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Collective Bargaining on the Campus: A Survey Five Years After Cornell

Daniel H. Pollitt†
Frank Thompson, Jr.‡‡

Since the 1970 Cornell University decision asserting jurisdiction over labor problems at private educational institutions the National Labor Relations Board has been confronted with a number of labor relations issues arising in that setting. In this article Congressman Frank Thompson and Professor Daniel Pollitt discuss the Board's disposition of these problems and adduce the reasons faculty and other employees will continue to feel the need to organize.

In 1963 the faculty at the Milwaukee Technical Institute organized the first union on an American campus.1 The first union at a four-year college was established in 1967 at the United States Merchant Marine Academy.2 Today, unions and collective bargaining exist on over 300 American campuses.3 As many as 80,000 professors now work under collective bargaining agreements.4

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2. Id.
3. By late 1974 there were 331 recognized bargaining agents in higher education, 132 in four year colleges and universities. Id. at 51.
4. Finkin, Goldstein and Osborne, A Primer on Collective Bargaining for College & University Faculty p. i. (1975).
In 1969, approximately 60 percent of the faculty polled in a Carnegie survey rejected the concept of campus unions. Three years later a similar sample of faculty was equally divided on the subject, and a wide majority of those under age thirty-five agreed with the proposition that "unionization of college and university faculty is beneficial and should be extended." The unionization of college and university faculty appears, in short, to be a growing phenomenon.

The impetus for this development was heightened in 1970 when, in Cornell University, the National Labor Relations Board reversed a longstanding doctrine and asserted its jurisdiction over the labor-management problems on most of the nation's private campuses. The change left the Board with numerous jurisdictional problems, however. One is how best to distinguish between a "public" and a "private" university, and if the institution clearly is a public one, whether the Board should assume jurisdiction over the labor disputes of private employers retained by the public institution to perform necessary services. Another concerns the extension of Board jurisdiction to privately owned secondary and other schools. A third problem related to the question of Board involvement with religious institutions providing religious instruction.

Even if jurisdiction is assumed to exist, other questions arise. What is the proper bargaining unit? Should bargaining on the multi-campus institution be restricted to the single campus? Should the law school faculty and other well-sicureined professors be permitted to sever theirselves from the rest of the faculty and go it alone? Are deans and department chairmen in a collegial setting supervisors and hence

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6. Id.
7. Section 14(c)(1) of the National Labor Relations Act, 29 U.S.C. § 164(c)(1) (1970), authorizes the Board, in its discretion, to decline to assert jurisdiction over any class or category of employers where the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. Under this discretionary power, the Board first declined in 1951 to exercise its jurisdiction over private colleges, Trustees of Columbia University, 97 N.L.R.B. 424 (1951), and then reversed itself on June 12, 1970 in Cornell University, 183 N.L.R.B. 329 (1970).
8. Section 2(2) of the Labor Act, 29 U.S.C. § 152(2) (1970), denies the Board jurisdiction over "any State or political subdivision thereof."
9. Section 9(b) of the Labor Act, 29 U.S.C. § 159(b) (1970), grants the Board almost absolute discretion to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ."
10. The Labor Act limits its protection and rights to "employees", and the term is defined in section 2(3) as not to include "any individual employed as a supervisor." 29 U.S.C. § 152(3) (1970). The term supervisor is defined in section 2(11) as any individual having authority to hire, transfer, suspend, reward, discipline or direct employees, or "effectively to recommend such action" when "the exercise of such authority requires the use of independent judgment." 29 U.S.C. § 152(11) (1970).
precluded from participation in a bargaining unit? Should the adjunct or part-time professors be included in a bargaining unit of fulltime professors? What should be done with the librarians and other professionals who perform essential supportive services? Should the right to vote for or against a union in an NLRB election be given to a professor emeritus or to a professor on terminal contract? What about the role of the ROTC instructors, the athletic department coaches, or the professor at a religious institution who has taken the vows of poverty and obedience? And should the graduate student who is employed as a research or teaching assistant be put in a unit of tenured professors, in a unit of graduate assistants, or denied the status of employee altogether?

The purpose of this article is to explore the implications of the provisions of the National Labor Relations Act [hereinafter also referred to as the Act or Labor Act] governing collective bargaining on private campuses. Specifically, the Act prohibits certain designated “unfair labor practices.” An employer, for example, may not “contribute financial or other support” to a union. Does this mean that the local American Association of University Professors [hereinafter also AAUP] chapter, seeking union recognition, must be denied its traditional rights to meet on the campus and utilize the campus mails free of charge? Once a union is recognized by a secret ballot election, the management must bargain in good faith with that union over “wages, hours, and other terms and conditions of employment.” Does this mean that faculty union representatives can demand to meet with the Board of Trustees to participate in the selection of the President, deans and other ranking officials or to help allocate funds among the various departments?

These are some of the novel and difficult questions that the post Cornell University Labor Board has sought to resolve. Additional questions apart from those arising under the Labor Act affect the

12. Section 8(a)(2) of the Labor Act declares it to 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.” 29 U.S.C. § 158(a)(2) (1970).
13. Section 8(a)(5) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees. . . .” 29 U.S.C. § 158(a)(5) (1970). Section 8(b)(3) makes it an unfair labor practice for a union “to refuse to bargain collectively with an employer. . . .” 29 U.S.C. § 8(b)(3) (1970). Section 8(d) defines collective bargaining as a “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.” Section 8(d), however, does not require “either party to agree to a proposal or require the making of a concession. . . .” 29 U.S.C. § 158(d) (1970).
answers. Why do professors turn to unions in the first place? What do they bargain about? What impact has collective bargaining had on the traditional organs of campus government? The rest of this article analyzes the Labor Board's resolution of these issues and discusses the major remaining problems in the area of collective bargaining in higher education.

I

INTRODUCTION—THE LABOR ACT

The popular image of higher education conflicts with the notion of collective bargaining. Higher education conjures up Mr. Chips, tea and sympathy, shabby gentility, plain living and high thinking, and a protected and cloistered life removed from everyday cares and concerns. Occasionally a professor is discharged for reading controversial works to an English class; but, by and large, the preservation of such rights has been left to collegial discussions and the ultimate self-interest of the university administration in preserving academic freedom on its campus—never through the processes of collective bargaining.

The self-image of many professors was no different. Thus, the AAUP did not fully authorize its local chapters to seek recognition as bargaining agents until 1972 and, to date, it authorizes strikes and work stoppages "only in extra-ordinary situations which . . . flagrantly violate academic freedom or the principles of academic government." 16

A. The Wagner Act of 1935

It is not surprising then, that the hearings and debates on the 1935 Wagner Act 17 were silent on the question of collective bargaining in higher education. The National Labor Relations Board's initial concern was with rights of employees and employers with labor disputes affecting interstate commerce. 18 Only one occasion arose between the 1935 enactment of the Wagner Act and the sweeping Taft-Hartley Amend-


16. ORIENTATION PACKET OF THE ACADEMIC COLLECTIVE BARGAINING INFORMATION SERVICE 7 (undated) [hereinafter referred to as ACBIS]. The National Educational Association (NEA) first began to organize collective bargaining units on the campuses toward the end of the 1960's, the American Federation of Teachers (AFT) somewhat earlier. Id.


ments in 1947 in which the Labor Board had to determine whether professors were "employees," and whether their labor disputes "affected" interstate commerce. Specifically, in 1944, when the faculty at the Henry Ford Trade School\textsuperscript{19} petitioned the Board regarding a union election, the Board took jurisdiction with the comment that "the avowed educational purposes for which the School was organized is [not] inconsistent with a finding that it is also engaged in a manufacturing enterprise which substantially affects commerce."\textsuperscript{20}

### B. The Taft-Hartley Amendments of 1947

In 1947, Congress substantially revised the Wagner Act by adding the Taft-Hartley amendments.\textsuperscript{21} Among other changes, Congress devoted its attention to the problem of NLRB jurisdiction over educational institutions and decided not to exclude those employed by schools and colleges from the protections and prohibitions of the Labor Act. Initially, the House enacted a bill which proposed to exclude all "churches, hospitals, schools, colleges, and societies for the care of the needy" from the coverage of the Act.\textsuperscript{22} The House Report reasoned that "these institutions frequently assist local governments in carrying out their essential functions, and for this reason should be subject to exclusive local jurisdiction."\textsuperscript{23} The Senate, however, disagreed with this sweeping renunciation of NLRB jurisdiction, and limited the exclusion to non-profit hospitals. The conference committee appointed to reconcile the differences between the two chambers adopted the Senate version,\textsuperscript{24} which was eventually enacted into law.

### II

**Jurisdictional Problems**

Thus, the Taft-Hartley amendments freed the Board to exercise jurisdiction over campus labor-management relations. And for a short

\textsuperscript{19} Henry Ford Trade School, 58 N.L.R.B. 1535 (1944). The faculty apparently did not vote for union representation at that time. It did so, however, twenty-one years later. The Milwaukee Technical Institute was the first two-year post-secondary school to vote for faculty union representation. *Academic Collective Bargaining, History and Present Status*, (undated publication of ACBIS).

\textsuperscript{20} *Id.* at 1537.


\textsuperscript{22} 1 *LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 161* (1947) [hereinafter *LEGISLATIVE HISTORY*].

\textsuperscript{23} 1 *LEGISLATIVE HISTORY* 303. The minority report found it "ironical that organizations devoted to the social welfare should be exempted from bargaining with their own, often underpaid employees." *Id.* at 652.

\textsuperscript{24} 2 *LEGISLATIVE HISTORY*, 1536.
period of time it did just that; at least with regard to the cleaning crews in the dormitories; the cooks and culinary workers in the cafeterias; the grounds' crews who keep the campus neat and green; the painters, electricians, plumbers and others who keep things in proper maintenance; the secretaries and clerical employees; and all the other workers engaged in a variety of supportive services on college and university campuses. These people needed a collective voice and bargaining power; and they turned to the Labor Board with their problems.

Initially, the Labor Board was receptive to their requests and ordered secret ballot elections for the technicians employed at the research foundations of Illinois Institute of Technology, the engineers employed at the radio station of Port Arthur College, and the clerical employees who worked on the publications for the Sunday School Board of the Southern Baptist Convention.

Four years later, however, the Board did an about face.

A. The NLRB Rejects Jurisdiction in Columbia University

In 1951 the clerical employees at the various libraries of Columbia University joined a union and sought to negotiate with the administration. Columbia refused, and the union turned to the NLRB. The Board refused to help on the grounds that it would not "effectuate the policies of the Act for the Board to assert its jurisdiction over a non-profit educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."28

25. 81 N.L.R.B. 201 (1949).
27. 92 N.L.R.B. 801 (1950).
28. The Trustees of Columbia University, 97 N.L.R.B. 424 (1951). The Board added that it would make its services available only "in exceptional circumstances and in connection with purely commercial activities of such organization." Id. at 427. As indicated in the text, such "exceptional circumstances" were extremely rare. South Bend Broadcasting Co., 116 N.L.R.B. 1166 (1956) wherein the Board took jurisdiction over the labor-management relations at the commercial radio station operated by Notre Dame, stands almost alone.

The Board did not explicate its reason for declining jurisdiction over the librarians who sought its aid in the Columbia University case. It merely announced and applied the new rule.

The real reason may rest in an outdated concept that universities and colleges are not in commerce or in trade. This would explain the fact that the Labor Board, following Columbia University, refused to exercise jurisdiction over proprietary profit-making hospitals, Flatbush General Hospital, 126 N.L.R.B. 144 (1960); over symphonic orchestras, Philadelphia Orchestra Association, 97 N.L.R.B. 548 (1951); over the hotels operated by the YMCA, Young Men's Christian Ass'n of Portland, Oregon, 146 N.L.R.B. 20 (1964); over the blind and others employed by institutions for the training of the handicapped, Sheltered Workshops of San Diego, Inc., 126 N.L.R.B. 961 (1960); and most recently over the office employees of a large law firm which engages in
From then on the Labor Board concluded that almost all campus activities were "noncommercial in nature" and "intimately connected" with the educational activities of the institution. It therefore declined jurisdiction of petitions from employees at a college cafeteria,^{29} from maintenance employees at a college student union,^{30} from technical employees at a college radio station^{31} and various college computation centers,^{32} and even from the seamen who manned three ocean-going vessels operated by the Institute of Marine Science at the University of Miami.^{33}

The anxieties and frustrations which had spurred these university employees into seeking unionization persisted. The failure of the NLRB to assert jurisdiction denied to these employees a formalized, civilized process for resolving their labor disputes and thereby forced the disputants into sidewalk confrontations and other forms of self-help.

The grievances multiplied and finally exploded into a rash of sit-ins, picket-lines, strikes and other protests across the nation. The most publicized was the long strike by blue-collar employees at the Medical College Hospital in Charleston, South Carolina,^{34} followed by the unprecedented scene at St. Johns University in New York where professors maintained a picket-line vigil throughout the cold winter months.^{35} Other, lesser publicized situations, included the strike of the cafeteria employees at the University of North Carolina to protest what they claimed was a "plantation mentality," and the failure of the administrat-

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^{29} The Prophet Co. (Whitewater State University in Wisconsin), 150 N.L.R.B. 1559 (1965); Crotty Brothers (Trinity College), 146 N.L.R.B. 755 (1964).
^{30} Iowa State Memorial Union, 55 L.R.R.M. 1362 (March 19, 1964).
^{31} Lutheran Church, Missouri Synod, 109 N.L.R.B. 859 (1954).
^{33} University of Miami, 146 N.L.R.B. 1448 (1964).
^{34} Extension of NLRA to Nonprofit Hospital Employees, Hearings before the Special Sub-Committee on Labor on H.R. 11357, 92nd Cong., 1st Sess. 224 (1971).
tion to pay them the minimum wages required by federal law. At nearby Duke University, the administration discharged a maid in the dormitory, and her co-employees picketed the administration building to support a demand for impartial arbitration. At Columbia, some thirty clerical employees in the controller's office staged a sit-in in the outer office of President Andrew Cordier to demand that he permit the employees to vote on the question of a union. At Ohio University, the cooks and janitors went on strike to protest their working conditions. Most students supported the walk-out, but some took over the kitchen duties at a rate of pay of $1.00 an hour. Similar strikes and protests exploded on the campuses in Indiana, Michigan, and Tennessee.

