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During the last decade the salient characteristic of the labor law field has been its expansion from narrow considerations of interpretation of the National Labor Relations Act[1] and the actions of the agency which administers it, the National Labor Relations Board,[2] to broader concerns. Among these broader concerns are the role of collective bargaining in the public sector, new statutory requirements regarding occupational safety and health, employment discrimination and the individual's relationship with the union.

During the nineteen seventies, a great proportion of United States Supreme Court decisions in the labor law area have dealt directly with issues reflecting these concerns. A relatively lesser proportion of opinions have addressed these concerns when the primary issue related to the courts' role in reviewing National Labor Relations Board decisions.[3] Because of the structure of the Act, the United States Courts of Appeals have been given jurisdiction to review cases decided by the Board.[4]

This year, in the 1977-78 term, the Seventh Circuit was faced with several complex and recurring issues both in interpreting the Act, and in judging the Board's method of administering the Act. These issues are: (1) what constitutes an appropriate bargaining unit for purposes of collective bargaining in non-profit hospitals, colleges and universities, and retail stores;[5] (2) whether a union commits an unfair labor practice under the Act when it pickets an armored-car service after the Board has determined that the union cannot be certified as a bargaining agent

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1. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976) [hereinafter referred to as the Act].

2. Hereinafter referred to as the Board.

3. For a discussion of this phenomenon *see* B. Aaron, *Labor Law Decisions of the Supreme Court, 1975-76 Term* [1976] 92 LAB. REL. REP. (BNA) 311 (address to Annual Convention of American Bar Association's Labor Law Section, August 1976).

4. National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (1976).

5. NLRB v. West Suburban Hosp., 570 F.2d 213 (7th Cir. 1978); Kendall College v. NLRB, 570 F.2d 216 (7th Cir. 1978); Walgreen Co. v. NLRB, 564 F.2d 751 (7th Cir. 1977); NLRB v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331 (7th Cir. 1977).

under the Act;[6] and (3) whether in-plant meal service prices are within the purview of "other terms and conditions of employment" and, thus, mandatory subjects for bargaining.[7]

In all these areas, the Seventh Circuit exhibited a sensitivity to its control function over the Board in the statutory scheme of the Act. However, in at least one area, that of hospital unit determination, the Seventh Circuit's view is probably not sufficiently sensitive to Board expertise or the practical impact of the court's interpretation of the mandate of the Act.

THE APPROPRIATE UNIT CASES

Determining appropriate units for collective bargaining is clearly the function of the Board, and its decisions are deemed to be discretionary judgments to be given great deference by reviewing courts.[8] The principal developments in Board unit determinations in recent years have occurred in three distinct areas: (1) health care institutions,[9] as a result of the extension of the Board's jurisdiction in the 1974 amendments to the Act;[10] (2) private, not-for-profit colleges and universities,[11] as a result of a Board decision in 1970 to assert jurisdiction over such institutions[12] and (3) retail chain stores,[13] where the Board reversed its former position as to the inappropriateness of single-store units and decided that such single-store units are presumptively appro-

6. International Bhd. of Teamsters, Local 344 v. NLRB (Purolator Security), 568 F.2d 12 (7th Cir. 1977).

7. Ford Motor Co. (Chicago Stamping Plant) v. NLRB, 571 F.2d 993 (7th Cir. 1978).

8. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1976), in pertinent part, declares that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

The Supreme Court, in *South Prarie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs,* 425 U.S. 800, 805 (1976) stated that "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed'. . . ." (quoting Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947)).

9. *See, e.g.*, NLRB v. West Suburban Hosp., 570 F.2d 213 (7th Cir. 1978).

10. *See* National Labor Relations Act § 2(14) (as amended 1974), 29 U.S.C. § 152(14) (1976), which provides:

> The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

11. *See, e.g.*, Kendall College v. NLRB, 570 F.2d 216 (7th Cir. 1978).

12. Cornell Univ., 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970) (where appropriate, the BNA LABOR RELATIONS REPORTER MANUAL citations are provided for the convenience of the practitioner).

13. *See, e.g.*, Walgreen Co. v. NLRB, 564 F.2d 751 (7th Cir. 1977); NLRB v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331 (7th Cir. 1977).

priate under the Act.[14] This year the Seventh Circuit had occasion to review Board action in each of these areas.

How Broad Should a Unit be in Health Care Institutions?

In 1974, the Act was amended to cover the once exempt non-profit health care institutions.[15] This amendment expansively defines coverage to include not just hospitals, but all "health care institutions." "Congress removed the exemption because it 'could find no acceptable reason why . . . employees of . . . non-profit, non-public hospitals . . . should continue to be excluded from the coverage and protection of the Act.' "[16] During the hearings and debates leading to the passage of the amendments, Congress was concerned that the welfare of hospital patients might be disrupted by proliferation of collective bargaining units in health care institutions. This concern was reflected in the committee reports of both Houses[17] which admonished the Board that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."[18]

In the first group of representation decisions under the new amendments, the Board attempted to state general principles which could be applied to later decisions.[19] These decisions found permissible the following appropriate bargaining units in health care institutions: (1) registered nurses;[20] (2) all other professionals;[21] (3) technicals, including licensed practical nurses;[22] (4) business office clericals[23] and

14. *See* Sav-On Drugs, Inc., 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962).

15. National Labor Relations Act § 2(14) (as amended 1974), 29 U.S.C. § 152(14) (1976).

16. NLRB v. West Suburban Hosp., 570 F.2d 213, 214 (7th Cir. 1978) (quoting S. REP. No. 766, 93d Cong., 2d Sess. 5 (1974); S. CONF. REP. No. 988, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3946, 3948).

17. S. REP. No. 766, 93d Cong., 2d Sess. 5 (1974); S. CONF. REP. No. 988, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3946, 3950. *See* NLRB v. West Suburban Hosp., 570 F.2d at 214-15.

18. S. REP. No. 766, 93d Cong., 2d Sess. 5 (1974); S. CONF. REP. No. 988, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3946, 3950.

19. *See* Mercy Hosps. of Sacramento, Inc., 217 N.L.R.B. 765, 89 L.R.R.M. 1097 (1975); St. Catherine's Hosp. of Dominican Sisters, Inc., 217 N.L.R.B. 787, 89 L.R.R.M. 1070 (1975); Barnert Memorial Hosp. Ass'n, 217 N.L.R.B. 775, 89 L.R.R.M. 1083 (1975); Newington Children's Hosp., 217 N.L.R.B. 793, 89 L.R.R.M. 1108 (1975); Sisters of St. Joseph of Peace, 217 N.L.R.B. 797, 89 L.R.R.M. 1082 (1975); Duke Univ., 217 N.L.R.B. 799, 89 L.R.R.M. 1065 (1975); Mt. Airy Foundation, 217 N.L.R.B. 802, 89 L.R.R.M. 1067 (1975); Shriners Hosps. for Crippled Children, 217 N.L.R.B. 806, 89 L.R.R.M. 1076 (1975).

20. Mercy Hosps. of Sacramento, Inc., 217 N.L.R.B. 765, 89 L.R.R.M. 1097 (1975).

21. *Id.*

22. Barnert Memorial Hosp. Ass'n, 217 N.L.R.B. 775, 89 L.R.R.M. 1083 (1975).

23. Mercy Hosps. of Sacramento, Inc., 217 N.L.R.B. 765, 89 L.R.R.M. 1097 (1975); Sisters of St. Joseph of Peace, 217 N.L.R.B. 797, 89 L.R.R.M. 1082 (1975).

