Roxborough v. NLRB*,[93] the Third Circuit expressly refused to reconsider those cases.[94] The court characterized the Board's action as a direct refusal to apply the law announced by the judiciary and as an affront to the doctrine of stare decisis.[95]

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[84] 100 L.R.R.M. at 1034; *see* note 83 *supra*.

[85] 100 L.R.R.M. at 1034, 1037. The Board applied the community of interest test espoused in *American Cyanamid Co.*, 131 N.L.R.B. 909, 48 L.R.R.M. 1152 (1962), which is generally applied in the industrial sector. 100 L.R.R.M. at 1036-37.

[86] 199 L.R.R.M. at 1031-34; *see* notes 34, 82 *supra*.

[87] 100 L.R.R.M. at 1035. Professional employees are entitled by statute to separate representation if they so desire. 29 U.S.C. § 159(b)(1) (1976). The Board, by applying the traditional community of interest test for professional employees, has found appropriate separate units of physicians, registered nurses, and all other professional employees. 100 L.R.R.M. at 1034-35. *See generally* Montefiore Hosp. & Medical Center, 235 N.L.R.B. 241, 97 L.R.R.M. 1474 (1978) (separate unit comprised of doctors and dentists appropriate); Ohio Valley Hosp. Ass'n, 230 N.L.R.B. 604, 95 L.R.R.M. 1430 (1977) (separate unit of all physicians appropriate); Kaiser Foundation Hosp., 219 N.L.R.B. 325, 89 L.R.R.M. 1763 (1975) (separate unit of pharmacists not appropriate); New York Univ. Medical Center, 217 N.L.R.B. 522, 89 L.R.R.M. 1045 (1975) (separate unit of psychiatrists not appropriate); Mercy Hosp. of Sacramento, 217 N.L.R.B. 765, 89 L.R.R.M. 1097 (1975) (separate unit of RN's appropriate).

[88] *See also* Shriner's Hosp., 217 N.L.R.B. 806, 89 L.R.R.M. 1076 (1975).

[89] 100 L.R.R.M. at 1037.

[90] 608 F.2d 965 (3d Cir. 1979).

[91] *Id.* at 971.

[92] St. Vincent's Hosp. v. NLRB, 567 F.2d 588 (3d Cir. 1977); *see* text accompanying notes 58-68 *supra*.

[93] 545 F.2d 351 (3d Cir. 1976). In *Memorial Hospital of Roxborough*, the Board extended comity to a Pennsylvania Labor Relations Board bargaining unit determination without explaining how the unit determination effectuated the purposes of the congressional admonition against undue proliferation of bargaining units. The Third Circuit refused to enforce the Board's grant of comity. *Id.* at 360-62; *see* note 83 *supra*.

[94] Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 (3d Cir. 1979).

[95] *Id.* at 968-970. *Accord*, Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980). In refusing to overrule *Memorial Hospital*, *see* note 96 *supra*, and *St. Vincent's Hospital*, *see* text accompanying notes 58-68 *supra*, the Third Circuit noted that other circuits had relied on those holdings in denying enforcement to similar Board determinations. 608

The recent appellate decisions may be viewed in two ways. The courts may be exercising their duty to ensure that Board decisions are neither arbitrary nor capricious and have a reasonable basis in the law.[96] By requiring the Board to explain how each unit determination implements the congressional directive, the courts appear to be adhering to this function. Alternatively, however, the courts may be substituting a per se rule for the Board's determinations. The courts have denied separate maintenance or stationary engineer units[97] even when the Board expressly explains why such a unit does not violate the congressional directive against unit proliferation in non-profit hospitals.[98] By apparently permitting a maximum of five basic units,[99] the appellate courts usurp a function expressly entrusted by Congress to the National Labor Relations Board.[100]

If the courts are limiting the total number of possible hospital bargaining units to five, then non-proliferation of units is the only factor to consider in deciding whether a unit is appropriate for bargaining. In essence, the courts are legislating in an area where Congress has refused to legislate.[101] Allowing only five units renders consideration of the particular needs of an individual hospital irrelevant. Extended to its logical extremes, a per se rule would bar units which differ from the five court-approved units, even if an established bargaining relationship already exists.[102] The courts of appeals may have put a tool in the hands of hospital

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F.2d at 969. The court characterized the Board's disagreement with the holdings as "an academic exercise that possesses no authoritative effect." 608 F.2d at 970. Although the court cited 29 U.S.C. § 160(f) which gives courts of appeals the authority to modify or set aside Board orders, the court ignored the doctrine that the determination of an appropriate bargaining unit is entrusted to the informed discretion of the Board and not to be overturned unless the determination amounts to an abuse of discretion. *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).

[96] Court review of Board bargaining unit decisions is limited. The standard for review is not whether the Court of Appeals would have arrived at the same result as the Board, but whether the Board's findings are supported by substantial evidence of the record as a whole. NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters Local 638, 429 U.S. 507, 531 (1977). The selection of an appropriate bargaining unit is largely in the Board's discretion. Board discretion, if not final, is rarely to be disturbed. Southern Prairie Constr. Co. v. Local No. 627, International Union of Operating Engineers, 425 U.S. 800, 805-6 (1976). Some courts contend that the Board has exclusive jurisdiction over bargaining unit determinations. *See, e.g.*, West Point-Pepperell, Inc. v. Textile Workers, 559 F.2d 304, 307 (5th Cir. 1977).

[97] *See* text accompanying notes 63-67, 75-81, 89-94 *supra*.

[98] *See* text accompanying notes 81-95 *supra*.

[99] The only bargaining units the appellate courts allow are professional employees (occasionally divided into doctors, nurses, and all other professionals), technical employees, business-clerical employees, and all other non-professional employees.

[100] 29 U.S.C. § 159(b) (1976). *See* text accompanying note 7 *supra*.

[101] *See* Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980) (Fairchild, C.J., dissenting). Judge Fairchild noted that the congressional directive was not part of the statute, and that § 9(b) had not been amended, so there exists no need to use the directive to interpret any change in 9(b). *Id.*

[102] The extension of a per se rule to bar units where an established bargaining relationship exists seems unlikely. *See* Bay Medical Center, Inc. v. NLRB, 588 F.2d 1174, 1178 (6th

management to frustrate organizational efforts in otherwise appropriate units.[103] The courts should stop substituting a mechanical rule for the informed exercise of an administrative agency's special expertise in an area where Congress has expressly entrusted the agency with the determination of the appropriate unit for collective bargaining based on the individual facts of each case.

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Cir. 1978). The court in *Bay Medical Center* enforced a Board order requiring bargaining in a unit where a prior bargaining relationship existed. *Id.*

[103] *See* text accompanying notes 21-29 *supra.*