The turmoil caused by the strikes of academic and non-academic employees on college campuses caused the state legislatures of Wisconsin, Michigan, and Massachusetts to pass laws giving non-academic employees at state colleges and universities the right to join unions and engage in collective bargaining. New York authorized collective bargaining for its non-academic campus employees at both public and private institutions. By 1970, some 130 collective bargaining contracts had been negotiated on various campuses within these states. Nevertheless, a large majority of the states did nothing, and the right to engage in collective bargaining was left to the use of brute force both on and off the campus.

B. The NLRB Reasserts Jurisdiction in Cornell University

In 1969 three different unions representing non-academic personnel at Cornell University sought recognition and bargaining rights in conflicting and overlapping bargaining units. The University petitioned the Board to take jurisdiction and resolve this controversy. Syracuse University, beset with a similar problem, joined in the request. On June 12, 1970, the Board unanimously overruled Columbia and agreed to take jurisdiction.

40. Letter from the Department of Research, American Federation of State County and Municipal Employees, June, 1968.
In taking jurisdiction, the Board recognized that with combined annual operating budgets of over $6 billion, the labor problems of America's private colleges had an obvious impact on interstate commerce.\(^{48}\) The Board also noted that thirty-five states had ignored the slack created by its hands-off attitude toward the campus labor disputes.\(^{49}\) Finally, the Board suggested that by asserting jurisdiction it could help establish peaceful and orderly procedures for the resolution of campus labor controversy.\(^{50}\) The Board affirmed the Cornell policy in 1970 when it took jurisdiction over unfair labor practice charges filed, in separate actions, by the Building Service Employees' Union against Boston College\(^{51}\) and by the Cooks and Pastry Cooks Association against Garland Junior College.\(^{52}\) Subsequent Board decisions have focused on lesser jurisdictional concerns such as dollar amounts, academic unions, secondary and other non-college or non-academic institutions, and private colleges subsidized with public funds.

C. Jurisdictional Amount

In order to avoid being overwhelmed by the problems of the "mom and pop" establishments, the NLRB has authority to set a "dollar amount" jurisdiction standard based upon gross revenue per annum.\(^{53}\) Following the Cornell decision, the Board held formal hearings on this question, and issued a rule limiting its jurisdiction to those private colleges or universities with gross annual operating expenses of at least $1 million.\(^{54}\) The Board estimated that the jurisdictional standard would include approximately 80 percent of all private colleges, and approximately 95 percent of all non-professional personnel.\(^{55}\)

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48. *Id.* at 332.
49. *Id.* at 333.
50. *Id.* at 334.
53. The Board, in fixing its "jurisdictional amount" limitation, seeks to confine its caseload to manageable proportions but at the same time to extend its protections to as many employers and employees as possible. Thus, when the Board extended its jurisdiction to private hospitals, it set a jurisdictional limitation of $250,000, which included over 75 percent of the industry. Butte Medical Properties, 168 N.L.R.B. 266 (1967). Similarly, the $500,000 annual gross revenue standard in the hotel industry includes only 3.5 percent of the hotels, but over 60 percent of the hotel employees. In construction, marked by many small enterprises, the jurisdictional limitation is $50,000; whereas in manufacturing, where the typical operations are much larger, the jurisdictional limitation is $500,000. Similarly, the jurisdictional amount in the newspaper business is $200,000, Belleville Employing Printers, 122 N.L.R.B. 350 (1958); whereas in radio and television it is set at $100,000. Raritan Valley Broadcasting Company, Inc., 122 N.L.R.B. 90.
55. *Id.*
D. Jurisdiction Over Faculty

Cornell, Boston College, and Garland Junior College involved non-academic employees. The Board indicated in these decisions that its jurisdiction extended only to non-academic employees. It was not long, therefore, before litigation involving the question of jurisdiction over professional academic employees arose. In 1970, the United Federation of College Teachers (affiliated with the American Federation of Teachers) filed petitions for elections among the faculty at the C.W. Post and Brooklyn Centers of Long Island University. The universities protested that even if jurisdiction were asserted over them it should not be asserted over members of their faculties. The Board rejected this limitation and held that they were employees and that the Act was applicable.

Despite the Board's decision, various universities have continued to insist that faculty members are not "employees" subject to the Labor Act, but instead are "supervisors" and hence part of the management team. It is true that faculty members exercise a degree of control over their own working conditions undreamed of in other occupations; and it is flattering that the administration considers the faculty as co-managers of the educational institutions. Too often, however, the "velvet glove" customarily extended by administration and trustees contains an "iron fist" which, when the occasion demands, can come down hard on those who stand in the way of cherished prerogatives.

57. C. W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971).
58. Long Island Univ. (Brooklyn Center), 189 N.L.R.B. 909 (1971).
59. Id.
60. Section 14(a) of the Labor Act, 29 U.S.C. § 164(a) (1970), provides in pertinent part that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

In the first cited case the Board concluded as follows:
At Northeastern University, faculty participation in collegial decisionmaking is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.


The problem of the N.L.R.B. jurisdiction over the faculty in general is discussed in more detail in the text accompanying notes 182-191 infra.
E. Jurisdiction Over Secondary Schools and Other Educational Institutions

It was not long before the employees at secondary level private educational institutions requested the assistance of the NLRB. The first petition sought an election among the maintenance and service employees at the Shattuck School, a private, nonprofit, in-residence secondary school with gross annual revenues of over $1 million. The Board acknowledged that secondary schools were not within the literal language of the Board's implementing regulations, but concluded that they are "sufficiently similar to warrant assertion of jurisdiction under the same jurisdictional standard." Subsequently, the Board announced a jurisdictional standard of $1 million gross revenue for private secondary institutions.

The Board later reconsidered the matter and proposed a rule declining to assert jurisdiction over private secondary and elementary schools and preschools (but not over trade, technical and secretarial schools). The AFL-CIO opposed this proposed rule because more than 216,000 teachers are employed in these private schools and seven of the fifteen largest school systems in the United States are operated by the Catholic Church. After considering this and thirty-eight other responses, the Board unanimously agreed to continue its jurisdiction over private schools meeting the $1 million gross annual revenue standard.

F. Jurisdiction Over the Hospitals and Health-Care Centers Operated by Private Educational Institutions

In 1971 when the Cornell case was decided, the Labor Act expressly excluded all nonprofit hospitals from Board review. Thus, once the Board assumed jurisdiction over private universities, it raised the question of what to do about the employees working in a nonprofit

63. Id. at 886.
65. The Board has not set a jurisdictional amount for nursery schools and day-care centers. Young World, Inc., 216 N.L.R.B. No. 97 (1975); Creative County Day School, 192 N.L.R.B. 586 (1971).
69. Section 2(2) of the Labor Act defined the term "employer" as not to 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 . . . ." 29 U.S.C. § 152(2) (1970).
hospital run by a university in conjunction with its medical school. Obviously, the private university was not to be excluded merely because it operated a medical school. But should a university hospital's employees be viewed as though they work for a non-profit hospital and thereby denied protection?

In *Duke University*, the Labor Board, with one dissent, held that the Duke Hospital, located on the Duke University campus and with no separate legal existence apart from the University, is nonetheless a "non-profit hospital" and therefore "literally, the exclusion contemplated in Section 2(2) applies to it." Subsequently, the Board applied this *Duke University* rationale to a series of other university hospitals and denied its jurisdiction to all university employees spending at least 50 percent of their time in hospital work. Congress, however, put an end to this Board policy on August 25, 1974, when it amended the Labor Act by eliminating the "nonprofit hospital" exemption. Since then the Board has exercised its jurisdiction over nonprofit hospitals operated by "covered" private universities and colleges.

G. Jurisdiction Over "Public Related" Private Institutions

Just as the Labor Act at one time excluded nonprofit hospitals from its definition of "employer" it still excludes "public institutions." But because of the massive subsidization of private educational institutions with state or other public funds, the Board must frequently decide when an otherwise "private" institution has become so "public" that jurisdiction should be denied as a matter of policy.

The leading decision is *Temple University*. Temple is a private

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71. Member John Fanning dissented. *Id.* at 239.
72. *Id.* at 238.
73. *E.g.*, California College of Podiatric Medicine Corp., 195 N.L.R.B. 813 (1972); Loyola Univ. Medical Center, 194 N.L.R.B. 234 (1971). *See also*, Texas Medical Center, Inc., 197 N.L.R.B. 255 (1972) (nonprofit corporation operating a parking lot for hospital employees is "... an integral part of these exempt nonprofit hospitals and shares their statutory exemption").
76. Yale-New Haven Hospital, 214 N.L.R.B. No. 34, 87 L.R.R.M. 1217 (Oct. 16, 1974); Philadelphia College of Osteopathic Medicine, 213 NLRB No. 44, 87 L.R.R.M. 1182 (Sept. 13, 1974).
77. Section 2(2) provides that "the term 'employer' ... shall not include ... any State or political subdivision thereof." 29 U.S.C. § 152(2) (1970).
78. 194 N.L.R.B. 1160 (1972). In that case Temple admitted that it was and remained a private, nonprofit educational institution; further, that it was not exempted from the National Labor Relations Act as a "political subdivision" within the meaning of section 2(2). However, it argued that the Board *in its discretion* should deny jurisdic-
non-profit institution of higher education. However, pursuant to a 1965 Act, Temple agreed to maintain a low tuition rate for Pennsylvania residents, and the Commonwealth of Pennsylvania agreed in exchange to subsidize the university. Approximately two-thirds of Temple's income, and most of the funds for capital improvement, are provided by the state. With these state expenditures came state control. One-third of the trustees are appointed by the state, and the state audits the university expenditures of state-supplied funds.

Under these circumstances the majority of the Labor Board concluded that whereas Temple is "in form a private, nonprofit institution," it is in reality "a quasi-public higher educational institution to provide low cost higher education for Commonwealth residents." For this reason the Board determined that "it would not effectuate the policies of the Act to assert jurisdiction over the University." The fact that Temple was a public employer within the meaning of Pennsylvania's Public Employees Relations Act and, therefore, denial of NLRB jurisdiction would not leave Temple's employees without any agency to turn to for resolution of their labor disputes may have significantly influenced the decision.

Thereafter, the Board applied the standards set forth in Temple and sometimes found sufficient public entanglement to warrant a denial of jurisdiction over nominal private institutions, and at other times decision because of the substantial nexus between the University and the Commonwealth. The Labor Board without explication, labeled Temple as a "quasi-public educational institution" and then concluded that "it would not effectuate the policies of the Act to assert jurisdiction over the University." Id. at 1161.

Member John Fanning issued a brief dissent, as he could not find "a meaningful distinction between the instant case and Cornell University"; Cornell also being a "state related" school. Id. at 1162.

The very existence of this Temple University rule seems questionable, as almost all colleges and universities are "quasi-public" and "state-related" to a greater or lesser degree. The necessity for drawing fine lines seems an unnecessary burden, far removed from the remedial purposes of the National Labor Relations Act.

80, Id. § 2510-6.
81, Id. §§ 2510-6, 2510-7.
82, Id. § 2510-4.
83, Id. § 2510-8.
84, Temple Univ., 194 N.L.R.B. 1160, 1161 (1972).
85, Id.
86, The faculty at Temple turned to the Pennsylvania Labor Relations Board, and in December of 1972 the AAUP won an election by vote of 676 to 437. Lengthy negotiations then took place, and a contract with the administration was ratified in July of 1974. See Dubeck, Collective Bargaining: A View From the Faculty, ACBIS Orientation Paper #7, p. 2 (Oct., 1975).
87, See, e.g., Pennsylvania School for the Deaf, 213 N.L.R.B. No. 83, 87 L.R.R.M. 1180 (Sept. 25, 1974); Overbook School for the Blind, 213 N.L.R.B. No. 82, 87 L.R.R.M. 1179 (Sept. 25, 1974); Nassau Library System, 196 N.L.R.B. 864 (1972);
In Howard University\textsuperscript{88} a majority of the Board also felt it would be inappropriate to assert jurisdiction and thus dismissed a petition for an election filed by a local Teamster union. The Board stressed that the federal government's involvement in the University's financial affairs far exceeds, in degree, that normally associated with federal funding of university projects; and further, that Howard University is "uniquely characterized by involvement of several Federal agencies at several levels."\textsuperscript{89} Board members Fanning and Penello dissented\textsuperscript{90} on the grounds that the employees at Howard are not "public employees" under any other labor-management relations act, and denial of NLRB jurisdiction would create "a permanent no-man's land, a result contrary to the thrust" of the National Labor Relations Act.\textsuperscript{91}

In a related area, the Board has had to wrestle with jurisdictional problems when "public institutions" (admittedly beyond reach of the Labor Act) subcontract or franchise part of their operations to a private organization (admittedly covered by the Act). Jurisdiction depends on the degree of control retained by the public institution. Thus, when the State University of New York at Stony Brook franchised its food services to a private institution, yet retained control over the labor relations, the Board declined to exercise jurisdiction.\textsuperscript{92} On the other hand, when the Edison public school system in New Jersey delegated to a private institution the full and complete powers to operate its cafeteria systems, the Board exercised jurisdiction.\textsuperscript{93} Similarly, when the guard and security services at the City College of New York were performed by a private organization, the Board refrained from exercising jurisdiction because the public institution retained a substantial degree of control over the employment relations of the guards.\textsuperscript{94} When the security guards paid by Mount Holyoke College sought an election, the Board

\textsuperscript{89}Howard Univ., 211 N.L.R.B. No. 11, 86 L.R.R.M. 1389 (June 14, 1974).
\textsuperscript{90}Id., 86 L.R.R.M. at 1391.
\textsuperscript{91}Id., 86 L.R.R.M. at 1392.
\textsuperscript{92}Howard University was decided in 1974 by the full five-member Board by a vote of three to two. Id. In November of 1975 the issue arose again when a union of security guards petitioned for an election at Howard. In the interim, Chairman Murphy replaced Chairman Miller, and this time Chairman Murphy joined the previous dissenters in holding that the matter should be reconsidered. No reason was given for this turn-about. Howard Univ., 221 N.L.R.B. No. 152 (Nov. 30, 1975).
\textsuperscript{93}Servomation Mathias Pa., Inc., 200 N.L.R.B. 1063 (1973).
\textsuperscript{94}Ja-Ce Co., Inc., 205 N.L.R.B. 578 (1973).
\textsuperscript{95}The Wackenhut Corp., 203 N.L.R.B. 86 (1973).
declined to exercise jurisdiction until it had more facts relating to the
degree of control exercised by the Town of Mount Hadley over these
uniformed policemen.96

H. Jurisdiction Over Charitable and Religious Institutions

Apart from the consideration of statutory mandates and limita-
tions, the Labor Board has for many years refused, as a matter of
discretion and policy, to exercise jurisdiction over institutions which are
primarily charitable or religious. This paralleled the Labor Board's
hands-off policies in regard to educational institutions prior to its Cor-
nell97 decision.