(5) service and maintenance employees.[24]

Thus, in *NLRB v. West Suburban Hospital*,[25] the Seventh Circuit was faced with the propriety of an NLRB determination that a unit of certain service and maintenance employees was appropriate. The case involved a group of twenty-one non-professional employees comprising the hospital's maintenance department. The Board found that the sole question was whether this group constituted a distinct and homogeneous unit whose employees share a community of interests. However, the Court of Appeals for the Seventh Circuit did not agree. The court stated that "[t]he determination of an appropriate unit for collective bargaining purposes is [generally] committed to the informed discretion of the Board . . . . But the Board's discretionary powers with respect to unit determination are not without limits. . . ."[26] The court concluded that the issue was not one of informed discretion but of the application of the law. Hence, the appellate court had to decide whether the Board's determination, that the hospital's maintenance department constituted an appropriate collective bargaining unit, conformed to the legislative history of the 1974 amendments to the Act as a matter of law.

In reviewing this case, the court observed that the Board unit determination in *West Suburban Hospital*[27] was contrary "to at least eleven other similar bargaining unit cases,"[28] and that the Board had erroneously stressed the importance of the amount of time spent in the maintenance area of the hospital. The court also concluded that the Board had erred in considering whether the maintenance employees were in contact with each other about fifty per cent of the time. The Seventh Circuit pointed out that although common work stations, numerous work contracts, and similar indicia of unique community of interest are traditional factors used by the Board in the industrial sector to make unit determinations, the stated congressional policy is to prevent proliferation of bargaining units in this field. The key question, therefore, should not have been whether the maintenance department employees worked together at a common station. Rather, crucial scrutiny should have been applied in determining whether the twenty-one maintenance employees had sufficient common relationships with the other 359 non-professional employees to establish a community of in-

24. Newington Children's Hosp., 217 N.L.R.B. 793, 89 L.R.R.M. 1108 (1975); Shriners Hosps. for Crippled Children, 217 N.L.R.B. 806, 89 L.R.R.M. 1076 (1975).

25. 570 F.2d 213, 214 (7th Cir. 1978).

26. *Id.* (citations omitted).

27. 224 N.L.R.B. 1369, 92 L.R.R.M. 1369 (1976).

28. NLRB v. West Suburban Hosp., 570 F.2d at 215.

terests for the entire non-professional group.[29] Thus, after reviewing the facts, the Seventh Circuit found that:

> [The] Board's mere lip-service mention of the Congressional admonition as a factor to be taken into account, without any indication from the Board as to the manner in which its unit determination in this case implemented or reflected that admonition, . . . the Board's decision violates the Congressional directive that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care field."[30]

In analyzing whether the Board action did indeed comport with the Congressional mandate, the court relied upon *Memorial Hospital of Roxborough v. NLRB*,[31] *Long Island College Hospital v. NLRB*[32] and *St. Vincent's Hospital v. NLRB*.[33] In doing so, however, it misapplied these decisions.

In *Roxborough*,[34] a Board decision permitting a separate maintenance department unit in a hospital was reversed. However, this reversal was not on the merits of the maintenance unit issue, but was based on procedural grounds. Prior to adoption of the 1974 amendment,[35] the Pennsylvania Labor Relations Board had exercised jurisdiction over a representative dispute and had determined that a bargaining unit of maintenance employees, excluding the service department, was appropriate. When the 1974 amendment came into effect, the National Labor Relations Board pre-empted the state agency. Nonetheless, the National Labor Relations Board extended comity to the state agency's findings. The National Labor Relations Board thus concluded that the employer's refusal to bargain with the employees' representatives constituted unfair labor practices under sections 8(a)(1) and (5) of the Act.[36]

After an extended analysis of the law surrounding comity, the United States Court of Appeals for the Third Circuit held that the National Labor Relations Board's grant of comity with respect to a determination of an appropriate bargaining unit was improper.[37] The court observed that the Board made the unit determination "without conducting a hearing, without making findings of fact, and without evaluating the facts of this case in light of the principles articulated in its

29. *Id.* at 215-16.
30. *Id.* at 216.
31. 545 F.2d 351 (3d Cir. 1976).
32. 566 F.2d 833 (2d Cir. 1977).
33. 567 F.2d 588 (3d Cir. 1977).
34. 566 F.2d 833 (2d Cir. 1977).
35. National Labor Relations Act § 2(14) (as amended 1974), 29 U.S.C. § 152(14) (1976).
36. Memorial Hosp. of Roxborough, 220 N.L.R.B. 402, 90 L.R.R.M. 1369 (1975).
37. 545 F.2d at 360.

prior decisions."[38] The court found that the Act requires the Board "to exercise its discretion as to an appropriate unit in each and every case."[39]

Thus, any discussion in *Roxborough* of the import of the congressional admonition against the proliferation of units in health care facilities was clearly dictum. Moreover, the discussion in *Roxborough* does not justify the expansive reading given it by the Seventh Circuit in *West Suburban Hospital*.[40] For example, the Third Circuit, while acknowledging the congressional directive to the Board to avoid unit proliferation, notes that the "non-profit" amendments "do not create special rules for bargaining unit determination in the health care industry."[41] It further suggests that the avoidance of proliferation of bargaining units in health care facilities was only one of many factors to be considered by the Board.[42]

In deciding *West Suburban Hospital*, the Seventh Circuit also relied on *St. Vincent's Hospital v. NLRB*.[43] In *St. Vincent's Hospital*, the Third Circuit again rejected a Board determination. The particular determination before the court did not involve the maintenance department but instead four boiler room operators, who the Board found shared the requisite community of interests. The court, however, believed that this was an inappropriate unit in light of the congressional intent to limit unit proliferation.[44] The reasons proffered by the court

38. *Id.* at 357.
39. *Id.* at 360.
40. 570 F.2d 213.
41. 545 F.2d at 360.
42. *Id.* at 361. The court specificially stated:

> This admonition against the proliferation of units in health care facilities was only to be one of many factors to be considered by the Board. Senator Williams, chairman of the Senate Committee which drafted the amendment and who was sponsor of the legislation, explained the committee's intent as follows: " . . . The National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is a history in the area or a notable disparity of interests between employees in different job classifications."

Id. (quoting NLRB v. Delaware-New Jersey Ferry Co., 128 F.2d 130 (3d Cir. 1942)).

43. 567 F.2d 588 (3d Cir. 1977).
44. In its discussion of the initial Board determination, the court recognized that the Board had often deemed a unit of stationary engineers appropriate in the industrial sector. *Id.* at 592. Further, the court recognized the Board's finding that there were several traditional factors present that allowed licensed boiler operators to be grouped in a separate boiler room unit. These were that all boiler room operators were licensed by the state, that they spent most of their time in the boiler room where there was little contact with other hospital personnel and that there was little interchange with other employees. However, the court decided that:

> The legislative history of the health care amendments, however, makes it quite clear that Congress directed the Board to apply a standard in this field that was not traditional. Proliferation of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension.

for rejecting this extremely small unit centered on the inappropriateness of the boiler room unit, and not on an entire maintenance department.[45] Thus, *St. Vincent's Hospital* is clearly distinguishable from the disputed unit determination which faced Seventh Circuit review in *West Suburban Hospital*, and the Seventh Circuit's reliance on *St. Vincent's Hospital* seems misplaced.

The last case relied on by the Seventh Circuit was *Long Island College Hospital v. NLRB*,[46] in which the United States Court of Appeals for the Second Circuit was concerned with the impact of a prior unit determination of a state labor agency. In this instance, the unit was a maintenance unit which had been certified thirteen years earlier by the state agency then having jurisdiction over the dispute. The Board had declined to follow *Roxborough*, and instead had recognized the thirteen-year-old certification, rather than making its own unit determination and conducting an election. The court, speaking through Judge Friendly, found the Board erred in not deciding anew the unit issue.

In *Long Island College Hospital*, the court noted that the Board's decisions are in a state of "disarray."[47] The Second Circuit did not, however, reject the idea of a separate appropriate maintenance unit, as the Seventh Circuit intimates. Rather, it specifically agreed with the appropriateness of the Board's findings as to maintenance units.[48] However, the Second Circuit perceived the issue as one requiring a Board hearing, and a resolution of the Board's vacillation over whether maintenance and engineering units should be certified without service employees.

> The Board therefore should recognize that the contours of a bargaining unit in other industries do not follow the blueprint Congress desired in a hospital.

