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Optimal Bargaining through Amalgamated Faculty Units (NCSCBHEP 2016–04–05)

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Bargaining for Mission

The issue of faculty bargaining unit composition arises primarily because of the (real or perceived) conflicts of interest between tenure-stream faculty and contingent faculty. Mixed units have a mixed track record. As Joe Berry often points out, the very best contract language for contingent faculty is in mixed units, but the very worst contract language for contingent faculty is also in mixed units. So simply having a mixed unit guarantees nothing, but it does seem potentially to achieve better results. In thinking about unit composition, then, we should pay attention both to the effects of unit composition itself and to whatever other factors might be determine those effects.

Community of Interest

We can get some insight into the factor that, in my view, crucially determines whether a mixed unit bargains effectively for contingent faculty—namely, union democracy—by looking carefully at how the NLRB conceives of unit composition. Under the Act, the NLRB is empowered to determine what unit is appropriate for collective bargaining, and it has returned to the question of exactly how to do so many times. One particularly illuminating passage comes from the 1962 *Kalamazoo Paper Box* decision, which had to do with whether a group of truckdrivers should be carved out of an existing production and maintenance unit and treated as having a distinct community of interest. In working through how to determine the bargaining unit, the Board observed that it

“must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which the freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of statutory purposes, must have direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.”
(*Kalamazoo Paper Box* 136 NLRB 10 1962)

I’ll return to the question of what exactly would make faculty bargaining “efficient” momentarily, but first I’d like to draw our attention to the Board’s emphasis on making unit determination decisions in a way that preserves workers’ right to (1) self-organization (i.e., free association), (2) individual freedom of choice, and (3) “collective expression” of that individual freedom.

The concern with the right to “self-organization” suggests that some deference is due to the workers’ own decision about who they think should be included, which is just to say that there’s a presumption in favor of the petitioned-for unit and the employer must bear the burden of

demonstrating that the unit is not appropriate. The union side often has the view that unit composition questions really ought to end there and the government has little legitimate right to interfere.

The concern with individual “freedom of choice” seems a little odd since the Board is perfectly happy compelling a minority into representation and has, if anything, been stridently resistant to members-only unions that would seem to facilitate individual “freedom of choice” (see *Dick’s Sporting Goods* NLRB Case No. 6-CA-24821). So probably the issue they have in mind here is more the concern that there will be a tyranny of the majority at the bargaining table, where the interests of a minority within the bargaining unit are not pursued at the table because they conflict with those of the majority. The variant of this problem that is probably more common in mixed faculty units is the situation in which a more privileged minority (tenured faculty) advances its interests at the expense of a less privileged majority (contingent faculty). But it’s essentially the same problem, and it’s a problem that every majoritarian democratic procedure faces: it is not clear at all why any individual’s autonomy should be abrogated merely because they are on the losing end of a vote (see, e.g., Robert Paul Wolff, *In Defense of Anarchism*).

Amalgamated Faculty Units

One obvious solution to this problem is to give up on majoritarianism, for example by adopting the view that decisions should be made by consensus. This approach, of course, has the danger that it can prevent decisions being made at all, as many people discovered during Occupy’s large general assemblies. The problem is one of scale: reaching consensus with 10 people is often feasible, whereas reaching consensus with 10,000 is probably impossible. (There’s a long tradition of interest in problems of scale in political philosophy, going back to Aristotle’s *Politics*, but the issue tends to be under-estimated in current political thinking.) So the traditional way to mitigate the problems of majoritarianism in a union is to delegate tasks to committees, who are charged with chewing through potential conflicts, reaching consensus, and bringing the resulting proposals before the larger body for a vote.

Of course that only works if the committees are composed of individuals who embody the various interests that might conflict over the issues the committee considers. Nothing in the NLRA or the LMRDA really compels that representativeness. To the extent that the Board can create conditions approximating consensus decision-making, it does so through choosing bargaining units in which the interests of individuals are relatively homogeneous.

From that point of view, it seems obvious that tenure-stream faculty and contingent faculty should be in different units. Indeed, it might even make sense to petition for separate micro-units of tenure-stream and contingent faculty for each academic unit (e.g., schools or colleges), invoking *Speciality Healthcare* (357 NLRB 83), in order to limit the heterogeneity resulting from the differences between pure and applied sciences, say, or academic and professional programs. Each unit would elect its own leadership, and thus be able to advocate directly for its own interests.