Immediately following Cornell the Board began to exercise juris-
diction over religious and philanthropic institutions which operated
orphan asylums and other types of educational institutions.98 But in
Ming Quong Children's Center,99 the Labor Board held that it would no
longer assert its jurisdiction "over this type of nonprofit institution
whose activities are noncommercial in nature and are intimately con-
nected with the charitable purposes of the institution."100 Following
Ming Quong the Board refused to exercise jurisdiction over a "nonprofit,
noncommercial institution which is devoted primarily to the charita-
ble work of caring for orphans"101 or over "a nonprofit charitable
institution operating a residential education and rehabilitation center for
multihandicapped children."102

Similarly, the Board denied jurisdiction to employees in a syna-
gogue-sponsored after-school class in religious instruction103 and over a
nonprofit religious organization which trains teachers in Judaism and
Hebraic study.104 However, the Board will grant jurisdiction if the
institution is "just religiously associated" rather than "completely reli-
gious" in character.105

98. Jewish Orphan's Home, 191 N.L.R.B. 32 (1971); The Children's Village, Inc.,
100. Id. at 901.
(Aug. 18, 1974).
102. Crotched Mountain Foundation, 212 N.L.R.B. No. 58, 86 L.R.R.M. 1529 (July
16, 1974).
103. Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053
(1974).
104. Board of Jewish Education of Greater Washington, D.C., 210 N.L.R.B. 1037
(1974).
105. Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, 216
This "discretionary" refusal to assert jurisdiction over religious and charitable institutions seems wrong both as a matter of law and as a matter of policy. At the time of the 1947 Taft-Hartley Amendments, the House expressly exempted churches, hospitals, schools, colleges, and societies for the care of the needy from NLRB jurisdiction. The Senate, however, rejected these exemptions except for the "non-profit hospitals." The Conference committee agreed to the Senate, not the House version of the law; and societies for the care of the needy were not exempted. The Labor Board should not refuse to assert its jurisdiction in the face of this clear legislative command. The policy basis for this legal matter was expressed by the minority position in the House during the 1947 Taft-Hartley debates before it became the majority position in the Senate. "It seems ironic that organizations devoted to the social welfare should be exempted from bargaining with their own, often underpaid employees."

III

"BARGAINING UNIT" PROBLEMS IN THE COLLEGE AND UNIVERSITY CONTEXT

Besides its jurisdictional problems since Cornell, the Board has wrestled with a host of bargaining unit problems. The Labor Act directs the Board to establish a "unit appropriate for the purpose of collective bargaining." This mandate is couched in general language
stating that the unit of bargaining, whether its employer-wide, craft-wide, plant-wide, or a subdivision of any of the above, “assure to employees the fullest freedom in exercising the rights guaranteed by this Act.”

A. The Appropriate Unit

The difficulty in selecting an “appropriate” unit is illustrated by the situation in the Cornell cases. An existing union wanted a unit restricted to skilled craftsmen on the Ithaca campus. A second union wanted a bargaining unit restricted to the staff employees of the School of Industrial Relations Center located in New York City. A third union wanted a unit consisting of librarians at the Ithaca campus. If this were all, the Board could have recognized three different but nonconflicting bargaining units. But, a fourth union wanted to establish a statewide unit representing all of Cornell’s nonprofessional employees, including the employees sought by the other three unions. The university’s administration joined the fray with a request for a university-wide bargaining unit, except for the employees at the Medical and Nursing Schools. This left the Board with the problem of selecting one or more of five bargaining units, any single one of which was appropriate.

(1973) the Board determined that the appropriate unit consisted of a countywide unit of 55 retail candy stores located in Los Angeles County; in Gray Drug Stores, 197 N.L.R.B. 924 (1972) the appropriate unit included all the stores from Miami to Fort Lauderdale. In contrast, the appropriate unit in White Cross Discount Centers, 199 N.L.R.B. 721 (1972) consisted of eight stores clustered within a radius of one-half mile in downtown Los Angeles.

In Frito-Lay, 202 N.L.R.B. 1011 (1973) the Board held that the appropriate bargaining unit for route salesmen consisted of three district offices in Phoenix, plus the two district offices in Tucson, plus the single district office in Las Vegas, Nevada. Similarly, in U-Wanna-Wash Frocks, 203 N.L.R.B. 174 (1973) the employer operated four plants—two eleven miles from the main plant, the third some 39 miles away. The union petitioned for an election in one of these plants but the Board held that the only appropriate unit consisted of all four plants.

In the public utilities industry the appropriate bargaining unit is generally held to be system-wide. Pioneer Natural Gas Co., 111 N.L.R.B. 502 (1955). But sometimes the appropriate bargaining unit is “district wide,” Michigan Bell Telephone Co., 192 N.L.R.B. 1212 (1971); sometimes the appropriate unit may be a single location; Communications Satellite Corp., 198 N.L.R.B. No. 171, 81 L.R.R.M. 1104 (Sept. 11, 1972); and sometimes it may consist of a group of employees at a single location. Central Power & Light Co., 195 N.L.R.B. 743 (1972).


Obviously a great deal of time and effort goes into these “unit determinations,” and the surface confusion results from the myriad factual distinctions which exist from industry to industry, and within any given industry.

Shortly thereafter, a sixth union sought an election as a way of obtaining recognition for a bargaining unit of employees at the non-fraternity dining facilities operated by Cornell on the Ithaca campus. The union sought to include the part-time student help. The University cross-petitioned to establish a university-wide bargaining unit of all nonacademic personnel throughout the State of New York. Again, either unit was "appropriate." In the first case, the Board adopted the statewide "unit" of all nonacademic personnel, obviously tolling the death knell for the three unions organized on limited "craft" lines in limited geographical areas: the librarians at Ithaca, the skilled craftsmen at Ithaca, and the staff of the School of Industrial Relations in New York City. Conversely, the Board restricted the unit to the dining hall employees on the Ithaca campus in the second Cornell case.

Taken together the two cases demonstrate that the Labor Board's "unit" determinations are highly crucial to the success or failure of a union organizing campaign.

The Board, in order to avoid the possibilities for abuse of this power, has established a number of principles for selecting manageable bargaining units of employees who share a high degree of common interest and concern.

1. Multi-Campus vs. Single-Campus Bargaining Units

Many universities and colleges have more than one campus and the Labor Board often has the opportunity to select a multi-campus bargaining unit or a single-campus bargaining unit. As the following decisions indicate, the Board has established principles which govern the selection of the appropriate unit on a multi-campus university.

Fairleigh Dickinson University has three New Jersey campuses within a 25 mile radius: Teaneck, Madison, and Rutherford. The American Federation of Teachers (AFT) sought an election among the full-time faculty on the Teaneck campus. The AAUP intervened and sought to represent the faculty on all three campuses. The University also petitioned for an election in a unit representing all three campuses, including the dental school. The Board concluded that the multi-campus unit was the appropriate one on the grounds that there was a "substantial community of interest shared by all the faculty regardless of

113. Cornell Univ., 202 N.L.R.B. 290 (1973). The Board rejected the units proposed by the union and by the University, and established its own: a unit of all dining facility employees on the Ithaca campus (including the fraternity chefs, but excluding the part-time student employees).
114. See note 112 supra.
115. See note 113 supra.
campus location" because salaries, teaching-loads, hiring and termination procedures, and other terms and conditions of employment were identical throughout the University.\(^\text{117}\)

Duke University has an "east" and a "west" campus, each of which constitutes a circumscribed and well-defined geographical area. A centralized physical plant department is responsible, however, for the maintenance of physical facilities on both campuses, and the maintenance workers are hired, supervised, and assigned work on either campus from centralized headquarters. As a result, the Board determined that a single bargaining unit was appropriate.\(^\text{118}\)

Tulane University has a principal campus in New Orleans, but it operates two research centers some distance from the city. The Service Employees Union petitioned for an election at the New Orleans campus, but the Board recognized a multi-campus unit because the operations were integrated and centralized, hiring and promotions were determined through a central personnel office, and wages, hours, and working conditions were uniform throughout the university.\(^\text{119}\)

The Roman Catholic Archdiocese of Baltimore operates five high schools; three in Baltimore, one ten miles to the south in Severn, the fifth 160 miles to the west in Cumberland. The Baltimore Archdiocesan Lay Teachers' Organization petitioned for an election in a unit consisting of all five schools. The Board determined that the five-school unit was appropriate\(^\text{120}\) because, although never formally recognized, the teacher organization had negotiated successfully for teachers at all schools since 1966,\(^\text{121}\) and because the employer maintained a significant degree of control over the schools and represented itself to the public and the State of Maryland as an integrated enterprise.\(^\text{122}\)

117. Id.

118. Duke Univ. and the International Union of Operating Engineers, 200 N.L.R.B. 81 (1972). Earlier, the Board had determined that the same two-campus unit was appropriate when requested by the service employees because of the uniform set of personnel policies and fringe benefits applied throughout the University. Duke Univ. and American Federation of State, County, and Municipal Employees, 194 N.L.R.B. 236 (1971).

119. Tulane Univ., 195 N.L.R.B. 329 (1972). Member Jenkins dissented. He would hold the election at the New Orleans campus alone, because of the geographical factors involved and the lack of interchange or transfer of personnel between any of the separate University units. Id. at 331.


121. Above and beyond all other factors, if an existing bargaining unit has worked well the Labor Board is hesitant to alter it. See, e.g., Mallinckrodt Chemical Works, 162 N.L.R.B. 387 (1966).

At Goddard College, the AFT sought a unit covering the faculty at both the main campus in Plainfield, Vermont, and the Goddard-Cambridge graduate program located 200 miles away in Cambridge, Massachusetts. Because of the semi-autonomous nature of the Cambridge-based program and the lack of contact or interchange between the two faculty groups, the Board restricted the bargaining unit to the Plainfield campus. Similarly, when the Florida Education Association sought a bargaining unit of the faculty at Florida Southern College's principle campus in Lakeland, the Board rejected the university's efforts to include the twenty-five instructors who taught exclusively at a branch campus located at the McCoy Air Force Base. The Board restricted the bargaining unit to the Lakeland campus, because of the absence of any real direct day-to-day supervision or substantial interchange of instructors, due to the fact that the McCoy facility was located approximately fifty miles from the main campus.

2. Campus-wide vs. Specialized Groupings of Employees

The two Cornell decisions indicate that the Board considers a number of factors in determining whether the appropriate bargaining unit might include all employees at a university, or, in the alternative, the unit might be restricted to a specialized, homogeneous, segment of the personnel. Specifically, these factors include "prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of the plants, differences of similarities in skills and functions of the employees, and geographical location of the facilities in relation to each other."

In applying these standards, the Board has held that three separate bargaining units, one for maintenance employees, one for policemen, and one for firemen were appropriate at Stanford University; that two separate bargaining units, one for the service and one for the maintenance employees, were appropriate at Duke University; that a central plant employees unit comprising only one section of the physical plant

123. 216 N.L.R.B. No. 81, 88 L.R.R.M. 1228 (Feb. 4, 1975).
124. Id.
125. 196 N.L.R.B. 888 (1972).
126. Id.
127. See note 112 supra.
128. See note 113 supra.
department was appropriate at California Institute of Technology, and that a unit restricted to office clericals was appropriate. A few decisions explain the rationale behind the different rulings.

At Claremont University Center, the Office and Professional Employees Union sought a unit of the approximately eighty centralized library employees. The University sought to broaden the unit to include all nonacademic employees at the University Center. The Board held that the library employees constituted an identifiable group of employees with a separate community of interest, because their work was specialized and different from that performed by employees of the other central services, the libraries were located apart and supervised separately from the other centralized services, the work schedule was unusual, and there was little transfer or interchange between the library and other colleges or facilities.

At Tuskegee Institute, the Laborers' International Union sought a campus-wide bargaining unit of approximately 300 service and maintenance employees engaged in transportation, food service, housekeeping, building maintenance, custodial, landscaping, grounds-keeping, and working in the auxiliary powerplants. They were all employed at the Institute's auxiliary Enterprises Division or its physical plant department, worked forty hours a week and were paid biweekly. The Institute sought to exclude some categories of employees paid by the month—engineers and firemen in the main powerhouse, and a group of employees in the mailroom, the snackbar and the bookstore. The Board certified the "campus-wide" unit. It included the power-plant employees, despite their separate intermediate supervision, different pay periods, and a lack of contract or interchange with other employees in the physical plant department because they wore the same uniforms, were subject to the same ultimate supervision, and were engaged with other employees in functions related to the internal environmental conditions of campus buildings. The mailroom, snackbar and bookstore

135. Id. at 813.
137. Id. at 775.
employees were included in the campus-wide unit because they were part of the same centralized administration and subject to the same ultimate supervision as the other employees in the Auxiliary enterprises division, and, like others in that division, they performed various service functions necessary to the overall operations of the institution.\footnote{138}

Similarly in \textit{Bowdoin College} the Board recognized the unit requested by the Marine and Shipbuilding Workers Union which included all maintenance, grounds-keeping, janitorial, housekeeping, food service, warehouse and transportation employees. The dispute concerned the chefs and kitchen helpers at ten fraternity houses. The Board held that they should be included within the campus-wide unit because the University played a significant role in their recruitment and retained the effective authority to terminate their employment and to set their rates of pay.\footnote{139}

3. \textit{Campus-wide vs. Departmental Groupings of Employees}

Colleges and universities may be grouped into academic departments (English, sociology, history, etc.); into divisions (arts and sciences, business administration, etc.); and into schools (law, medicine, journalism, music, and the like). The Board, therefore, has to decide whether to recognize a bargaining unit centered around one or more academic disciplines, or to insist on a campus-wide faculty unit.