Id.

45. *Id.* at 592, 592-93 n.6. The court declared that:

> [T]he factors of amount of contact between workers, separate immediate supervision, and the special skills of certain crafts must be put in balance against the public interest in preventing fragmentation in the health care field. A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with congressional intent to treat this unique field in a special manner.

Id. at 592. Nonetheless, this comment reflects the court's concern over the boiler room issue, not whether maintenance and service units are appropriate. The court does not indicate that maintenance units are contrary to the congressional directive against proliferation.

46. 566 F.2d 833 (2d Cir. 1977).

47. *Id.* at 844.

48. *Id.* at 843-44. *See* especially the court's discussion of the Board's posture that it can grant either a maintenance unit or a service and maintenance unit, depending on the facts of each case. *Id.* at 844. The court states that: "We agree with this conclusion. Moreover, the preamendment NLRB health care cases cited favorably in the legislative history of the 1974 amendment do not call for a different result." *Id.* at 844 n.4.

The decision in *West Suburban Hospital* is open to serious criticism if it is intended as a statement that maintenance units in hospitals are inappropriate because the congressional directive against proliferation of units in the health care field requires the Board to certify all non-professionals as the smallest permissible unit. It is this writer's contention that this is not the result Congress intended.[49] Moreover, given the pyramid-like structure and organization of the highly role-specialized, status-conscious health care industry, there are manifest disadvantages in placing cooks, clerical employees, laboratory employees, aides, housekeepers and the maintenance personnel in a single unit, while allowing professionals their separate units. At the forefront, such a requirement stands as a real impediment to the organizing rights of the employees.

It may be that the Seventh Circuit was merely objecting to the Board's failure to justify its finding in light of the congressional admonition to limit the number of units. However, the court's use of the comparison base of all non-professionals in analyzing the Board's action indicates this is not the case. The court's analysis over-emphasizes the importance of the non-proliferation factor and under-emphasizes the role of Board expertise and discretion in unit determination decisions. The Seventh Circuit should reconsider this position, in light of the Board's assigned role in administering the Act.[50]

49. *See* text accompanying notes 41-42, *supra*.

50. For a well-reasoned discussion of the Board's role, *see* St. Vincent's Hosp. v. NLRB, 567 F.2d 588 (3d Cir. 1977) or Long Island College Hosp. v. NLRB, 566 F.2d 833 (2d Cir. 1977).

In another major case interpreting the impact of the 1974 health care amendments to the Act, the Seventh Circuit, speaking through Judge Swygert, supported a Board determination that a hospital committed an unfair labor practice by promulgating a rule prohibiting employees from soliciting union support or distributing union literature in all areas of the hospital to which patients and visitors have access. *See* Lutheran Hosp. of Milwaukee, Inc. v. NLRB, 564 F.2d 208 (7th Cir. 1977). The court noted that:

> The primary function of a hospital is to provide health care, and the areas of a hospital outside of immediate patient care areas are by definition not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity. Thus, while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function.

Id. at 214.

This well-reasoned opinion attempted to accomodate the special needs of the health care industry and employee organizational rights on premises. It specifically approved the Board's decision in *St. John's Hosp. & School of Nursing, Inc.*, 222 N.L.R.B. 1150, 91 L.R.R.M. 1333 (1976), *enforcement granted in part, denied in part*, 557 F.2d 1368 (10th Cir. 1977), where the Board determined that the balance should be struck to allow employee solicitation and distribution in areas other than immediate patient care areas. *Id.* at 212-13. The court opined that further litigation will be necessary to determine in exactly which areas of a hospital solicitation and distribution may be forbidden as being immediate patient care areas.

The impact of this decision has been muted by the Supreme Court's June 20, 1978 decision in

Unit Determination in Not-For-Profit Colleges and Universities

In *Kendall College v. NLRB*,[51] the Court of Appeals for the Seventh Circuit enforced a Board determination that the composition of the appropriate unit in a small, liberal arts college was all full-time faculty and part-time faculty serving the college on a prorated contract basis. The unit excluded all part-time faculty who teach at the college on a per course appointment.

In 1970, in *Cornell University*,[52] the Board reversed its long-standing refusal to assert jurisdiction over private non-profit institutions of higher learning.[53] The composition of appropriate units of professional employees at colleges and universities was later confronted by the Board in *Long Island University (C.W. Post Center)*,[54] *Long Island University (Brooklyn Center)*[55] and *University of New Haven, Inc.*[56] In these cases, the Board held that the appropriate unit of professional employees included both full-time professors and part-time instructors and lecturers. This was consistent with its policy in the industrial sector, where regular part-time employees have been included in bargaining units.[57] However, in *New York University*,[58] the Board reversed itself and excluded all part-time faculty members from the faculty unit. The Board stated, "We are now convinced that the differences between the full-time and part-time faculty are so substantial in most colleges and universities that we should not adhere to the principle announced in the *New Haven* case."[59] The factors relied upon by the Board in this major policy change were: (1) the differences in compensation; (2) the lack of participation by part-time faculty in university governance; (3) the unavailability of tenure for part-time faculty and (4) the differences in working conditions.[60]

In *Kendall*, the Seventh Circuit noted that the facts developed at the representation hearing permitted the Board to reasonably differen-

Beth Israel Hosp. v. NLRB, 98 S. Ct. 2463 (1978). In *Beth Israel*, the Court also supported the Board's position for reasons similar to the Seventh Circuit's in *Lutheran Hospital*.

51. 570 F.2d 216 (7th Cir. 1978).

52. 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970).

53. In so doing, the Board took cognizance of the rapid growth in higher education since its prior decision not to assert jurisdiction. *See* Trustees of Columbia Univ., 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951). In *Cornell*, the Board reexamined the legislative history of non-profit organizations and potential coverage under the Act, and decided to assert its jurisdiction over private colleges and universities.

54. 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

55. 189 N.L.R.B. 909, 77 L.R.R.M. 1006 (1971).

56. 190 N.L.R.B. 478, 77 L.R.R.M. 1273 (1971).

57. *See* Kendall College v. NLRB, 570 F.2d at 219.

58. 205 N.L.R.B. 4, 83 L.R.R.M. 1549 (1973).

59. *Id.* at 6, 83 L.R.R.M. at 1552.

60. *Id.* at 7, 83 L.R.R.M. at 1552.

tiate the status of part-time faculty. The court concluded that part-time faculty with prorated contracts at Kendall shared a community of interests with the full-time faculty. The court noted that part-time faculty with contracts, received substantially higher compensation than the per course instructors.[61] Part-time faculty with contracts were required to have regular office hours and to participate in committee work and faculty meetings. The general tenure freeze at Kendall College made tenure status irrelevant. Moreover, a substantial portion of the prorated contract faculty were dual function employees performing administrative and counselling duties in addition to teaching. All these factors increased their community of interest with the full-time faculty.[62] Essentially, the court found that the factual support allowed the inclusion of one category of part-time instructors, those with prorated contracts, and the exclusion of the per course instructors.

In enforcing the Board order, the court specifically rejected the argument of the college that all part-time faculty have a mutuality of interests with their full-time colleagues. As the court stated:

> Kendall contends that the *New York University* case and the Board's subsequent decisions following it represent completely unprecedented Board action resulting in a *per se* rule, excluding part-time faculty members from bargaining units. Kendall then asserts that the application of the *per se* rule in this case constitutes an abuse of discretion which will result in a Balkanization of bargaining units and an impairment of the rights of the excluded part-timers. We do not agree.[63]

The court noted that the primary responsibility in making unit determinations rests with the Board. Those determinations should not be made on the basis of immutable or inflexible principles, however, "for it must be remembered also that the adaptation of the Act to the 'changing patterns of industrial life is entrusted to the Board.' "[64] Thus, the court agreed with the Board's decision to base unit determinations on the particular facts of each case and not on a slavish application of general principles.