But this leaves out the Board’s other concern in the passage I quoted earlier with the “collective expression” of those individual interests. In general, the framework of the US legal system has real difficulties with anything collective, difficulties that have all sorts of absurd results ranging from treating corporations as if they are individual legal persons to treating unions as “bargaining agents” rather than just the members of the union acting collectively. The law, in other words, is incapable of imagining interests that would genuinely be collective, rather than individual.

But the interests of faculty—especially the fundamental obligation to the mission—are collective interests. It is exactly for this reason that they can only effectively pursue those interests when they come together as a union. This consideration pulls us in exactly the opposite direction of the desire to defend against a tyranny of the majority or minority: if the faculty as a whole has fundamentally collective interests, then the faculty should all be in a union together. In short, both autonomy and solidarity are indispensable elements.

To satisfy both horns of this dilemma, I believe that the optimal solution is for the union to organize as separate units but then to amalgamate into a single local with the same affiliate (or whatever corresponding structure a particular affiliate's structure makes possible). Especially if all of the units organize in parallel, there's nothing preventing them from deliberating together, bargaining together, and acting in solidarity. The unity of the faculty would thus be a matter of internal union structure, and where conflicts existed they could be addressed without any group feeling disenfranchised since each unit would have their own elected officers. The solution, in other words, is to put joining together in the hands of academic workers themselves, rather than leaving it up to the Board to fret about potential variations in interests.

Of course, with separate units administrators could insist on bargaining with each unit separately, seeking to divide and conquer. But a divide and conquer strategy would be ineffectual as long as the units are all amalgamated in the same local union. The only effect would be a dramatic loss in the "efficiency" of bargaining that the Board expressed concern about in *Kalamazoo*. Having to re-bargain the same issues, and potentially end up with slightly different arrangements from one academic unit or one group of faculty to the next, obviously creates all sorts of administrative headaches. And while bargaining with a unified faculty would obviously give the faculty more leverage at the table, the faculty's leverage at the table also gives administrators of good will leverage of their own to push their own constituencies to accede to the faculty demands that would facilitate carrying out the institutional mission. So big, unified bargaining would benefit both sides of the table.

In two words, then, the optimal arrangement involves both **decentralized decision-making** and **aggregated action and bargaining**.

Regional Bargaining

Of course this optimal arrangement may not be feasible in particular circumstances, and strategic decisions are always hemmed in by what the Board in *Kalamazoo* refers to as the "factual situation with which the parties must deal," such as the situations we've faced in our faculty organizing campaigns in Pittsburgh. For example, when we started organizing at Duquesne University we were conscious of the fact that we'd probably end up in a protracted legal battle, so we chose just to organize the part-time faculty in the Liberal Arts in order to clear the legal hurdles out of the way and then to expand across campus. At Point Park University and Robert Morris University the full-time faculty were already organized, so we chose to organize the faculty who were yet unorganized. By contrast, at Chatham University we've been able to organize all faculty together from the beginning, and at the University of Pittsburgh the group that approached us included faculty at all ranks from the very beginning—a happy circumstance since, when we looked into the relevant public-sector labor laws, it turned out that we were legally obligated to organize all faculty at all campuses into a single unit, thanks in part to the Pennsylvania Employee Relations Act's official policy against unit "fragmentation" (and also thanks to a 1990 PLRB decision specifying an appropriate unit that was essentially wall to wall except that it excluded faculty in the School of

So circumstances will often dictate our options to some extent, but they don't necessarily tie our hands. Our strategy for overcoming the rather complex array of circumstances in Pittsburgh is to amalgamate all of these units into one city-wide higher education local across employers. Bringing faculty together on a metro scale, while maintaining all of the separate units, offers countless advantages, even beyond the obvious gains in leverage and solidarity. Administrators need not worry that they will be at a competitive disadvantage in relation to other institutions in the city because standards can be bargained that encompass the whole city, a crucial consideration when the majority of faculty (contingent faculty) are part of a regional labor market. This also opens up various win-win opportunities, including offering health care for all faculty through a city-wide trust managed by the union, then using the dramatic increase in scale to negotiate lower health care costs than any individual employer could manage. Both administrators and faculty ultimately benefit from such economies of scale.

In the long run, unionists should start talking about how we might form inter-union regional councils in particular sectors, like higher education, who engage in coordinated bargaining at a regional level, perhaps facilitated through CLCs. Keeping such arrangements localized has the potential to fly under the radar of some kinds of unhelpful inter-union politics, while also cultivating a movement-oriented ethos that we are going to need if we want to enact the systemic change for which workers in all sectors are clamoring.