\textit{C. W. Post Center of Long Island University}\footnote{140} was the first "faculty" case to reach the N.L.R.B. There, the United Federation of College Teachers sought an election in a unit of all professional employees engaged in student instruction, regardless of discipline, department or school. The Board held that a campus-wide faculty unit was an appropriate unit for collective bargaining.\footnote{141}

Shortly thereafter, the AAUP requested a campus-wide bargaining unit of faculty members at Fordham University, excluding only the law school faculty.\footnote{142} A law school bargaining committee requested a separate unit of law school faculty. The University contested this division.\footnote{143}

\footnote{138. \textit{Id.} at 774.}
\footnote{139. President and Trustees of \textit{Bowdoin College}, 190 N.L.R.B. 193 (1971). The Board excluded from the campus-wide unit the "fraternity custodians," mostly students performing housekeeping duties, hired and paid directly by the fraternity. \textit{Cornell University}, 202 N.L.R.B. 290 (1973), is the other "fraternity house" case decided by the Board. There, the Board included the chefs at the University-owned fraternities in a campus-wide unit of dining hall employees.}
\footnote{140. 189 N.L.R.B. 904 (1971).}
\footnote{141. \textit{Id.} at 908.}
\footnote{142. \textit{Fordham Univ.}, 193 N.L.R.B. 134 (1971).}
\footnote{143. \textit{Id.} at 134.}
The law school was unique in many respects. Its activities were confined to a separate building. The non-law faculty and students never used the law school's classrooms, and the law faculty never taught in other departments. The law school faculty members were eligible for tenure earlier than professors in other departments, and a larger number of them were in the higher professorial ranks, with salaries substantially above the other departments. The law school had its own academic calendar and determined its own curriculum. In addition, the law school was subject to control by three external agencies, The American Bar Association, the Association of American Law Schools, the New York Court of Appeals, each of which set minimum standards regarding faculty-student ratios, the teaching-load, and the content and number of hours required in the curriculum. Moreover, the law school administration was more autonomous than the other parts of the University.

Because of these and similar circumstances, the Board held 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 shared with all other faculty members; and that the law school was "not so highly integrated" with the remainder of the university as to compel a finding that only an overall unit would be appropriate. Subsequently the Board found a university wide faculty unit, excluding the law school, appropriate and found a unit limited to law school faculty appropriate.

Law schools are not the only university departments permitted to go their own way. At the University of Miami, the AAUP requested a bargaining unit excluding the law, medical, and oceanography schools.
The Board excluded the medical school because it was some distance from the main Coral Gables campus; it had exclusive use of separate buildings; few of the faculty taught on the main campus, while almost none of the other professors taught at the medical school; more than 300 of the faculty were practicing physicians; faculty income was augmented through a school-sponsored professional income plan; and the school had its own separate, twelve month, calendar.

The Board also excluded the University of Miami's Rosenstiel School of Oceanography from the bargaining unit. It, like the medical school, had its own separate campus some distance from Coral Gables. It is a graduate professional institution, with its own students and its own faculty. It had its own independent "nonuniversity" funding. Its faculty worked a twelve month year, in contrast with the regular nine month academic calendar. It had its own separate administration, responsible for curriculum, course requirements, and criteria for granting graduate degrees. The Board concluded that a University of Miami faculty unit excluding the Rosenstiel School would be appropriate.

B. Placement within the Bargaining Unit

Once the appropriate bargaining unit is determined, the Board must decide what positions are properly placed within that bargaining unit. The N.L.R.A. gives little guidance. "Supervisors" by definition are not "employees" and hence may not be included in a bargaining unit. Guards may not be included in a bargaining unit with employees who are not guards; and "professional employees" may not be in a

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151. The law school was held to be a separate unit. Id. at 6, 87 L.R.R.M. at 1637.
152. In New York Univ. Medical Center, 217 N.L.R.B. No. 116, 89 L.R.R.M. 1045 (April 29, 1975), the 60 psychiatrists on nontenure-producing appointments sought representation in a unit excluding the members of the psychiatry department with tenure or on the "tenure producing track." The Labor Board found that this limited "unit" was not appropriate, because the separate community of interest among these 60 psychiatrists had been largely submerged in the broader community of interest which they shared with all psychiatrists and other physicians at the Medical Center. In brief, salaries were all within the same range, functions and duties were the same, the common participation on equal footing in faculty government, similar overall supervision, and the fear of proliferation of bargaining units which could occur if physicians at each of the 13 departments could select their own independent bargaining unit.
154. Id.
155. See note 10, supra.
156. Section 9(b)(3) provides that the Labor Board may not "decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard"; further, that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or
unit with "nonprofessional employees" unless the professionals affirmatively vote to include the non-professionals. Over the years, the NLRB has grafted on these bare-bones statutory guidelines some of which have been applied to the campus scene with difficulty and backtracking.

I. Students

A good place to begin this analysis of placement within or without a campus bargaining unit is with the students. Generally students who work, even part-time in a store, on a construction site, or in a mill are considered a part of the work complement and, as such, they are entitled to vote in NLRB elections. The same is not true if they work as

is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." 29 U.S.C. § 159(b)(3) (1970).

157. Section 9(b) provides that the Labor Board shall not decide that any unit is appropriate "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b) (1970).

158. Most "unit determination" cases also include questions as to whether or not a given category of workers fall within or without the unit. The key to this question depends upon a number of factors, which disclose or fail to disclose a community of interest.

Should a small number of undercover investigators be included within a unit consisting primarily of uniformed guards? Yes, because of the larger "community of interest" they share by virtue of their common job function, the protection of clients' property. Defender Security & Investigation Services, Inc., 212 N.L.R.B. No. 23, 86 L.R.R.M. 1490 (June 28, 1974).

Should a handful of truck owner-operators be included within a bargaining unit dominated by employee-drivers? Yes, again because of the overall "community of interest." Contractor Members of the Associated General Contractors of California, Inc., 209 N.L.R.B. 363 (1974).

Should the few skilled machinists and instrument makers be included within a larger unit of production workers? Again the answer is yes, for the same reasons. Union Carbide Corp., Nuclear Division, 205 N.L.R.B. 794 (1973).

The principles are simple to state, but difficult to apply because the employment relations vary from plant to plant.

The unit placement of licensed vocational nurses illustrates the point. Their duties and responsibilities vary from nursing home to nursing home, from hospital to hospital. The consequence is that sometimes they are included within a unit consisting of various technical, clerical, maintenance and service personnel. See, e.g., Kaiser Foundation Hospitals, 210 N.L.R.B. 949 (1974). Sometimes they are placed within a unit of aides, orderlies and housekeepers. Pikeville Investors, Inc., d/b/a Mountain Manor Nursing Home, 204 N.L.R.B. 425 (1973).

When the NLRB took jurisdiction over the private colleges and universities in the first Cornell case, it frankly stated that it was "entering into a hitherto unchartered area" but expressed the belief that the unit determination criteria evolved in the industrial field would be "reliable guides to organization in the educational context." 183 N.L.R.B. 329, 336 (1970).

University employees. The issue first arose in *Georgetown University*\(^ {160} \) when the National Union of Hospital and Nursing Home Employees sought a bargaining unit of all service and maintenance employees, including part-time student workers.\(^ {161} \)

The NLRB noted that students were paid less than regular part-time employees, they normally worked for less than nine months, and they were restricted from working more than twenty hours per week. Accordingly, the Board found that, "... since students have many facts peculiar to themselves, and do not appear to have a community of interest with other regular part-time employees, we shall exclude them from the unit."\(^ {162} \)

Shortly thereafter in *Cornell University*,\(^ {163} \) the Board excluded student employees from a unit of dining hall workers because they did not share a "substantial community of interest" with the other employees.\(^ {164} \) Next, in *Barnard College*,\(^ {165} \) the Board excluded students from a unit consisting primarily of clerical employees, in good part, on the theory that their employment was incidental to their education objectives.\(^ {166} \)

Students are also excluded from "faculty units." The issue began obliquely at C.W. Post Center of Long Island University when the AFT sought a faculty unit, including certain laboratory personnel.\(^ {167} \) The union also sought to include "managers," whose duties involved the preparation of slides and specimens, assisting faculty members in demonstrations and experiments, and occasionally substituting for faculty in laboratory sessions. Although they were employed on a full-time basis,\(^ {168} \) the Board agreed with the University's objection because they did not appear to exercise sufficient discretion and judgment to be considered professional employees.\(^ {169} \) Graduate students at the Brooklyn Center of Long Island University performed the same work as the C.W. Post full-time managers.\(^ {170} \) For the same reason and the same rationale,

\(^ {160} \) The President and Directors of Georgetown College for Georgetown Univ., 200 N.L.R.B. 215 (1972).
\(^ {161} \) Id.
\(^ {162} \) Id. at 216.
\(^ {163} \) 202 N.L.R.B. 290 (1973).
\(^ {164} \) Id. at 292.
\(^ {165} \) 204 N.L.R.B. 1134 (1973).
\(^ {166} \) Id. at 1135. Some of the students worked as residence hall graduate assistants, while others worked as typists in the college activities office, as desk attendants at a bowling alley, and at the entrance to the college activities building. The students were treated differently from other employees with respect to their rates of pay, tenure, and other employment conditions. Id. at 1135-55.
\(^ {167} \) 189 N.L.R.B. 904 (1971).
\(^ {168} \) Id. at 907.
\(^ {169} \) Id.
\(^ {170} \) *Long Island Univ. (Brooklyn Center)*, 189 N.L.R.B. 909, 910 (1971).
the Board excluded the laboratory technical assistants from a faculty unit, although all of them had bachelor's degrees with master's degrees in progress.\textsuperscript{171}

In \textit{Adelphi University},\textsuperscript{172} the University sought to include "graduate assistants" in the faculty bargaining unit. Their primary assignment was teaching laboratory courses while working toward their own advanced academic degrees.\textsuperscript{173} The NLRB held that they "are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit."\textsuperscript{174}

The same result was reached at Stanford when the eighty-three graduate students employed as research assistants in the physics department formed their own union (the Stanford Union of Research Physicists) and petitioned the Board to hold an election.\textsuperscript{175} The NLRB found that the research assistants were primarily students and were not "employees" within section 2(3) of the Act.\textsuperscript{176} The holding was based on the finding that the payments to the research assistants were not wages since they were "in the nature of stipends or grants to permit them to pursue their advanced degrees and are not based on the skill or function of the particular individual or the nature of the research performed."\textsuperscript{177}

Some Board opinions regarding students make more sense than others. Under normal Board practice, regular part-time employees at an off-campus restaurant (students and non-students alike) are included within a bargaining unit with full voice, vote and right to fair representation.\textsuperscript{178} Despite the holdings in the \textit{Cornell}, \textit{Georgetown}, and \textit{Barnard} opinions, the Board presents no convincing rationale for distinguishing the situation simply because the place of employment moves to the campus and the employee is a student. If, as in the case of the \textit{Long Island University} laboratory technicians, the position in question is a low-level one, there is no reason to include the employee within a unit of professionals. Indeed, the Act specifically commands that non-professional employees be excluded from a bargaining unit of

\begin{footnotesize}
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\item[171.] \textit{Id.}
\item[172.] 195 N.L.R.B. 639 (1972).
\item[173.] \textit{Id.} at 640.
\item[174.] \textit{Id.}
\item[175.] The Leland Stanford Jr. Univ., 214 N.L.R.B. No. 82, 87 L.R.R.M. 1519 (Nov. 4, 1974).
\item[176.] \textit{Id.} at 8, 87 L.R.R.M. at 1521. Section 9(c)(1) of the Labor Act permits a petition for an election to be filed only by "an employee," by a "group of employees," or by any "individual or labor organization acting in their behalf." 29 U.S.C. § 159(c)(1) (1970).
\item[177.] 214 N.L.R.B. No. 82 at 3, 87 L.R.R.M. 1519 at 1520 (Nov. 4, 1974).
\item[178.] CCH 1970 \textsc{Guidebook to Labor Relations} 36.
\end{itemize}
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professional employees unless the latter affirmatively vote to include the former. But the status of the employee as a student is irrelevant to this issue.

Finally, the decision in Stanford to deny graduate students the right to organize a union of their own is particularly troublesome. Graduate student workers will have their grievances like other employees and to deny them the orderly bargaining processes of the NLRA may result in a pent-up explosion.

2. Faculty Members in General

Most college and university faculty are responsible for formulating and recommending academic policies regarding student admission standards, curriculum, graduation requirements, grading and honor assignments, and other matters of academic concern. In addition, the faculty generally exercises initial control over faculty personnel policies including recruiting, appointment, reappointment, promotion, tenure and removal. Final decision-making authority theoretically rests with the university administration and its Board of Governors, but this reserve power is seldom exercised.

For these reasons many colleges and universities have argued that faculty members do not have the status of “employees,” but rather fall within the “supervisory” or “managerial” category and as such are not eligible for NLRB jurisdiction. The Board rejected this contention when it was first made in C.W. Post Center of Long Island University, on the grounds that “the policymaking and quasi-supervisory authority which adheres to full-time faculty status is exercised by them only as a group.” The Board concluded that the professional

181. It might be noted that students may have another interest in campus bargaining—the role of consumer. Their concerns as consumers might be adverse to the concerns of the professors as producers, as, for example, when the faculty proposes that a salary increase be financed by increased tuitions. A few states have recognized this, and have taken legislative action to give students a voice in the bargaining process. Montana put the student on the Board of Regents’ bargaining team; Oregon gave the students an independent third party status, and in Maine a pending bill would give students the right to caucus with the Board of Higher Education prior to negotiations, and to sit in at the bargaining table. Student lobbyists are pushing for similar bills in California, Wisconsin and Washington. Current Status of College Students in Academic Collective Bargaining, ACBIS Special Report #22, (July, 1975).
182. See generally, C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 905 (1971).
183. Id. at 905.
employees on the faculty are "... entitled to all the benefits of collective bargaining, if they so desire." 184

The Board has continued to maintain this position. Thus, for example, in Fordham University, 185 the Board rejected the notion that professors who directed and utilized the services of a graduate assistant, had become supervisors. It found the relationship between a faculty member and his or her graduate assistant basically to be a teacher-student relationship. 186

Again in Manhattan College, 187 and yet again in University of Miami, 188 the Board adhered to the position that faculty members are employees, noting that since "faculty participation in collegial decision-making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than in the 'interest of the employer,' [and that] final authority rests with the board of trustees." 189

In Adelphi University, 190 the record showed that some professors had authority to hire, to direct, and to fire secretaries. The University argued that these professors were "supervisors" and not eligible to participate in a bargaining unit. 191 The Board rejected this contention because "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." 192

3. Faculty Members Serving on a Grievance Committee, a Faculty Senate, or Some Other Policy-Making Agency

Most universities have campus-wide representative faculty bodies to formulate faculty policy, to investigate faculty grievances, and to advise on individual problems of faculty promotion or tenure. The NLRB has rejected the contention that the faculty members on these committees enjoy the status of "supervisors." In Fordham University, 193 the Board held that, although the Faculty Senate had power effectively to recommend major policy decisions, the elected members were nevertheless "employees."