Single-Stores as Appropriate Units in Retail Store Chains

Board unit determinations for multi-store retail operations have fluctuated in the Board's attempts to guarantee employee freedom of choice while structuring an appropriate unit for bargaining. Until 1962, the chain-store position of the Board had been to follow the em-

61. Kendall College v. NLRB, 570 F.2d at 220.
62. *Id.*
63. *Id.* at 219.
64. *Id.* at 220 (quoting NLRB v. Weingarten, Inc., 420 U.S. 251 (1975)).

ployer's administrative structure and deny single-store units when the employing unit was larger.[65] In *Safeway Stores, Inc.*,[66] the Board stated: "[A]bsent unusual circumstances, the appropriate collective bargaining unit in the retail . . . trade should embrace all employees within the categories sought who perform their work within the Employer's administrative division or [geographic] area."[67]

The presumption encompassing all retail stores within a geographic or administrative area was discarded in 1962 when the Board decided its prior policy was not truly maximizing employee free choice of a bargaining representative. Speaking of its earlier policy on unit determinations in retail-chain cases, the Board in *Sav-On Drugs, Inc.*[68] stated:

> Reviewing our experience under [our prior] policy we believe that too frequently it has operated to impede the exercise by employees in retail-chain operations of their rights to self-organization guaranteed by Section 7 of the Act. In our opinion that policy has over-emphasized the administrative grouping of merchandising outlets at the expense of factors such as geographic separation of the several outlets and the local managerial autonomy of the separate outlets; and it has ignored completely as a factor the extent to which the claiming labor organization had sought to organize the employees of the retail chain. We have decided to modify this policy and to apply to retail-chain operations the same unit policy which we apply to multi-plant enterprises in general. Therefore, whether a proposed unit is confined to one or two or more retail establishments making up an employer's retail-chain is appropriate will be determined in light of all the circumstances of the case.[69]

In *Sav-On Drugs*, the retail chain was composed of nine drugstores located in New York and New Jersey. The administration of the chain, including that of labor-relations, was substantially centralized. Despite this, the Board held that an election unit of all nonsupervisory and non-professional employees in a single New Jersey drugstore was appropriate.

In so finding, the Board emphasized the following: geographic separation of the store; substantial authority of the store manager; minimal interchange of employees among the stores; absence of bargaining history on a broader basis and lack of any union-seeking representation

65. *See* NLRB v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331, 335-36 nn.7-8 (7th Cir. 1977). *See generally*, R. GORMAN, BASIC TEXT ON LABOR LAW 76-82 (1976) [hereinafter cited as R. GORMAN].

66. 96 N.L.R.B. 998, 28 L.R.R.M. 1622 (1951).

67. *Id.* at 1000, 28 L.R.R.M. at 1624.

68. 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962).

69. *Id.* at 1033, 51 L.R.R.M. at 1153.

on a broader basis.[70]

Two years later, in *Frisch's Big Boy Ill-Mar, Inc.*,[71] the Board amplified this change of policy when it decided that the single-store is "presumptively appropriate unless it be established that the single plant has been effectively merged into a more competitive unit so as to have lost its individual identity."[72] However, the Seventh Circuit refused to enforce the Board-ordered findings that such a single-store unit was appropriate among the ten Big Boy restaurants in Indianapolis, Indiana.[73] After reviewing the record, the court found that the restaurants were a single, integrated enterprise and that each restaurant lacked sufficient autonomy even though the individual restaurant manager could order supplies and merchandise and could independently hire employees within centrally prescribed wage rates.[74] The Seventh Circuit therefore reversed the Board and held that the employees in one restaurant were not an appropriate bargaining unit.

However, in 1968 in *Haag Drug Co.*,[75] the Board again applied its "presumption." In that case the Board stated:

> Our experience has led us to conclude that a single store in a retail-chain, like single locations in multi location enterprises in other industries, is *presumptively* an appropriate unit for bargaining. In cases subsequent to *Sav-On Drugs*, we have consistently found such units appropriate unless countervailing factors were present . . . [T]o draw a distinction between the single chain store and the single plant in a multi plant enterprise or the insurance district office would artificially disadvantage the organizational interests of chain store employees, simply because their employer operates a chain rather than a single store enterprise and would vest the chain operator with absolute power alone to control the scope of the appropriate unit.[76]

The propriety of the Board's presumption of single unit appropriateness has produced fundamental disagreements among the circuit courts of appeals both as to the scope of review of these determinations and as to the deference to be given to the Board determination based on its special expertise.

In *NLRB v. Purity Food Stores, Inc.*,[77] the First Circuit noted that

70. *Id.* at 1034-35, 51 L.R.R.M. at 1153.

71. 147 N.L.R.B. 551, 56 L.R.R.M. 1246 (1964), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966).

72. *Id.* at 551 n.1, 56 L.R.R.M. at 1247 n.1.

73. 356 F.2d 895 (7th Cir. 1966).

74. *Id.* at 897. In so holding, the court said that: "It is evident to us that the decisions left to the managers do not involve any significant element of judgment as to employment relations. . . . It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining." *Id.*

75. 169 N.L.R.B. 877, 67 L.R.R.M. 1289 (1968).

76. *Id.* at 877-78, 67 L.R.R.M. at 1290-91.

77. 376 F.2d 497 (1st Cir.), *cert. denied*, 389 U.S. 959 (1967).

the independence of the stores "amounts to no more than a few miles of physical separation and the consequent division of a few ministerial responsibilities."[78] Similarly, the Fifth Circuit in *NLRB v. Davis Cafeteria, Inc.*[79] was concerned with whether the Board had abused its discretion in finding that two cafeterias of a chain of eight constituted an appropriate bargaining unit. The court refused to approve the Board finding, and quoted with approval the First Circuit opinion in *NLRB v. Purity Food Stores, Inc.*[80]

On the other hand, there is substantial judicial support in decisions of the Sixth and Ninth Circuits for the point of view that the Board must be given wide lattitude in representation bargaining unit determination. Thus, in *NLRB v. Lerner Stores Corp.*,[81] the court stated:

> The Board is vested with a wide discretion in determining bargaining units and it is not the province of the courts to displace the Board's choice of a unit from among two or more appropriate units, even though the court might have made a different choice with a case here de novo. . . . Furthermore, in cases involving such chain stores, as here, there is a presumption that a single store is an appropriate bargaining unit.[82]

With these decisions as background, the Seventh Circuit again confronted the unit determination issue in *Walgreen Co. v. NLRB.*[83] In this case, the union had petitioned for a separate election in each of twenty-seven individual Walgreen stores.[84] Although these stores were grouped administratively by Walgreen into eight districts, each consisting of thirteen to nineteen stores, the Board found that the single-store units were appropriate.[85] The union won in eight of these elections.[86] This case came before the Court of Appeals for the Seventh Circuit after the Board had issued an unfair labor practice order against Walgreen for refusing to bargain with the union elected within the chal-

78. *Id.* at 501.

79. 396 F.2d 18 (5th Cir. 1968).

80. *Id.* at 20. *But see* NLRB v. Adams Drug Co., 414 F.2d 1194, 1202 n.18 (D.C. Cir. 1969). In *Adams* the court noted that the Board now finds "presumptively appropriate" single-store units. The court intimates that the Board so acts when a single-store is requested by the union as the maximum extent of its organizational drive. 414 F.2d at 1201. In *Adams,* the court rejected the Board's determination that a state-wide unit was appropriate, noting that the courts of appeals "have not shrunk from their duty to refuse enforcement." 414 F.2d at 1201.

81. 506 F.2d 706 (9th Cir. 1974).

82. *Id.* at 707-08. For a concise summary of the Sixth Circuit's posture, *see* NLRB v. Lou DeYoung's Mkt. Basket, Inc., 406 F.2d 17, 24 (6th Cir. 1969).

83. 564 F.2d 751 (7th Cir. 1977).

84. *Id.* at 752 n.1. Walgreen Co. owns approximately 124 stores in the Chicago metropolitan area. *Id.* at 752.

85. Walgreen Co., 226 N.L.R.B. 548, 93 L.R.R.M. 1430 (1976); Walgreen Co., 226 N.L.R.B. 553, 93 L.R.R.M. 1430 (1976).

86. Walgreen Co. v. NLRB, 564 F.2d at 752 n.1.

lenged units.[87]

The court ruled that the Board's unit determination was reasonable in light of all the facts presented, including the Board's crucial determination that the individual store managers were substantially autonomous and that there was an insubstantial amount of employee interchange within the Walgreen administrative district.[88] The court noted the underlying Board presumption and that the presumption is rebuttable. However, the court also noted the Board's position that in order to rebut the presumption, there generally must be a coalescence of several factors: geographic proximity of the stores; a lack of substantial autonomy in the local store managers; substantial employee interchange among stores in the chain and centralized management of merchandise and operations.[89]

A fair reading of *Walgreen* would lead the observer to conclude that the Board's unit determinations will be reviewed by the Seventh Circuit only for abuse of discretion constituting arbitrariness, capriciousness or unreasonableness.[90] The *Walgreen* decision itself contained no language limiting the court's holding to the facts of this particular case, nor any other indication that its holding should not be applied to other unit determinations in the retail-chain setting. *Walgreen* appeared to undercut the vitality of the Seventh Circuit's 1966 decision in *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*[91]

However, the court's decision in *Walgreen* did not foretell its later decision in *NLRB v. Chicago Health & Tennis Clubs, Inc.*[92] In *Chicago Health Clubs*, a consolidation of appeals by Saxon Paint Co. and the Chicago Health Clubs, the court was presented with an issue identical

87. *Id.*
88. *Id.* at 754.
89. *Id.*
90. In determining that the Board had not abused its discretion, the Seventh Circuit noted that since Congress has expressly delegated to the Board the authority to make unit determinations, federal courts have long accorded special deference to the Board's conclusions. Moreover, the court quoted the Supreme Court in its recent statement in *South Prarie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976).

The court interpreted *South Prarie* as containing an admonition which significantly limits the scope of judicial review. The court also cited the general rule that the function of judicial review of Board actions in the representation area is not to weigh evidence or overrule the exercise of Board discretion, but to guarantee against arbitrary action by the Board. This general rule, the court noted, was articulated in *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 380 (1945). The court further noted that the general rule was recognized by the Seventh Circuit in *State Farm Mutual Auto Ins. Co. v. NLRB*, 411 F.2d 356, 358 (7th Cir.) (*en banc*), *cert. denied*, 396 U.S. 832 (1969) and *NLRB v. Krieger-Ragsdale & Co.*, 379 F.2d 517 (7th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968). 564 F.2d at 753. Thus, the court declined to find that the Board was arbitrary or unreasonable in determining local managerial independence was sufficient to allow a single-store unit determination.
91. 356 F.2d 895 (7th Cir. 1966).
92. 567 F.2d 331 (7th Cir. 1977).

to the one in *Walgreen*: unit determination of the Board presented under the guise of reviewing an employer's refusal to bargain with the union elected within the challenged unit.[93] The court reaffirmed its statement in *Walgreen* that the primary responsibility for determining the appropriateness of a unit for collective bargaining rests with the Board.[94] In *Chicago Health Clubs*, however, the court noted that although Board determinations are subject to limited review, they are not immune from judicial scrutiny.[95] In supporting this view the Seventh Circuit stated that the United States Supreme Court has held that courts of review are not " 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenure of the Act."[96] Further, in *Chicago Health Clubs* the court discussed the scope of review of Board decisions and noted the cases cited in *Walgreen* providing for review of discretion when it is unreasonable, arbitrary or capricious.[97] The court also noted that *NLRB v. Pinkerton's Inc.*[98] provides for review of the Board determination and reversal where the unit determinations are unsupported by substantial evidence.[99]

The court, in *Chicago Health Clubs*, commented expansively on the history of the Board's unit determinations in regard to multi-store retail operations.[100] In analyzing the Board decisions, the court stated that several decisions had suggested a weakening of the presumptive appropriateness of single-store units. It noted the paradox that some Board decisions seem impossible to reconcile.[101]

The court stated that its job is to examine all of the factors used by the Board in determining whether the single-store unit is appropriate.[102] In *Chicago Health Clubs* the court found that the Board had based its unit determination for both Saxon Paint Co. and Chicago Health Clubs largely on the role of the local store manager. In analyzing the facts adduced to support the Board decision with regard to the Saxon Paint stores, the court rejected the Board's finding that the store managers had possessed autonomy and authority. The court also found that all hiring, firing, training and similar labor-relation policy decisions were not made by the local manager, but came from the cen-

93. *Id.* at 333.
94. *Id.* at 334-35.
95. *Id.* at 335.
96. *Id.* (quoting NLRB v. Weingarten, Inc., 420 U.S. 251, 256 (1975)).
97. *Id.*
98. 416 F.2d 627, 630 (7th Cir. 1969).
99. 567 F.2d at 335.
100. *Id.* at 332-33.
101. *Id.* at 335-36.
102. *Id.* at 335.

tral office.[103]

In addition, Saxon Paint Co., unlike Walgreen Co., frequently transferred its employees among the various Chicago area stores.[104] There was also a history of collective bargaining at Saxon which revealed that a larger unit than the single-store would be appropriate.[105]

With regard to Saxon Paint, the Seventh Circuit reversed the Board's request for enforcement and directed that the unfair labor practice complaint based upon the refusal to deal with the elected union be dismissed.[106] The court stated that it would not follow *Walgreen* because "it is distinguishable both in the absence of bargaining history and in the amount of autonomy exercised by the store manager."[107]

As to the decision regarding Chicago Health Clubs, the court again weighed whether the Board's determination was based on substantial evidence and concluded that it was.[108] Crucial to this was the evidence on the record showing a complete absence of bargaining history; the proof that the extent of employee interchange among the various clubs had been minimal; the difference in the types of health clubs (there are at least three different types of clubs) and the convincing proof that each Chicago Health Club manager had exercised a genuinely autonomous role.[109]

The effect of *Chicago Health Clubs* is to revive the efficacy of *Frisch's*. A major difficulty in reconciling the Seventh Circuit's opinion in *Walgreen* with *Chicago Health Clubs* and *Frisch's* is understanding how the court in each instance used different standards of review. In *Walgreen*, the court interpreted its role as merely to control abuse of discretion or arbitrariness on the Board's part. In *Chicago Health Clubs*, as in *Frisch's* eleven years earlier, the court used the classic substantial evidence standard. Yet, in *Chicago Health Clubs*, the court appeared to recognize the Supreme Court's recent admonition that in unit determinations the Board must be accorded deference as the more expert tribunal.

It is easy to understand the court's reasoning in *Chicago Health Clubs* when confronted with Board opinions that are inconsistent, ill-

103. *Id.* at 336-37.

104. *Id.* at 337-38. The court stated that "eighteen percent of all employees were transferred permanently among the Chicago stores [and a]dditional testimony showed that temporary transfers frequently occur, almost on a daily basis." (Footnote omitted). *Id.* at 338.

105. *Id.*

106. *Id.* at 339 (citing NLRB v. Frisch's Big Boy Ill-Mar, Inc., 356 F.2d 895 (7th Cir. 1966)).

107. *Id.* at 338.

108. *Id.* at 339.

109. *Id.* at 339-40.

reasoned, and which, instead of using legal analysis, are peppered with legal conclusions containing ritualistic language required by the Act. As noted by Professor Gorman:

> Perhaps the three most significant factors in the Board's unit determinations in retail chain-store cases are the degree of local managerial independence . . . the geographic proximity of the stores within the proposed unit . . . and the degree of employee interchange among the included and excluded stores. However, there is no sure way to determine how the Board will apply these criteria. In any given case, the Board's analysis is likely to be conclusory, with quantitative labels such as "substantial" or "mere" appended without elaboration; and in different cases, there is quite often inconsistency in the Board's use of any one of the three fundamental criteria.[110]

Circuit court panels which strictly construe their function under the Supreme Court's admonition in *South Prarie Construction Co. v. Local 627, International Union of Operating Engineers*[111] apply only the abuse of discretion standard. Panels, like *Chicago Health Clubs*, which are more dubious when confronted with the Board's expertise, apply the more usual substantial evidence standard in viewing the record as a whole.[112] Thus, the distinctions relied upon by the Seventh Circuit in the cases discussed have granted or denied enforcement of Board unit determinations by shifting considerations of the scope of review. Al-

110. R. GORMAN, *supra* note 65, at 78-79.

111. 425 U.S. 800, 805 (1976). *See* note 90, *supra*.