184. Id.
186. Id. at 136.
188. 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (Sept. 27, 1974).
189. Id. at 4, 87 L.R.R.M. at 1637.
191. Id. at 643-44.
192. Id. at 644 (emphasis supplied).
The faculty members serving on these committees are elected by other faculty members to represent the faculty as a whole, and no one faculty representative can make the policy decisions in question. The role played by these representatives is one of group determination and does not make them individually supervisors. In Adelphi University, the membership of two faculty committees was in issue. An eleven member personnel committee elected at large by the faculty was to pass on all matters of tenure, promotion to the higher ranks, sabbatical leaves, and removal during a term of employment. A similarly elected three member grievance committee was to investigate all faculty grievances, including the failure to achieve tenure or promotion and other alleged discrimination by the University. The recommendations of both faculty committees went to the Trustees who uniformly, and almost routinely, accepted them. The NLRB agreed that these committees have “considerable and effective authority with respect to a wide range of actions affecting the status of the University’s professional personnel.” It refused, however, to put them into the category of supervisors.

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. We are not disposed to disenfranchise faculty members merely because they have some measure of quasi-collegial authority. . . . We therefore find that the several members of the University personnel and grievance committees here . . .

194. Id. at 135.

The University contention that all faculty members are part of the management team is sometimes inconsistently coupled with the contention that collective bargaining already exists on the campus. The Universities argue that the faculty senate is the elected representative of the faculty, and that the faculty handbook is the equivalent to a collective bargaining agreement.

This contention is raised under the so-called “contract bar” doctrine; whereby an existing contract between a labor union and an employer will “bar” for a reasonable period of time any action on a petition filed by a different union. See Appalachian Shale Products Co., 121 N.L.R.B. 1160 (1958). The purpose of this rule is to provide some degree of stability to the collective bargaining relationship. In Northeastern University, the NLRB held that the Faculty Senate was not a union, and the faculty handbook was not the equivalent to a collective-bargaining agreement so as to bar a petition for an election filed by the NEA. Northeastern Univ., 218 N.L.R.B. No.40,89 L.R.R.M. 1862 (June 5, 1975).

196. Id. at 647.
197. Id.
198. Id. at 648.
199. Id.
are not supervisors within the meaning of the Act solely by reason of such membership, and we shall include them in the bargaining unit.200

In Tusculum College,201 six faculty members are elected by their colleagues to serve on an executive committee. This committee "acts for the faculty between regular faculty meetings and whenever problems require immediate faculty attention."202 In addition, it prepares the agenda for faculty meetings, nominates members of other faculty committees, and evaluates the performance of other professors regarding promotion, tenure, or discharge.203 The recommendations of this committee are not binding, but the college President testified that a faculty member had no chance of promotion over the adverse recommendation of this committee.204 Despite this delegated authority, the NLRB held that the committee members were not supervisors, and therefore could be included in the bargaining unit.205

Here, as in Adelphi, ultimate authority rests with the Board of Trustees rather than with the executive committee. The members of the executive committee are elected by the faculty as a whole and are not requested to advocate the interests of management or act as management's representatives in making their recommendation.206

These cases, and the most recent opinion in Yeshiva University,207 suggest that there is no reason why faculty members elected by their colleagues to represent interests important to their colleagues should thereby lose their status as faculty members.

4. Adjunct or Part-time Professors

At many universities, particularly those in the larger metropolitan cities, the full-time faculty is augmented by a large number of adjunct or part-time teachers. C.W. Post Center of Long Island University has a full-time faculty of 335 and a part-time faculty of 206.208 Catholic University's School of Law employs twenty-one full-time and thirty-one part-time faculty members.209 The University of Detroit has 330 full-time and 230 part-time faculty members.210

The issue of whether to include adjunct professors in the collective

200. Id.
201. 199 N.L.R.B. 28 (1972).
202. Id. at 29.
203. Id. at 29-30.
204. Id. at 30.
205. Id.
206. Id.
208. C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 904-05 (1971).
bargaining unit first arose in *C.W. Post Center of Long Island University*. There, the AFT sought an election in a bargaining unit of all professionals engaged directly or indirectly in student instruction, including the adjunct professionals. The University took the position that the full-time and part-time faculty should be in separate units.\(^{212}\)

The adjunct professors had the same educational background as their full-time counterparts and engaged in exactly the same teaching activities.\(^{213}\) They participated in the faculty policy deliberations, although they had no power to vote.\(^{214}\) They did not, however, enjoy fringe benefits such as health insurance, pensions, sick leave, and widows' benefits. Many of them taught night courses.\(^{215}\)

The NLRB was not persuaded that it should apply different principles from those applied in the normal industrial setting, *i.e.* "... neither difference in benefits, high ratio of part-time to full-time employees, nor additional employment elsewhere militates against their inclusion ... ." in the bargaining unit with a full and equal voice and vote.\(^{216}\)

For some period of time this ruling was applied to any adjunct professor who taught at least one-fourth the average full-time teaching load.\(^{217}\) There were many protests, however, and the Board reconsidered the problem.

In *New York University*,\(^{218}\) a majority of the Board became convinced that there was "no real mutuality of interest between the part-time and full-time faculty ... . because of the difference with respect to (1) compensation, (2) participation in University government, (3) eligibility for tenure, and (4) working conditions."\(^{219}\) As a result, the Board majority concluded that a single unit of both part-time and full-time faculty would impede organization and effective bargaining.\(^{220}\)

Consistent with its *New York University* rule, the Board excluded the adjunct professors from the bargaining unit sought by the Associated Law Professors in *University of San Francisco*\(^{221}\) because the part-

\(^{211}\) 189 N.L.R.B. 904 (1971).

\(^{212}\) *Id.*

\(^{213}\) *Id.* at 905.

\(^{214}\) *Id.* at 906.

\(^{215}\) *Id.* at 905.

\(^{216}\) *Id.* at 906.

\(^{217}\) Catholic Univ. of America, 201 N.L.R.B. 929, 930 (1973); Univ. of Detroit, 193 N.L.R.B. 566, 567 (1971); Univ. of New Haven, Inc., 190 N.L.R.B. 478 (1971).


\(^{219}\) *Id.* at 7.

\(^{220}\) *Id.* at 7-8.

\(^{221}\) University of San Francisco, 207 N.L.R.B. No. 15, 84 L.R.R.M. 1403 (Nov. 7, 1973).
time faculty members are generally practicing lawyers, are employed on a semester basis only, do not have offices in the Law School, do not vote at law school faculty meetings, and do not participate in law school governance. Similarly, in Point Park College, the Board concluded, with little or no discussion, that the "... part-time faculty herein do not share a community of interest with full-time faculty."223

In Northeastern University the parties stipulated that approximately one-thousand part-time teaching faculty members should be excluded from the unit. The Board agreed for the same reasons set forth in New York University. A similar result was reached in Rensselaer Polytechnic Institute, although in that case the professors wanted them excluded and the university took no position on the issue. In Yeshiva University the university sought to include regular half-time faculty members who were involved in issues of curriculum and standards. The Board denied this request, stating that there was "a lack of mutuality of interest between the part-time and full-time faculty."227

It is undoubtedly true that many part-time or adjunct professors are primarily concerned with some other, more principal means of livelihood and consider their teaching assignments as a hobby, a pleasure, a prestige value, a means of picking up a little extra income, or a mixture of all these things. But there are other part-time professors who have a deep and continuing interest in the institution and its concerns.

In some instances their ties to the college or university are deeper and stronger than those of regular faculty members who hope to promote their career by moving to a "better" institution. This suggests that the Board's per se rule is ill advised, and that those part-time faculty who have taught regularly over a period of time should be included in the bargaining unit with full voice, vote, and rights to representation. At a minimum, however, they should have a right to form their own bargaining unit.

5. Professors Emeriti, Professors on Terminal Contract, Professors Who Have Tendered Their Resignations, and Visiting Professors

The problem of the professors emeriti arose in Tusculum

222. 209 N.L.R.B. 1064 (1974). See also, Catholic Univ. of America, 205 N.L.R.B. 130 (1973), reversing its earlier decision that part-time law school faculty are to be included in the bargaining unit. Catholic Univ. of America, 201 N.L.R.B. 929 (1973).
227. Id. at 5, — L.R.R.M. at —.
College. Some of these officially retired professors had continued to teach under letters of intent similar to those received by part-time faculty members. In addition to their earned retirement pay, they, like the other part-time faculty, were paid for any course they taught, but they did not receive the fringe benefits available to full-time faculty members. They were furnished with offices, had use of all college facilities, and participated and voted in faculty meetings. One even served as the faculty marshall. Nevertheless, the Board held that, under the relevant Supreme Court decisions, their status was essentially that of retiree, rather than of employee and as such they could not be included within the bargaining unit.229

In contrast, in Rensselear Polytechnic Institute,230 where two emeritus professors were engaged in full-time teaching and where the parties stipulated that they should be included within the bargaining unit, the Board included them without further discussion. This suggests that the emeritus professor on a year-to-year appointment is analogous to the adjunct professor with many years of service. Neither should be excluded from the faculty bargaining unit, of which each is so much a part.

Faculty on terminal appointment are included within the bargaining unit and entitled to vote for or against union representation.231 This is in accordance with the Board's customary practice of permitting any employee employed at the time of the election to vote, irrespective of the expectancy of continued employment thereafter.232 Thus, in Fordham University,233 some professors had “probationary” contracts for a defined number of years and were eligible for reappointment if necessary requirements were met; others had “temporary” one year contracts. Any “probationary” faculty member whose contract was not to be extended was to be notified one or two years in advance of the termination date. “Temporary” professors were given six months notice if their contracts were not to be extended. Usually approximately twenty-five percent of the “temporary” professors were retained for a subsequent year. The faculty also included some professors who had tendered their resignations or planned to retire at the end of the academic year.234

The Board held that whatever their category, all professors were eligible to vote in the faculty unit because each professor “continues to share a community of interest with other faculty members before his

228. 199 N.L.R.B. 28 (1972).
234. Id. at 14, 87 L.R.R.M. at 1646.
contract terminates," and each continues "to have an interest in the terms and conditions of employment prior to their effective termination of employment."\textsuperscript{235}

The issue was relitigated in \textit{Rensselaer Polytechnic Institute}\textsuperscript{236} and in \textit{Yeshiva University}\textsuperscript{237} when the universities sought to exclude faculty members in their final year of employment, but the Board continued to hold that these faculty members should be included within the bargaining unit.

Given the exclusion of part-time faculty and some emeriti professors, these decisions seem questionable. One wonders about the degree of interest a resignee, a retiree, or a terminee might have in the terms and conditions of employment to be negotiated for the future, when he or she will long have passed from the scene. Their positions seems analogous to that of the professor who "visits" for a semester or a year.

Visiting professors are excluded from the bargaining unit. In \textit{Goddard College}\textsuperscript{238} the visiting professors had been hired for a definite term of one semester or one year. Only occasionally would their employment be continued beyond the stated term. Only 5 to 10 percent of the visiting faculty had ever been offered permanent positions. Visiting faculty were paid according to regular faculty scales and participated in curriculum and faculty meetings with full voting privileges. The Board concluded, however, that visiting faculty should be excluded from the bargaining unit because "their work is \ldots of a temporary nature, and they have no reasonable expectancy of reappointment."\textsuperscript{239}


Professors in nontenure-earning positions are included in faculty bargaining units and entitled to vote. Thus, at the University of Miami\textsuperscript{240} there were three types of faculty appointments: regular, term, and indefinite. The regular appointments included all tenured or ten-

\begin{itemize}
\item \textsuperscript{235} \textit{Id.}
\item \textsuperscript{236} 218 N.L.R.B. No. 220, 89 L.R.R.M. 1846 (June 30, 1975).
\item \textsuperscript{237} 221 N.L.R.B. No. 169.
\item \textsuperscript{238} 216 N.L.R.B. No. 81, 88 L.R.R.M. 1228 (Feb. 4, 1975). Although the matter apparently has not arisen, it seems sound that professors who leave their home base to visit elsewhere for a year should be included within the bargaining unit at their home base with full rights to vote for or against union representation. Whatever the result of the election, they might be affected for years to come, and their temporary absence should not deny them a voice in the outcome. For similar reasons, professor on research leave should be included within the bargaining unit.
\item \textsuperscript{239} \textit{Id.} at 4, 88 L.R.R.M. at 1230.
\item \textsuperscript{240} University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (Sept. 27, 1974).
\end{itemize}
ure-earning positions. Term appointments were made for a specific period of time and indefinite appointments continued from year to year until terminated. Faculty in the latter two categories did not have and normally could not earn tenure, but were otherwise entitled to most, if not all, the prerogatives and fringe benefits given to faculty members holding regular appointments. All three categories had members with equal academic qualifications and who taught classes or performed research work of equal stature. All participated in the affairs and deliberations of their respective academic departments and were listed in the University's bulletins under the heading of "faculty." Given these similarities, the Board concluded that the "term" and "indefinite" professors were professional employees who have a close community of interest with their fellow faculty members holding tenured or tenure-earning positions" and therefore should be included in the bargaining unit.241

Many universities also employ research associates or program specialists. These persons are academically trained with advanced degrees and frequently enjoy faculty status. They differ from the regular faculty in that they are normally paid out of "soft money," i.e. money from grants by public agencies or private foundations. They are seldom tenured. Their primary function is research and their teaching assignments are non-existent or negligible. Because of their professional qualifications and the intellectual character of their duties, the Board has included these persons in the faculty units.242

At the C.W. Post Center of Long Island University a research associate worked in the biology department under an outside grant. He had a PhD but did no teaching. Based upon the intellectual character of his duties and his qualifications, which are similar to those of other faculty members, the Board found him to be a professional employee with similar interests and included him in the faculty bargaining unit.243

The University of Miami also employed a number of research personnel holding the titles of research scientist, program specialist, research associate, and training associate. All held advanced academic degrees, were employed on an annual salary and contract, and had the same stature as the regular faculty. They shared all faculty prerogatives, except for tenure and participation in faculty government. Their major responsibilities involved the conduct, planning, and evaluation of research and training programs and, in this connection, they sometimes guided, assisted, and reviewed the work of students. On occasion, some

241. Id. at 16, 87 L.R.R.M. at 1641.
242. See University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1636 (Sept. 27, 1974); C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971).
also taught classes. The Board concluded that “the research scientists and program specialists are professional employees who have a close community with the faculty” and should be included in the requested faculty bargaining unit.244

The community of interest existing between research associates paid outside “soft money” and the regular teaching faculty is dubious.245 But, there seems little reason for not including them within the bargaining unit. Unfortunately their inclusion can lead to other anomalies. In Rensselaer Polytechnic Institute,248 the Board designated those faculty members who supervise outside grants as “principal investigators” and excluded them from the bargaining unit.