112. The problem in these cases may really be with the Board and its unnecessary use of the concept of presumptions in ascertaining what constitutes an appropriate unit for bargaining. As noted in C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. 1972):

> One ventures the assertion that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof." One author has listed no less than eight senses in which the term has been used by the courts. Agreement can probably be secured to this extent, however: a presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.

According to the Board's procedures, in unit determinations, the only evidentiary hearing is non-adversary so that the actual burden and responsibility is on the Board itself as expert, neutral factfinder. *See* NLRB STATEMENTS OF PROCEDURE 29 C.F.R. § 101.20(c) (1977). How can a concept developed in the trial court setting and dealing with allocating burdens of proof and persuasion be useful in this context? Actually, the Board when discussing presumptions of appropriateness, is obviously not utilizing a presumption at all, but merely the language of presumptions.

This use by the Board of inappropriate and confusing legal langauge causes problems for both the practitioner and the reviewing court. The practioner's problem is in knowing how much evidence rebuts the Board's presumption of appropriateness or persuades the Board of a single unit's appropriateness again after rebuttal. Under the present system, the non-adversary hearing structure affords the practitioner no possible glimpse into when he or she has presented sufficient evidence to prove the unit's appropriateness. Similarly, those advocates attempting to disprove the appropriateness of the bargaining unit also have difficulty determining the Board's standard of when they have *disproven* the unit's appropriateness. In like manner, the reviewing court's problem is that it must determine whether the Board has acted arbitrarily, capriciously, or based on substantial evidence. The Board's complicated decisional language obscures what ought to be a simple question—that is, whether or not there is evidence on the record to sustain the Board's determination of appropriateness.

though review is possible under arbitrary, capricious or abuse of discretion standards,[113] reversal of Board action by the "substantial evidence" standard set forth in section 10(e) of the Act[114] is obviously much easier. Thus, the imposition of "substantial evidence" review by the court in *Chicago Health Clubs* allowed rejection of the Board's determination.

The utilization of the broader scope of review language in *Chicago Health Clubs* appears to be no accident. The court leaned in this direction because it was confronted with Board action which the court believed did not conform to the evidence presented at the initial adjudication. Implicit in this action is the court's insistence on carefully culling Board determinations in representation matters despite the court's lipservice to the recent Supreme Court suggestion that reviewing courts should look only for real abuse of discretion on the Board's part. Thus, the differing conclusions achieved in *Walgreen* and *Chicago Health Clubs* do not reflect mere differences of result but completely different concepts of judicial control of the Board's expert administrative actions in representation cases.

RECOGNITIONAL PICKETING PROHIBITED BY NON-GUARD UNIONS AGAINST ARMORED-CAR EMPLOYERS

This term, the Seventh Circuit also considered the issue of whether recognitional picketing subsequent to a Board determination that it cannot or will not hold a representation election constitutes an unfair labor practice in violation of section 8(b)(7)(c) of the Act.[115] In *Inter-*

113. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

114. National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (1976). This section provides, in pertinent part:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of the title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of facts if supported by *substantial* evidence on the *record considered as a whole* shall be conclusive. (Emphasis added).

115. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1976) provides, in part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recog-

national Brotherhood of Teamsters, Local 344 v. NLRB (Purolator Security),[116] the union filed a representation petition seeking an election for a unit of employees of Purolator Security, Inc. The regional director dismissed the petition relying on section 9(b)(3) of the Act.[117] The Board agreed with the regional director that the petition must be dismissed because the employees in question were "guards."[118] Since the Board decided that a unit of "driver-guards" could not be represented by a labor organization also representing non-guard employees, it concluded that the union was forbidden from engaging in recognitional picketing.[119]

The Seventh Circuit affirmed the holding of the Board.[120] First, it noted that the Board has considered armored-car drivers to be "guards" since 1953 when the Board decided *Armored Motored Service Co.*[121] The court noted that the Board has based its findings that armored-car drivers are guards on "general concern for the problem of divided loyalties in employees primarily responsible for the protection of the employer's property."[122] The Board's position has been that the divided loyalty problem is present in the case of armored-car guards, albeit to a lesser extent than in the instance of plant-guards. The court found support in both the language of the Act and its legislative history for the Board's view.[123] Moreover, the court found persuasive the Board-cited example of possible disloyalty when such guards might be asked to deliver money or valuables through a picket line of one of the armored-car service's customers whose employees were represented by

> nize or bargain with a labor organization as the representative of his employees. . . :
> . . . .
> (C) where such picketing has been conducted without a petition under section 159(c) of this title. . . . [Act § 9(c)].

116. 568 F.2d 12 (7th Cir. 1977).

117. *Id.* at 14. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1976) provides in part:

> The Board shall decide in each case . . . in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining . . . *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a *guard* to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than *guards*. (Emphasis added).

118. 568 F.2d at 14.

119. *Id.* at 15.

120. *Id.*

121. *Id.* (citing Armored Motor Service Co., 106 N.L.R.B. 1139, 32 L.R.R.M. 1628 (1953)).

122. *Id.* at 16.

123. *Id.*

the same union as that representing the armored-car guards.[124] The court noted that the Board's theory was accepted last year by the District of Columbia Circuit in *Local 71, Teamsters v. NLRB (Wells Fargo)*.[125]

Having concluded that the armored-car employees could reasonably be viewed by the Board as guards under the Act, the court rejected the union's contention that even if the Board could not certify the union as the representative of the unit, it nevertheless should have held an election for the employees in the unit and certified the arithmetical results. The union had contended that if such an election had been held, and if a majority of the employees had voted for the union, its recognitional picketing would not have been an unfair labor practice under section 8(b)(7)(c). The court held that the Board was not required to hold an election, and therefore refused to consider whether the union's theory was correct.[126]

The court found that the Act barred recognitional picketing after a determination that no Board-conducted election would be held. Distinguishing several earlier decisions by other courts,[127] the Seventh Circuit rejected the union argument that it should be able to employ economic pressure to obtain majority status, even though the union has not been afforded the opportunity to use the Board's representation election procedures. The court agreed with the District of Columbia Circuit position[128] that the limitation on recognitional picketing as expressed in section 8(b)(7)(c) appears to contemplate recognitional picketing only as a prelude to a Board election. Thus, the court found that absent the possiblity of an election, recognitional picketing would constitute an unfair labor practice which the Board may enjoin.[129]

Finally, the court recognized that two policies crucial to the recognitional picketing prohibition set forth in the Act are implemented by refusing to allow union picketing without the possibility of a Board-conducted election. The first is a policy favoring orderly settlement of labor disputes—the opposite conclusion would allow representational picketing for a potentially indefinite period of time. The second is that

124. *Id.*
125. 553 F.2d 1368 (D.C. Cir. 1977).
126. 568 F.2d at 17.
127. The cases distinguished in 568 F.2d at 17-18 nn. 10-12 were: United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956); Rock-Hills-Uris, Inc. v. McLeod, 236 F. Supp. 395 (S.D. N.Y. 1964), *aff'd per curiam*, 344 F.2d 697 (2d Cir. 1965); Vila Barr, 157 N.L.R.B. 588, 61 L.R.R.M. 1386 (1966).
128. The District of Columbia position is stated in Local 71, Teamsters v. NLRB (Wells Fargo), 553 F.2d 1368 (D.C. Cir. 1977).
129. 568 F.2d at 19.

the ban on recognitional picketing prevents "the union practice of going into an employer's office without any concern for the sentiments of the majority of the employees and threatening to engage in picketing indefinitely unless the employer recognized the union as the bargaining representative of the employees."[130] Thus, the court manifested an awareness that indefinite recognitional picketing in this context would open the door to the same types of abuse which the Act was designed to prevent.[131]

The court rejected the union claim that section 8(b)(7)(c) was unconstitutional as applied in this case and that section 9(b)(3) was unconstitutional since as interpreted it violated employees' first amendment right to freedom of association. The court noted:

> Balancing the public interest to be served by Section 9(b)(3) against the minimal infringement on the Union and employee's rights, we conclude that this provision is plainly Constitutional. Congress in passing this provision did so in order to avoid conflicting loyalties in employees deemed to be of particular importance to the employer . . . .
>
> As to the degree of infringement caused by this statute, it can only be characterized as incidental and minimal. Nothing restricts the guards' right to join the Union, to associate with nonguards or even to receive voluntary bargaining rights. All that is deprived is certification and a Board-conducted election. Balanced against the public policy served by this provision, we find that there is too insubstantial an infringement on the Union's and employees' rights to justify holding this provision to be violative of the Constitution.[132]

In *Local 71, Teamsters v. NLRB (Wells Fargo)*,[133] the District of Columbia Circuit similarly rejected the union arguments regarding indefinite picketing for recognition by unions incapable of being certified by the Board. In this case, the Court of Appeals for the District of Columbia Circuit found that the union committed an unfair labor practice by resuming picketing after its representation petition had been dismissed by the regional director. The court noted that "a Board-conducted election is a 'costly occasion' " and the Board could reasonably conclude that non-certifiable unions "should not be allowed to invoke the Board's processes."[134] Second, the court held that the unfair labor practice occurred after the Board's dismissal of the election petition, when there was no reasonable prospect of achieving a Board-conducted election. The court reasoned that "[t]o tolerate continued

130. *Id.* at 18.
131. *Id.* at 19.
132. *Id.* at 18.
133. 553 F.2d 1368 (D.C. Cir. 1977).
134. *Id.* at 1376 (quoting Brooks v. NLRB, 348 U.S. 96, 99 (1954)).

picketing after dismissal of the Union's petition would bestow on petitioner greater rights than are afforded qualifying unions."[135]

Thus, two circuit courts of appeals have rejected recognitional picketing against armored-car services by a union that cannot be certified under the Act. Both opinions are well-reasoned and appear to authoritatively sustain the Board in enjoining recognitional picketing which could be of indefinite duration.

IN-PLANT CAFETERIA SERVICES AS MANDATORY SUBJECTS OF BARGAINING

One of the major requirements of the Act is that employers and unions bargain in good faith[136]—as that term has been defined for more than forty years of close analysis and development by both the Board and the courts.[137] The duty to bargain in good faith is imposed on both the employer and the representative of his employees by section 8(d) of the Act;[138] the refusal to bargain is made an unfair labor practice by sections 8(a)(5) and 8(b)(3),[139] and any refusal to discuss "mandatory subjects of collective bargaining" is a *per se* violation of the Act.[140] This obviously requires a finding of whether or not a particular item on which a charge is based is a mandatory subject of bargaining, which in turn is dependent on the determination of whether a particular item is deemed to be embraced by the phrase "wages, hours and other terms and conditions of employment" contained in section 8(d). Determining what specific items are encompassed by the term "conditions of employment" has been an extremely troublesome task for the Board and the courts.

135. *Id.* at 1377.

136. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976) provides that:

> To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

137. *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); NLRB v. Katz, 369 U.S. 736 (1962); General Electric Co., 150 N.L.R.B. 192, 57 L.R.R.M. 1491 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 28 L.R.R.M. 1608 (1951), *enforced*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953); and Jacobs Mfg. Co., 94 N.L.R.B. 1214, 28 L.R.R.M. 1162 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

138. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976).

139. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees . . . ." National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). Section 8(b)(3) of the Act makes it an unfair labor practice for a labor organization or its agents to "refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [29 U.S.C. § 159(a)]." National Labor Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3) (1976).

140. NLRB v. Katz, 369 U.S. 736 (1962).

One facet of this problem is whether in-plant meals and food services are such a sufficiently integral part of the employment relationship that they constitute a "condition of employment."[141] In four recent decisions,[142] the United States Courts of Appeals for the First, Fourth and Seventh Circuits have rejected Board findings[143] that in-plant cafeteria and vending machine food services, and the prices charged for the items sold there, are terms and conditions of employment, and therefore mandatory bargaining topics.

In *Ford Motor Co. v. NLRB*,[144] the Seventh Circuit was again faced with this issue. The case arose from the auto company's refusal to bargain with the union regarding an increase in cafeteria and vending prices and its further refusal to give the union information regarding the vending machine operations, profits from food operations, control of prices and contractual relations by Ford Motor Company with the outside caterer who had actually supplied the in-plant food services. The union and the company had bargained over various aspects of the quality of service provided by the caterer for nearly a decade, but the company had consistently refused to bargain concerning prices set by the outside caterer.[145]

Based on the employer's refusal to divulge the requested information and its further refusal to negotiate, the union filed charges with the Board. At the administrative hearing level, the administrative law judge dismissed the complaint against the employer, reasoning that since the courts had consistently reversed the Board's findings that in-plant meals present mandatory topics for bargaining, and that the Board had failed to seek certiorari from the Supreme Court in *NLRB v. Ladish*,[146] the Board had acquiesced in this result.[147] The Board rejected this deduction, stating that "[w]ith all due respect to the First, Fourth, and Seventh Circuits, we adhere to our position that cafeteria

141. *See* Weyerhaeuser Timber Co., 87 N.L.R.B. 672, 25 L.R.R.M. 1163 (1949). *See also* Herman Sausage Co., 122 N.L.R.B. 168, 43 L.R.R.M. 1090 (1958), *enforced*, 275 F.2d 229 (5th Cir. 1960).

142. NLRB v. Ladish, 538 F.2d 1267 (7th Cir. 1976); NLRB v. Package Mach. Co., 457 F.2d 936 (1st Cir. 1972); McCall Corp. v. NLRB, 432 F.2d 187 (4th Cir. 1970); Westinghouse Elec. Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967) (*en banc*), *rev'g* Westinghouse Elec. Corp. v. NLRB, 369 F.2d 891 (4th Cir. 1966).

143. The respective Board cases were as follows: Ladish Co., 219 N.L.R.B. 354, 89 L.R.R.M. 1653 (1975); Package Mach. Co., 191 N.L.R.B. 268, 77 L.R.R.M. 1456 (1971); McCall Corp., 172 N.L.R.B. 540, 69 L.R.R.M. 1187 (1968); and Westinghouse Elec. Corp., 156 N.L.R.B. 1080, 61 L.R.R.M. 1165 (1966).

144. 571 F.2d 993 (7th Cir. 1978).

145. *Id.* at 995-96, 996 n.3.

146. 538 F.2d 1267 (7th Cir. 1976), *rev'g* 219 N.L.R.B. 354, 89 L.R.R.M. 1653 (1975).

147. 571 F.2d at 996.

and vending machine prices are a mandatory subject of bargaining."[148]

It was in this context that the issue in *Ford* was presented to the Seventh Circuit. Under the facts of the case, the court concurred with the Board in its determination that the in-plant food service price structure was a mandatory subject of bargaining.

In so deciding, the court presented a cogent analysis of the state of the law with reference to the nature and scope of bargaining. The Seventh Circuit's analysis centers around its interpretation of *Fibreboard Paper Products Corp. v. NLRB*,[149] the major Supreme Court decision defining the scope of bargaining duty. Essentially, the Seventh Circuit's perception is that the Supreme Court in *Fibreboard* stressed the particular facts of the case in holding that sub-contracting constituted a mandatory subject for bargaining even in the absence of any evidence of employer anti-union motivation in its determination to sub-contract work. In the *Ford* opinion, the court viewed the majority opinion in *Fibreboard* as having achieved an extermely limited holding.