Most faculty research at R.P.I. is funded through contracts with government agencies or private concerns. A faculty member identifies an area warranting research, applies for and may receive a grant. Approximately 116 of the total 330 full-time faculty at R.P.I. had such research contracts. Because the faculty members, while administering the grants, have authority to hire, fire, and direct the work of others, and because those who did the research and clerical work in connection with the grant are employees of the University and members of the bargaining unit, the Board held that these “principal investigators” fell within the Act’s statutory definition of “supervisors” and hence were excluded from a unit of “employees” (the other professors).247

The result is that one-third of the professors, often those with the greatest prestige and intellectual curiosity, are excluded from the bargaining unit, simply because their research associates are members of the bargaining unit. This reverses the order of things. Professors are expected to engage in research and public services as well as teach. The mere fact that a professor has a large research project in progress that utilizes research associates does not make him or her any less a professor. It is inappropriate that they are “bumped” from the faculty bargaining unit and their research associates who do not teach and who have less justification to be members of a faculty bargaining unit are included within the unit.248

244. 213 N.L.R.B. No. 64, 87 L.R.R.M. 1636 (Sept. 27, 1974).
245. In Yeshiva University, 221 N.L.R.B. No. 169, — L.R.R.M. — (Dec. 11, 1975), with no reference at all to the earlier contrary decisions, the Board excluded two faculty members who had been hired primarily to perform research activities under a research grant.
248. When the persons supervised by the principal investigator are not employees of the University and are not members of the bargaining unit, the principal investigator is included within the bargaining unit. New York Univ., 205 N.L.R.B. 4 (1973); Fordham
7. **Deans, Division Directors, and Department Chairmen**

When professors are appointed to be deans, they generally become supervisors and lose their status as employees. They are viewed as joining management and can no longer vote or participate in a faculty bargaining unit. Generally, the same is true when a professor becomes a division director, or department chairman, depending upon the amount of authority he or she has over departmental colleagues.

The early decision of *C.W. Post Center of Long Island University* set the pattern. The AFT wanted to exclude deans from the faculty bargaining unit; the University wanted to include them. The facts disclosed that within the University there were a number of schools and colleges, each with a dean as its chief administrator. These deans were responsible for the departmental budget within their own school or college and exercised authority over its faculty. As a result, the Board found them to be supervisors and excluded them from the unit. Similarly, in *Tusculum College*, the AFT and the University stipulated that both the dean of the college and its President were supervisors and therefore, they were to be excluded from the faculty bargaining unit.

The matter was litigated again in the *University of Miami* when the University sought to include its deans in the faculty bargaining unit. Deans at the University of Miami are appointed by the President and receive substantial salary increases upon their appointments. They are responsible for budgets, faculty salaries, and the distribution of funds among the various departments within their deanships. They appoint department chairmen and are free to reject departmental recommendations when they believe a department is weak and needs a leader stronger than the one proposed by the faculty. In the university personnel classification system they are included in the administrative rather than in the faculty “category.” The Board, on these facts, excluded the deans from the faculty bargaining unit.

Whether the associate and assistant deans are supervisors depends upon their authority to effectively recommend action such as hiring.

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Univ., 193 N.L.R.B. 134 (1971). The Board decisions in this area result in this anomaly: the professor with a grant is either included or excluded from the faculty bargaining unit depending upon the fortuity of whether those he hires and supervises are paid directly from the grant money, or indirectly with the University acting as the funnel for the grant funds.

249. 189 N.L.R.B. 904 (1971).
250. *Id.* at 906.
252. 213 N.L.R.B. No. 64, 87 L.R.R.M. 1635 (Sept. 27, 1974).
253. *Id.* at 13, 87 L.R.R.M. at 1640.
254. *Id.* at 14, 87 L.R.R.M. at 1641.
promoting, and discharging of the faculty. In Catholic University, a law faculty bargaining committee sought to exclude the associate and the assistant deans from the faculty unit. The Board held that neither was a supervisor and included them within the unit.

The specific facts of the case suggest why the Board came to this conclusion. The associate dean served as chairman of the faculty committee on academic policy to implement the school's academic program. He was compensated on an eleven rather than the usual nine month basis. He also taught 2½ hours per week each semester and enjoyed full faculty status. Key to the Board's decision, however, was the fact that his recommendations regarding the hiring, firing, and promotion of faculty members carried no more weight than the recommendations of his colleagues. Moreover, although he was the ranking law school official in the absence of the dean, he had not been delegated authority to exercise independent discretion in the dean's absence. In view of this limited authority and his close association with the faculty, the Board held he should be included in the bargaining unit.

The assistant dean's position was similar. Primarily he was a teacher, with a reduced course load so that he could help with student recruitment and admission. Since he had no supervisory authority vis-à-vis the other law school professors, the Board held he was to be included in the bargaining unit.

The same results were reached in University of San Francisco, when the Associated Law Professors sought to exclude the assistant dean from their bargaining unit. The Board concluded that since his administrative responsibilities were primarily in the area of admissions and minority programs, and because he taught four hours each week of each semester, enjoyed full faculty status, and did not substitute for the dean on those occasions when the dean was absent, he should be included within the unit.

These "assistant dean" cases turn on the facts of each particular situation. The vice-principals at the Archdiocesan High Schools in Baltimore were, for example, held to be supervisors because they had authority to reprimand teachers, evaluate the performance of teachers, assign substitute teachers, and insure compliance with the school regulations.

256. Id. at 930.
257. Id. at 931.
258. Id.
Most colleges and universities are organized into departments, divisions, or programs with an administrative head reporting directly to the dean. When the division director, program director, or departmental chairman is delegated authority to establish policy, make budget decisions, set the salaries of the faculty within the division, and effectively recommend faculty selection or termination, he or she becomes a supervisor and is excluded from the faculty bargaining unit. Thus, at the C.W. Post Center of Long Island University the Department chairmen were selected by the Dean after consultation with the faculty of the department. Upon appointment, they were responsible for the recruitment of new faculty, again in consultation with the dean; they recommended promotion and tenure, subject to appeal by an aggrieved faculty member to the faculty tenure board, and they taught a reduced load depending on their other duties.

Similarly, Loretto Heights College had seven program directors who reported directly to the academic dean and were responsible for budget control, supervision of all unit personnel in their respective programs, academic policies, evaluation of personnel, and the screening and selection of faculty. No one was hired without the recommendation of the appropriate program director. The Board readily concluded that these arrangements were sufficient to make the directors and chairmen supervisors and therefore ineligible for inclusion in a faculty bargaining unit.

At the other extreme is Florida Southern College, where departmental executive officers are appointed annually, on a rotating basis without regard to seniority or tenure. They do not receive additional compensation, and maintain their normal teaching schedules. Their function is to coordinate their departments and act as liaison with the dean’s office. They interview applicants for teaching positions, but so do the other faculty members. Moreover, they lack the authority to discuss contractual terms with the faculty, are not responsible for the preparation of departmental budgets, and do not assign or schedule courses. Under these circumstances, the Board concluded that the departmental executive officers are not supervisors, and should be included in the faculty bargaining unit. More typical is the arrangement at Fordham University. There, the departmental chair-

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261. C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971).
265. Id. at 889.
man is nominated by the faculty of his or her department and, except for unusual circumstances, is appointed for a three year renewable term. The appointment carries a special stipend of $500 to $1,000 and involves a reduced teaching load. Department chairmen have authority to hire adjunct professors. Full-time appointments are decided by a faculty committee. A separate faculty promotion committee is responsible for recommending promotions, giving the greatest weight to collegial evaluations. There is also a faculty tenure committee with equivalent authority. Even the authority to dismiss rests not with the chairman but with a faculty hearing committee whose decision goes directly to the board of trustees.

Each Chairman draws up his or her departmental budget, with the advice and consent of the faculty, and makes the initial recommendation concerning faculty “merit pay increases.” These are often modified by the deans. The entire department is responsible for its academic program. Matters such as course assignments and summer school program assignments are arranged, if possible, by a consensus of the faculty. The department chairman makes them only in the event of an irreconcilable conflict. Because the duties of the chairmen are executed in an atmosphere of collegiality, the Board concluded that the chairmen are not supervisors, and hence are entitled to be included in the faculty bargaining unit.267

The upshot of these and similar decisions is this: if the departmental chairmen are no more than first among equals, selected by their colleagues to represent the faculty interests in negotiations with the administration, the NLRB holds them to be properly included within the faculty bargaining unit. On the other hand, if they are appointed by the administration to supervise the department as the administration sees best, then they are excluded from the faculty bargaining unit. When they are neither completely one nor the other, a balancing process takes place to determine whether their interests are closer to those of the faculty or the administration. Compare the situation at Rensselaer Polytechnic Institute268 (where the department chairmen were excluded from the faculty unit) with that at Northeastern University269 and Yeshiva University 270 (where the department chairmen were included within the faculty unit).

267. See also, Univ. of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (Sept. 27, 1974); Rosary Hill College, 202 N.L.R.B. 1137 (1973); Tusculum College, 199 N.L.R.B. 28 (1972); Univ. of Detroit, 193 N.L.R.B. 566 (1971).
8. **Librarians and Other Professional Support Personnel**

Almost all colleges and universities employ a host of support personnel: librarians, deans of students, guidance counselors, placement directors, financial aid directors, infirmary nurses, and so on. Generally, they are professionals who play a significant role in the integrated life of the college. The Board has held that only the librarians can be included within a faculty bargaining unit. At Claremont University, however, the central library employees desired a bargaining unit of their own and the Board held that this also was appropriate.\(^{271}\)

The issue first arose in *C.W. Post*\(^ {272}\) when the AFT sought a bargaining unit of all professional employees engaged directly or indirectly in student instruction, including the librarians. There were twenty-seven librarians employed at the center's various libraries. Each had a master's degree in library science and each was designated in the University catalogue as having the rank of instructor or assistant professor. They participated in faculty meetings and enjoyed many of the privileges accorded to faculty members. In addition to their usual duties as librarians, they worked individually with students in assisting them with library problems. They also worked with the faculty to assure that the library could supply the books required by the curriculum.

The Board concluded that the librarians were professional employees engaged in functions closely related to teaching and given their community of interest with the faculty, should be included in the faculty bargaining unit.\(^ {273}\)

Only the library director was to be categorized as a supervisor and therefore excluded from the bargaining unit.\(^ {274}\) The litigation has continued, however.

In *Catholic University*,\(^ {275}\) the union sought a bargaining unit at the law school consisting of all members of the full-time faculty, including the head librarian. The head librarian was a member of the faculty and attended all faculty meetings where his voice and vote were equal to

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271. Claremont University Center, 198 N.L.R.B. No. 121, 81 L.R.R.M. 1317 (Aug. 9, 1972). The unit included the professional and non-professional librarians at the Honnold Library System, excluding "supervisors."


273. The same result was reached on essentially the same facts in Rensselaer Polytechnic Institute, 218 N.L.R.B. No. 220, 89 L.R.R.M. 1844 (June 30, 1975); Point Park College, 209 N.L.R.B. 1064 (1974); New York Univ., 205 N.L.R.B. 4 (1973); Tusculum College, 199 N.L.R.B. 28 (1972); Florida Southern College, 196 N.L.R.B. 888 (1972); Manhattan College, 195 N.L.R.B. 65 (1972); and Fordham Univ., 193 N.L.R.B. 134 (1971). There are no decisions to the contrary; unless the librarians are excluded from the unit on the independent ground that they are "supervisors." See, e.g., Northeastern Univ., 218 N.L.R.B. No. 40, 89 L.R.R.M. 1862 (June 5, 1975).

274. *C.W. Post Center of Long Island Univ.*, 189 N.L.R.B. 904 (1971).

those of the teaching faculty. He did not teach any courses, but assisted
students in the research and preparation of papers. He did not super-
vise any members of the bargaining unit and his control over the small
library staff was limited. Indeed, on the one occasion in which he had
recommended the discharge of a library employee, the associate dean
had declined to follow the recommendation. The Board, on these facts,
concluded that the head librarian’s “community of interest quite clearly
resides with the faculty.”

In University of San Francisco, the union sought a bargaining
unit of the law school faculty that excluded the law school librarians.
The University wanted them included. None of them, a head librarian
and two assistant librarians, had law degrees nor did any teaching.
Despite this, the Board held that the “library is essential to, and fully
integrated with, the law school. . . . [L]aw librarians have a sufficient
community of interest with the faculty to be included with them in an
appropriate unit.” Accordingly, the two assistant law librarians were
included in the unit, but the chief librarian was excluded because she
was their supervisor. The distinction is inappropriate for most law
schools. Head librarians in law schools frequently hold law degrees,
teach courses within the regular curriculum, and are regarded as col-
leagues by the faculty members. The assistant librarians, in contrast,
generally hold library science degrees, do not teach, do not attend
faculty meetings, and are considered to be simply staff. To include
the assistant librarians within a faculty unit, but exclude the head
librarians simply because they are supervisors is to ignore the reality of
academic life.