Attention to the particular facts in *Fibreboard* seems to require a case-by-case approach to any determination of the scope of mandatory bargaining. The Seventh Circuit stated that the scope of bargaining issues are to be decided as questions of fact by the Board as the expert agency, and not as questions of law, and that this seems to have been neglected or overlooked in cases subsequent to *Fibreboard*.[150]

A second requirement of *Fibreboard* is that the standard to be applied to the facts by the Board and the reviewing court alike is whether a particular matter affects or has an impact upon a term or condition of employment.[151] Hence, in *Ford*, the Seventh Circuit articulated the standard to be applied in mandatory bargaining cases as a two-pronged approach. First, the determination is a question of fact, to be decided on the particular facts and on a case-by-case basis. Second, whenever

148. 230 N.L.R.B. 716, 717, 95 L.R.R.M. 1397, 1399 (1977) (footnote omitted).

149. 379 U.S. 203 (1964).

150. 571 F.2d at 997. The Seventh Circuit pointed out that this emphasis on the importance of a case-by-case approach is especially well-articulated in Justice Stewart's concurrence in *Fibreboard Paper Products Corp.*, 379 U.S. at 218.

151. In *Ford Motor Co.*, the Seventh Circuit stated that the "*Fibreboard* opinion goes to great pains to emphasize that each categorization of what is or is not a term or condition of employment or what has or has not sufficient effect or impact upon a term or condition so as to convert it into a mandatory subject of bargaining, must depend on the facts . . . ." 571 F.2d at 997.

In explaining the use of the effect-impact test, the court stated:

> [T]he courts of appeals have sought to further develop the standard for determining whether a particular matter "affects" or "has an impact upon" a term or condition of employment. Some courts have limited the "effect-impact" test by requiring a "material" or "significant" effect or impact . . . , or a "substantial adverse effect" upon the employees . . . .

Id. at 998 (citations and footnote omitted).

the issue is close, the legal standard to be applied is the "effect-impact" test.

In *Ford*, the court distinguished several cases on their facts. Those cases were *Westinghouse Electric Corp. v. NLRB*,[152] *McCall Corp. v. NLRB*,[153] *Package Machinery v. NLRB*[154] and *NLRB v. Ladish Co.*[155] In *Westinghouse*, the Fourth Circuit initially rejected the Board's position that an increase of one cent per cup of coffee served in the company cafeteria by an independent caterer was a mandatory subject for bargaining. Upon review, the Fourth Circuit, sitting *en banc*, reversed both its own panel and the Board[156] in finding that "it was not the intent of Congress in enacting the National Labor Relations Act to sweep every act by every employer within the ambit of 'conditions of employment.' "[157]

In *McCall Corp. v. NLRB*,[158] the Fourth Circuit again denied the Board determination that in-plant food services came within conditions of employment. The Board had found that the employer supplied the food at the plant, and fixed the prices at which the food was dispensed.[159] The court reversed this decision, holding that the plant was not so isolated that employees were dependent on food solely in vending machines, since the employees could bring their lunches from home.[160] Therefore, food prices were not a condition of employment.

The First Circuit, in *NLRB v. Package Machinery*,[161] similarly rejected the Board's stance that in-plant food services are within the terms and conditions of the working environment. Here, the court noted that only fifty per cent of the employees patronized the company cafeteria, and that there were several restaurants or cafeterias within a five-minute drive of the plant. Hence, the court reversed the Board's order that the company bargain with the employee representative over the extent the company should subsidize the food prices.[162]

152. 387 F.2d 542 (4th Cir. 1967).
153. 432 F.2d 187 (4th Cir. 1970).
154. 457 F.2d 936 (1st Cir. 1972).
155. 538 F.2d 1267 (7th Cir. 1976).
156. Westinghouse Elec. Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967) (*en banc*), *rev'g* Westinghouse Elec. Corp. v. NLRB, 369 F.2d 891 (4th Cir. 1966).
157. 387 F.2d at 550. The court further stated: "The dissenting members of the Board pointed out, in effect, that equating the trifles here involved with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially effecting 'conditions of employment' is sheer nonsense." *Id.*
158. 432 F.2d 187 (4th Cir. 1970).
159. McCall Corp., 172 N.L.R.B. 540, 69 L.R.R.M. 1187 (1968).
160. 432 F.2d at 188.
161. 457 F.2d 936 (1st Cir. 1972).
162. *Id.* at 937.

In *NLRB v. Ladish*,[163] decided in 1976, the Seventh Circuit denied enforcement of a Board order to bargain over vending machine prices. The court emphasized the lack of employer control over prices—prices which were established by the third-party caterer who owned and operated the vending machines located on the employer's premises.[164]

That the Seventh Circuit distinguished these cases on their facts is consistent with the court's most recent approach demonstrated in the area of mandatory bargaining. However, the reviewing courts' consistent rejection of Board action prior to *Ford*, had begun to develop sufficient precedential force to take the determination away from the Board as a matter of law. Certainly, the administrative law judge who initially dismissed the complaint in *Ford* thought this to be so.[165] Hence, the careful analysis and emphasis on the case-by-case approach in *Ford* must be seen to denote a variation in emphasis from the perceived direction of the other recent court decisions.

Implicit in the discussion in *Ford* is the court's recognition that the decisions as to what particular items constitute "other terms and conditions of employment" are matters of fact and not of law. This view does seem to comport with the reasoning expressed by both the majority and the concurrence in *Fibreboard*. Certainly the limited nature of that holding is indicated by the following language expressed in the majority opinion:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[166]

The Seventh Circuit's flexible construction and case-by-case approach as exemplified by *Ford* thus would seem consistent with the approach suggested by *Fibreboard*. An effect-impact analysis allows the court to avoid forcing bargaining for unimportant trifles. By reasserting the primacy of questions of fact in these cases, the court has tipped the balance in favor of the Board, deference therefore must be paid to the Board's expertise. The particular result in *Ford* is not of great significance; in-plant food price and quality is not of concern beyond the company gate. However, the mode of analysis and the stand-

163. 538 F.2d 1267 (7th Cir. 1976).
164. *Id.*
165. *See* Ford Motor Co. v. NLRB, 571 F.2d at 996.
166. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 215 (1964).

ards set forth reinforce the Board's traditional role in determining what topics must be dealt with in bargaining among employers and representatives of their employees. On balance, the *Fibreboard* approach, as clarified in *Ford*, seems a correct one.

CONCLUSION

The foregoing survey has focused on five recent decisions of the Court of Appeals for the Seventh Circuit. In three of these cases, the court considered what constitutes an appropriate bargaining unit in the troublesome areas of health care institutions, non-profit private colleges and universities, and retail chain stores. The fourth concerns whether a union commits an unfair labor practice under the Act when it pickets an armored-car service after the Board has determined that the union cannot be certified as a bargaining agent under the Act. The court supported the National Labor Relations Board's theory that such action constitutes an unfair labor practice under the Act. In the last case surveyed, the court approved a Board holding that in-plant meals are mandatory topics of bargaining between an employer and the chosen representative of its employees.

The Seventh Circuit has chosen to rule on the propriety of Board actions in four of the five cases surveyed based on a sensitive concern for its relationship to the expert agency involved, the National Labor Relations Board. The court seems acutely aware of its limited function of review pursuant to the scheme of the Act. However, as noted above, the Seventh Circuit's view in the one area of hospital unit determination is not properly cognizant of the Board's expert role. Perhaps this is due to the Board's own fumbling and inconsistency in this newly-assigned sector of labor relations. The shifting explanations and contradictory results advanced by the Board and the courts make the development of careful, finely drawn precedent in the health care field a problem for the future, perhaps only to be settled by further Supreme Court explication.[167]

167. *See, e.g.*, Beth Israel Hosp. v. NLRB, 98 S. Ct. 2463 (1978).