All other university professional support personnel are not consid-
ered to engage in functions as closely related to teaching as the librari-
ans. Consequently, they are excluded from the faculty bargaining unit.
This applies to positions such as guidance counselors, admissions officers,
placement counselors, deans of stu-

276. Id. at 931.
278. Id. at 13.
279. Id.
281. Goddard College, 216 N.L.R.B. No. 81, 88 L.R.R.M. 1228 (Feb. 4, 1975);
Adelphi Univ., 195 N.L.R.B. 639 (1972); Long Island Univ. (Brooklyn Center), 189
N.L.R.B. 909 (1971); C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904
(1971).
282. Long Island Univ. (Brooklyn Center), 189 N.L.R.B. 909 (1971); C.W. Post
Center of Long Island Univ., 189 N.L.R.B. 904 (1971).
283. Adelphi Univ., 195 N.L.R.B. 639 (1972); C.W. Post Center of Long Island
134 (1971); C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971).
the college registrar, nurses in the campus health care center, business managers, and directors of veterans affairs. If, however, a professor’s primary duty is teaching, he or she can perform one of the above functions on a part-time basis and still be included within the faculty bargaining unit. This occurs, for example, when a psychology department member also serves part-time as a guidance counselor.

More recently, in Rensselaer Polytechnic Institute, the AAUP sought to exclude the associate and assistant deans working in the office of the Dean of Students. The University sought their inclusion within the faculty unit. These employees worked with fraternities, dormitories, women students, and minority students; they had no teaching assignments. The Board decided to exclude them from the faculty unit because "they are essentially administrative personnel and have no substantial community of interest with the faculty. . . ." Again, in Northeastern University, the academic administrators, academic counselors, and admissions counselors were all excluded from the faculty unit because they "do not share a sufficient community of interest with the classroom teachers to warrant their inclusion in the unit. . . ." Anyone connected with the campus scene recognizes the deep gulf which exists between "faculty" and "staff." But the Board also based its decision on the fact that the academic counsellors "are not required to have knowledge of the advanced type, and are not performing the intellectual and varied tasks" performed by the teaching faculty. The Board also held that those employed at the university counseling and testing center were to be included within the faculty bargaining unit, because they are "professional" employees with advanced degrees

286. Id.
290. See, e.g., University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (Sept. 27, 1974); Long Island Univ. (Brooklyn Center), 189 N.L.R.B. 909 (1971).
291. See, e.g., Florida Southern College, 196 N.L.R.B. 888 (1972) (Professors in the departments of religion, journalism and physical education who respectively serve part-time as college chaplain, publications director, and director of athletics are included in faculty bargaining unit).
293. Id. at 15, 89 L.R.R.M. at 1845.
295. Id.
and the work they perform—primarily career planning—is “clearly associated with the educational process.”

But if one goes back to the basic “community of interest” test, those who administer and interpret standardized tests designed to assist in career planning are no more allied with the teaching faculty than the host of others who engage in supportive services. One may well expect that the interests of a small group of guidance counsellors would be overshadowed at the bargaining table by the interests of the teaching faculty. It is more appropriate to have two bargaining units on the campus, one for the faculty and one for the staff, and permit them to coordinate their bargaining strategies if they so desire.

9. **ROTC Instructors, Coaches, Chaplains, and Members of Religious Orders**

There are still other personnel on campus who have been the subject of controversy in these “faculty unit” determinations. It is now established, for example, that ROTC instructors who are assigned to a campus for a term of years are not to be included within the faculty bargaining unit. In *Florida Southern College*, the Board rejected the University’s contention that ROTC instructors should be included within the faculty bargaining unit.

The record shows that there are five R.O.T.C. instructors (one colonel and four majors). All of the officers are on active duty with the U.S. Army. The R.O.T.C. instructors, unlike other faculty members, are not and do not become tenured, and they are paid by and subject to the U.S. Army. Because of their responsibilities as officers of the U.S. Army, we do not believe that they share sufficient interests in common with the other faculty members and we shall exclude them from the unit.

For purposes of the Board’s “community of interest” test, the ROTC instructors are analogous to “visiting professors”, particularly since their permanent interest is advancement within the U.S. Army.

The placement of coaches and athletic directors within or without a “faculty unit” has also been the subject of controversy. Athletic directors who are employed full time and who enjoy the authority effectively to recommend the hiring and termination of coaches, are viewed to be supervisors and excluded from a bargaining unit for that reason.

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296. *Id.* at 17, 89 L.R.R.M. at 1869.
299. *Id.*
300. Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, 216
In this regard they are analogous to Deans and some departmental chairmen.

This classification of coaches depends on the facts. In *University of Miami*, the Board excluded fourteen coaches from the faculty bargaining unit but included the fifteenth. The fourteen excluded coaches were recruited by, paid by, and served at the pleasure of the President of the University. They had no affiliation whatsoever with the physical education department and were not eligible for participation in faculty government. Their sole function was the coaching of students who participated in intercollegiate sports. There was "no record evidence as to the range of salaries they receive, or as to how their salaries are arrived at." Few of them held advanced degrees; advanced degrees were not a necessary requirement for any level of coaching. The Board concluded that these coaches did not "share a community of interest with the University's faculty and research personnel sufficient to warrant their inclusion in the unit." The fifteenth coach, following the stipulation of the parties, was included. He was a full-time professor in the faculty of business administration, and coached the golf team on a part-time basis.

In contrast with the University of Miami was the situation at Rensselaer Polytechnic Institute. All students at RPI were required to complete a two-year noncredit physical education program. A twelve member physical education department was employed to operate this program. All its members were engaged in teaching; some, in addition, coached the inter-collegiate teams. Nine had master's degrees and one was currently enrolled in a master's program. All were eligible for sabbatical leave, enjoyed the fringe benefits common to faculty members, and were permitted to serve on the faculty council. The Board included all of them except for the Department Chairman Coordinator within the faculty bargaining unit.

Miami and RPI set the pattern. If, as at Miami, the coach is hired by the President to produce a good win-loss record in inter-collegiate athletics, the coach is viewed as being a part of the administration and excluded from the faculty bargaining unit. If, as at RPI, he or she is employed in connection with the curriculum requirements of the institu-

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301. University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (Sept. 27, 1974).
302. Id. at 18, 87 L.R.R.M. at 1641.
303. Id. at 19, 87 L.R.R.M. at 1641.
tion, the coach is part of the faculty and included within their bargain-
ing unit. 306

Chaplains, like coaches, are included or excluded from a faculty bargaining unit depending upon their community of interest with the faculty. If the chaplain also teaches in the religious or philosophy department, he or she normally is included within the faculty unit. 307 However, if the chaplain reports directly to the College President and functions primarily as a chaplain, he or she is considered to be in the administration, like the guidance counselors and student deans and is excluded from the faculty bargaining unit. 308

There have been a few cases involving members of religious orders, and similarly they are included or excluded from the faculty bargaining unit depending upon their community of interest with their teaching colleagues. Approximately seventy of the five hundred full-time faculty members at Fordham University were members of the Society of Jesus. 309 These Jesuits were employed and paid in the same manner as other faculty members. Most of them lived in a separate building, however, and turned their salaries over to the Jesuit community, which housed and fed them. They could, with permission of their religious superior, live in their own quarters; but only two of the seventy did so. A Jesuit who left the Order could remain a faculty member at Fordham and accept tenure, despite the objection of the Order. The Board concluded that "[t]here is no evidence that membership in the Order is in any way inconsistent with collective bargaining..." 310 and therefore included them in the faculty bargaining unit.

On the other hand, the Sisters of Charity were excluded from the faculty bargaining unit at Seton Hall College. 311 The college property was owned by the Order and leased to the college for $1.00 per year. Fifty percent of the Board of Trustees were members of the Order, including the Mother General. Fifty-eight of the ninety-five full-time faculty were members of the Order, who were hired when referred by the Mother General to the College President, also a member of the Order.

Members of the Order took vows of poverty and obedience; the Sisters on the faculty received no direct remuneration. Their salaries

308. University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (Sept. 27, 1974).
310. Id. at 139.
were paid to the Order. The Order provided housing for the Sisters, and gave each $25.00 per month. The Board concluded that the interests of the lay and religious members of the faculty did not coincide and excluded the Sisters from the bargaining unit. The Board explained that the "lay faculty are particularly interested in wages. . . . The sisters, however, are not similarly interested in the economic rewards of their employment since they have taken vows of poverty. . . ." In addition, the Board concluded, the relationship of a sister to the College is more complex than that of her lay colleague. She is an employee, but also in a sense part of the employer since the Order owns and administers the College. . . . As a member of the bargaining unit, a sister would therefore be subject to a conflict of loyalties. . . .

It is difficult to assess these last two decisions. When the unionized lay teachers at the Catholic high schools in Brooklyn and Queens went on strike last fall, the eighty nuns and priests employed in those schools crossed the picket lines. There was no "solidarity" with the lay teachers. On the other hand, the priests and clergymen are often in the forefront of the union movement. The decisions to include the Jesuits in the bargaining unit at Fordham and to exclude the Sisters at Seton Hall because of their vows of poverty and obedience seem to be sound on the facts presented.

IV

UNFAIR LABOR PRACTICES

After the "unit determinations" are made, the Board conducts a secret-ballot election in which the members of the unit can vote for or against the union or unions seeking their allegiance. During this period, electioneering goes on. The union and the employer are guaranteed the right to present their views and arguments for or against collective bargaining. There are, however, certain minimum ground-rules which must be observed.

312. Id. at 1027.
313. Id.
315. Section 8(c) of the Labor Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1970).

See Texas Christian Univ., 220 N.L.R.B. No. 72, 90 L.R.R.M. 1275 (Sept. 16, 1975), where the Board held that there had been no "taint" of the "laboratory conditions" required in an NLRB election process. In that case, a pre-election threat by a spokesperson of the employer that the University might have to ends its policy of
The Labor Act grants to all employees the right to self-organization; the right to form, join, or assist labor organizations; the right to bargain collectively through representatives of their own choosing; the right to engage in other concerted activities for mutual aid or protection; and the right to refrain from any or all of the above activities. To protect these basic rights, the Act enumerates a series of "unfair labor practices." The Board is authorized and directed to prevent their commission, and to issue remedial orders when the proper bounds of what is fair are exceeded by either labor or management.

The colleges and universities brought under the Labor Act by the Cornell University decision have not violated the Labor Act in large number. On the contrary, the nation's colleges and universities have a very good five year record of compliance with the federal law. Nevertheless a few institutions have engaged in conduct which collectively covers the entire range of prohibited unfair labor practices.

A. Section 8(a)(1): The General Prohibition Against Employer Restraint on Employee Rights

Section 8(a)(1) of the Labor Act is couched in bare-bones language. It makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" discussed above. The substantiality of this section is illustrated by some of the reported cases.

In May, 1973 several of the security guards employed at the Chicago College of Osteopathic Medicine began to organize a union. Shortly thereafter, the Chief of Security called one of the organizers into his office and told him they did not need a union to represent them, if they were men. He then directed them to sign a paper repudiating the union, and said he would fight for the jobs of those who signed the

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318. Section 10(a), 29 U.S.C. § 160(a) (1970), directs the Board "to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) affecting commerce." Section 10(c), 29 U.S.C. § 160(c) (1970), authorizes the Board to issue orders requiring violators of the Act "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]."
320. See text accompanying note 190 supra.
paper against the union, and concluded with the statement that "those who don't are probably going to be without a job." The NLRB administrative judge found that this was unlawful "interference, restraint and coercion" with the rights of the security guards to "self organization."

Similarly the Board found a violation of section 8(a)(1) when the superintendent of all building and maintenance employees at the University of the Pacific called in the gardeners who were organizing a union and told them "he didn't want no union coming to UOP. . . ." He threatened them with discharge if they persisted in the organizing campaign and promised them wage increases if they desisted.

The situation was much the same at The Judson School, a private boarding academy in Arizona. Its instructors formed a chapter of the AFT, whereupon the headmaster called a special faculty meeting, told the assembled teachers they "would kill the goose that laid the golden egg," and demanded that all union members stand up and be counted. The Board held this was unlawful.

In Aclang, Inc., the operator of a language school at Briggs Field in Texas engaged in even more outrageous behavior. Many of the instructors were Vietnamese citizens and their temporary visas could be extended only if they maintained continued employment. The owner-operator threatened the language instructors with discharge, and consequent deportation, if they persisted in their efforts to seek better working conditions through collective bargaining. Fortunately, these section 8(a)(1) violations are rare in the educational world.

B. Section 8(a)(2): The Prohibition Against Company Domination or Support of Unions

A technique once commonly used by management to avoid true collective bargaining involved the creation of "company unions," a union which the management could manage and control. A related device was for management to favor the more docile of two competing unions. When the more militant union would leaflet at the plant gates,

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322. Id.
323. Id. The Labor Board on appeal dismissed the case because at that time it was refusing jurisdiction over the non-profit hospitals operated by institutions of higher education. See text accompanying note 69 supra.
325. Id. at 607-10.
328. For similar types of § 8(a)(1) violations see the consent decrees in Hofstra University, Case 29-CA-3900 (NLRB, Dec. 22, 1974) and Washington University, Case 14-CA-7259 (NLRB, Sept. 12, 1973).
the management would invite the "tame" union to sign a contract giving it the right to exclusive representation. These "back door unions" and their sweetheart contracts have been prohibited by Congress in section 8(a)(2) of the Act which makes it illegal for management to participate in any way in the formation or administration of labor unions.\(^{329}\)

The violation of section 8(a)(2) at the University of Chicago was totally inadvertent. Some 600 employees at the library began organizing a union. Thirteen of the more militant and active union leaders thought they were part of the rank-and-file. They distributed leaflets. They urged fellow-workers to sign union membership cards. They were elected as delegates of the local to represent the local at other union conferences. Subsequent to all this, the Board determined they were supervisors.\(^{330}\) This new status put them on the side of management and, consequently, the University was vicariously responsible for their actions. The Board held that the University, through the actions of these thirteen supervisors, had unlawfully assisted in the formation and administration of the union.

The violation of section 8(a)(2) at Duquesne University was neither vicarious nor an oversight. It was a throwback to the ugly days of labor relations common to the 1930's. When the Teamsters union began an organizing campaign among the non-academic personnel, the university encouraged the employees to form an "independent union," the Employees Committee of Duquesne University. The Employees Committee was permitted to meet on working time on University premises without loss of pay and the University printed the Committee's literature and sent it to all employees through the University's mail without cost to the independent union. Without waiting for the outcome of the secret-ballot election petitioned for by the Teamsters, the University recognized the Employees Committee as the bargaining representative of all its employees and began contract negotiations. The Board held on these facts that the University had unlawfully contributed financial and other support to its favored union, and ordered the University "to withdraw and withhold recognition from the Committee until such time as the Committee is certified by the Board as the bargaining representative."\(^{331}\) In addition, the Board ordered the University "to withhold all unlawful financial and other support and assistance from the Committee."\(^{332}\)

\(^{329}\) Section 8(a)(2) declares it to 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." 29 U.S.C. § 158(a)(2) (1970).

\(^{330}\) Univ. of Chicago Library, 205 NLRB 220 (1973).


\(^{332}\) Id. at 8, 81 L.R.R.M. 1091, 1094. An administrative law judge found a
The Board also added a caveat potentially of great significance. The Board said that it "would be reluctant to find" a violation of the Labor Act when a University "freely makes available its facilities, time, and services to any desirous organization." On the contrary, the Board said it would regard such action, if conducted at arm's length "merely as friendly cooperation growing out of an amicable labor-management relationship."  

This caveat is very significant. Chapters of the AAUP have existed on campuses for decades. Commonly, they publicize their meetings through the campus mail at university expense and hold their meetings in campus buildings. If a university should decide to withhold these traditional privileges from the AAUP because the local chapter decided to form a union, it would seem that the university would be in violation of section 8(a)(1). The withdrawal of existing privileges might well be an unlawful "interference, restraint and coercion" of the professors' rights under section 7 to "form, join, or assist labor organizations. . . ."  

This caveat is in accord with existing law regarding the somewhat comparable situation of the "company owned town." In the leading case, *NLRB v. Stowe Spinning*, a textile company owned the town of North Belmont in North Carolina, including the only hall suitable for public meetings. The employees had blanket permission to use this hall for any purposes they wished, until they sought to use it for a union organizing meeting. Then the company said no. The Supreme Court ruled that this was an unlawful violation of section 8(a)(1). The Supreme Court added that had the company leased the hall to the union, it would not thereby have violated the prohibitions of section 8(a)(2) against employer "financial or other support" to unions.  

While the analogy between the university campus and the company owned town is not perfect, the better course for a university is to make its facilities available for employee use, union and non-union alike. This avoids the possibility of Labor Board charges under either 8(a)(1) or 8(a)(2). 

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similar § 8(a)(2) violation in Rensselaer Polytechnic Institute, Case No. 3-CA-5661 (Nov. 25, 1974). The university organized and established a personnel advisory committee to represent the clerical, technical, service and maintenance employees, and thereafter the university, not the employees, selected the 15 members who served on this committee. The university then negotiated with its own appointees concerning wages, hours, and other terms and conditions of employment.  

336. *Id.* at 231-32.
C. Section 8(a)(3): The Prohibition Against Discharge and Discrimination

The easiest way to kill a union organizing drive is to discharge the activists, or to transfer them to some unpleasant task out of sight and mind of their co-workers. The framers of the Labor Act recognized this fact, and Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment” when the purpose is “to encourage or discourage membership in any labor organization. . . .”337

The 8(a)(3) violations have been few in number, and relatively clear-cut. Forty of the faculty members at the Judson School joined a union.338 The proprietor called them all together and threatened them with dismissal if they continued with their union activity. Shortly thereafter he dismissed nine of them when they failed to heed his admonition. Never before had so many professors been discharged at any one time. The proprietor denied that he had discharged them because of their union activity; he cited reasons of economy. But in light of an increasing enrollment, the Board dismissed this contention and ordered that the discharged employees be reinstated with back pay.

An Administrative Law Judge had no hesitancy in concluding that a young professor had been discharged because of his election to the executive committee of the Faculty Association of Monmouth College.339 He rejected testimony that the professor had been let go because of failure to make “reasonable progress” toward his PhD degree. He did not accept the testimony because (1) he was making “reasonable progress” towards the degree; (2) he was making better progress than others in like position who were retained; and (3) in any event there was no requirement at the college that professors obtain advanced degrees as a condition of continued employment.

The Labor Board held that the Henry M. Hald High School had discharged a French teacher with eight years experience and tenure because of his union activities and not, as the school alleged, because of his classroom inadequacies.340 Similarly, the Labor Board held that Columbia University discharged a telephone operator because of her efforts to form a grievance committee.341 The Board considered persuasive evidence that the operator had been warned by the chief opera-

tor that she would be discharged if she continued her activity.\textsuperscript{342}

The above cases concern discharges. It is also unlawful to discriminate by altering the "terms or conditions" of employment. A case of this sort arose at the Illinois Institute of Technology. John Budz was employed as a mechanic at a Pulaski Street location, and was transferred to a State Street location because of his activities as a union steward at the former location. Joseph Haracz was transferred from his mechanic's job at State Street to the Pulaski location to make room for Budz. The Board concluded that the transfer of Budz was motivated by his union activities. It was the first instance of involuntary permanent transfer within recent history. Since the transfers worked hardship and added costs in travel to and from their new work stations, the remedy was an order that each employee be returned to his original work station.\textsuperscript{343}

Section 8(a)(3) makes it unlawful to discriminate against an employee because of his union activities, or because he refrains from such activities.\textsuperscript{344} \textit{Aclang, Inc.},\textsuperscript{345} concerned a discrimination based on lack of union participation. There had been bitter controversy among the Vietnamese teachers at the language school at Briggs Field, Texas. Most of the teachers favored a union; Miss Ky-My led the opposition. When the union was recognized, Miss Ky-My's appointment was not renewed because, as the President informed her, "some teachers told me they would walk out on the job if I hired you."\textsuperscript{346} The Board held that this was an unfair labor practice, and ordered her reinstatement with back pay.

Not all the cases go against the university. \textit{Lawrence Institute}\textsuperscript{347} involved three young professors who, in the fall of 1969, joined the AAUP with the idea of seeking collective bargaining. In the fall of 1970, these three were elected to the AAUP "steering committee." Shortly thereafter they were notified that they would not be reappointed at the end of the school year. During this period, the university was concerned about its quality of education, and was in the throes of changing a "good college" into a "great one." Despite the suspicious timing, the Labor Board accepted the university contention that the three discharges were not motivated by anti-union animus, but resulted from the new policy that only the most fit be reappointed to faculty positions.

\begin{itemize}
\item \textsuperscript{342} For "stipulated" violations of § 8(a)(3) see Hofstra Univ., 29-CA-3900 (NLRB, Dec. 22, 1974); Washington Univ., 14-CA-7259 (NLRB, Sept. 12, 1973).
\item \textsuperscript{343} 201 N.L.R.B. 941 (1973).
\item \textsuperscript{345} 193 N.L.R.B. 86 (1971).
\item \textsuperscript{346} \textit{Id.} at 89.
\item \textsuperscript{347} Lawrence Institute of Technology, 196 N.L.R.B. 128 (1972).
\end{itemize}
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D. Section 8(a)(4): The Prohibition Against Retaliation for Going to the Labor Board

The Labor Act protects access to its processes by making it an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act. .."348

There are few reported instances wherein an educational institution retaliated against its employees because they went to the Labor Board. Washington University agreed to a consent order that it would refrain from any such conduct in the future;349 and in Illinois Institute of Technology350 the Labor Board determined that an employee named Murphy had been suspended for two weeks for staying too long in the washroom, and not, as the supervisor told co-workers, because Murphy "made trouble by going to the Labor Board on me. .."351

E. Section 8(a)(5): The Prohibition Against Refusal to Bargain

The goal of union organization is peaceful and orderly collective bargaining. Accordingly, the Labor Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees selected by majority process in a Board proceeding.352 As illustrated below, violation of this section may take many forms.

In Wentworth Institute353 the college simply refused to recognize or meet with the union selected by its faculty. The Board held that this was unlawful and rejected, almost out of hand, the college defense that "the imposition of collective bargaining upon a faculty of higher education violated the individuals' constitutional rights. .."354 In Henry M. Hald High School355 the institution did not refuse outright to meet

351. Id.
352. Section 8(d), 29 U.S.C. § 158(d) (1970), defines collective bargaining as "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 negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." The section then adds: "but such obligation does not compel either party to agree to a proposal or require the making of a concession."
354. Id.
with the faculty union, instead it delayed, from March 29 until July 6, before meeting with the union, and during this period failed to respond to any of the union's proposals. The Board held this evasive technique was, in effect, a refusal to meet and bargain.

Good faith bargaining requires that all necessary and relevant information be made available to both sides. Consequently, if an employer simply denies that he or she can afford a requested wage increase, he or she must upon demand supply the supportive data and information. In a number of situations, the Board has determined that colleges and universities violated section 8(a)(5) because of their refusal to supply information necessary or helpful to meaningful dialogue at the bargaining table, or to the processing of grievances under a contract.

Coliseum Hospital is unusual in that the institution reached agreement with the union, but thereafter refused to execute the final draft. Upon proper charges and hearing, the Board ordered that the contract be signed.

Once an agreement is signed, it controls the relationships between the parties, and neither side may alter the contract without reopening negotiations and obtaining the agreement of the other side. In University of Chicago, the Board held that the University had violated its bargaining obligation when, unilaterally and without prior consultation, it reassigned "unit work" to lesser-paid employees who were not within the collective bargaining unit. In Radio Television Technical School, Inc., an administrative law judge found a default in collective bargaining when the school, without prior discussion, unilaterally discontinued the traditional Christmas bonus.

As the survey of all the reported cases indicates, once the problems of jurisdiction and unit determination are out of the way, the colleges and universities tend to accept the mandates of the Labor Act and reach the bargaining table in good faith.

V

BARGAINABLE TERMS AND CONDITIONS

Once bargaining is established, what is it that university professors

358. Coliseum Hospital, d/b/a Univ. Hospital, No. 31-CA-4205 (NLRB, Oct. 1, 1974).
360. No. 4-CA-5504 (NLRB, May 2, 1972).
This is an indirect way of asking why it is that the faculties on 431 campuses have turned to unions and collective bargaining.

The University of Delaware may perhaps be taken as representative of a significant category of colleges elsewhere. When polled, a majority of the faculty reported they were interested in salary increases and job security, of course; but most who voted for a union did so to improve the academic quality of the university by giving the faculty some input in university policymaking. Putting it negatively, they "lacked faith in the administration," which the professors believed, "acted without consultation" and "didn't take the faculty seriously."

The subject matter on the bargaining tables at many American colleges reflects more specifically what the faculty wants.

The professors are insisting their peers be consulted when it is time for promotion or tenure, and that the matter of discharge be referred, at least initially, to an elected faculty committee. They want to have some voice in the selection, reappointment, and dismissal of their departmental chairmen and other supervisors. They also want a voice in the governance of the institution, through an elected faculty senate, and that this body be consulted in the academic decision-making process. In short, they are insisting upon the standards recommended long ago by the AAUP and some ninety other educational associations and societies.

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361. The parties are required by law to bargain with respect to "wages, hours of employment, or other terms and conditions of employment." These topics are known in labor law circles as "mandatory" subjects of bargaining. NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1957). If the subject matter under discussion does not fall within the definition of "wages, hours of employment, or other terms and conditions of employment," it is known in labor law circles as a "permissive" subject of bargaining. The parties must bargain over mandatory subjects; they may by mutual agreement bargain over permissive subjects, and quite often do so.

The mandatory subjects are in themselves elusive. They expand to meet the needs of an industrial society in constant flux. As the Supreme Court has often repeated, the term "collective bargaining" is considered "to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 346 (1944).

The Labor Act does not seek to regulate the substantive terms of a collective bargaining agreement. It does not require concessions nor agreement. It does not require fruitless marathon discussion at the expense of frank statement of position. NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

The policy of the Act is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement. Mere meeting of an employer with the representative of his employees is not enough; the essential thing is the serious intent to adjust differences and to reach an acceptable common ground. Undergirding the whole bargaining structure is the right reserved to both parties to utilize economic weapons—traditionally the strike and lock-out—once a bona fide impasse in the negotiations is reached. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1959).

362. The Unionization Of Professors At The University Of Delaware, Special Report # 12, ACBIS (February 1975).

Professors are also insisting upon affirmative action programs, and compensatory salary increases for women and minority group professors; to make up for what they view as administrative neglect or callousness of past years.

These changes often include maternity, and sometimes, paternity, leaves, and the abolition of nepotism rules which so often preclude the wife or husband from the profession for which she or he was trained.

Finally, professors are bargaining over bread-and-butter matters: across-the-board salary increases, merit increases, summerschool teaching, hospitalization insurance, tuition remission for the family, sabbatical and research leaves, travel expenses to professional meetings, secretarial assistance, office space and faculty lounges, parking facilities. Even more specific matters such as teaching loads, class sizes, textbook selection, course development, classroom environment, office hours, and academic regalia are being brought to the bargaining table.\textsuperscript{364}

When items such as those listed above must be bargained for, something is amiss.

The data to date supports the conclusion that collective bargaining on the campus has produced large scale improvements in faculty academic freedom, and in faculty participation in matters of immediate personal concern through the creation of grievance committees and faculty senates.\textsuperscript{365}

What lies ahead in the area of campus collective bargaining? It all depends on those who administer our colleges and universities. If they assure adequate financial protection, if they treat all segments of the faculty with fairness, if they share their leadership with faculty senates, grievance committees, tenure bodies, in short, if they "take the faculty seriously," there is little or no future for union growth on the American campus. If it is otherwise, the possibilities are overwhelming.

\textsuperscript{364} Developing Trends in Content Of Collective Bargaining Contracts In Higher Education, Special Report \#6, ACBIS (undated).