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THE NONPROLIFERATION MANDATE AND THE APPROPRIATE LEGAL STANDARD IN HEALTH CARE BARGAINING UNIT DETERMINATIONS

I. Introduction

In 1974, Congress enacted amendments to the National Labor Relations Act (the Act)¹ which extended its coverage to employees of nonprofit health care institutions.² The most controversial and liti-

1. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980)). The Act seeks to avoid industrial strife which interferes with the free flow of commerce "by encouraging the practice . . . of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . ." 29 U.S.C. § 151 (1976). The Act has undergone significant changes since its original enactment in 1935. The amendments prior to 1974 which comprise the Act include: The Labor Management Relations Act of 1947 (Taft-Hartley Act), Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-144, 151-167, 171-183, 185-187 (1976)) (shifted focus from employee rights to a more balanced federal labor policy by imposing restrictions on unions and granting certain freedoms of speech and conduct to employers and individual employees) and The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, 73 Stat. 519, (codified at 29 U.S.C. §§ 401-402, 411-415, 431-441, 461-466, 481-483, 501-504, 521-531 (1976)) (standardized internal administrative practices and procedures of unions and guaranteed members full access to information disclosed under the reporting requirements). The jurisdiction of the Act extends to all cases involving enterprises whose operations "affect commerce." See 29 U.S.C. §§ 152(6), (7), 159(c), 160(a) (1976). The constitutional coverage of the Act over activities that "affect" interstate commerce has been enlarged since its initial promulgation. See *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) (a business itself does not have to be in interstate commerce to affect commerce between the states); *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (interstate transportation of raw materials or finished products is material in interstate commerce without regard to the relative amount or volume of commerce); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (intrastate activities such as manufacturing may have a close and substantial relation to interstate commerce).

2. Pub. L. No. 360, 88 Stat. 395 (1974) (codified in scattered sections of 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980)). One of the new amendments, § 213, is an addition to the Labor Management Relations Act. 29 U.S.C. § 183 (Supp. III 1979). See notes 38-61 *infra* and accompanying text for a discussion of the legislative history of the 1974 amendments. The most significant amendments enacted in 1974 include: (1) extension of the Act's jurisdiction to include nonprofit health care institutions, 29 U.S.C. § 152(14) (1976); (2) special time periods for health care collective bargaining, including: (a) 90-day notice to the other party of intent to terminate or modify a collective bargaining agreement, *id.* § 158(d)(A) (Supp. 1979); (b) 60-day notice of the termination or modification of a collective bargaining agreement to the Federal Mediation and Conciliation Service (FMCS), *id.*; (c) 30-day notice to the FMCS of initial contract bargaining, *id.* § 158(d)(B) (1976); (d) mandatory participa-

gated area³ of the new law has centered on the determination of appropriate bargaining units.⁴ Fearful of unchecked bargaining unit growth in an industry which encompasses a complex array of job levels and skills, Congress issued a mandate⁵ in 1974 directing the National Labor Relations Board (the Board)⁶ to prevent unit prolifer-

tion by the health care institution and labor organization in mediation conducted by the FMCS, *id.* § 158(d)(C); (e) 10-day notice to the health care institution by a labor organization of concerted refusals to work, *id.* § 158(g).

3. See notes 73-196 *infra* and accompanying text for a discussion of conflicting Board and circuit court decisions concerning bargaining units in the health care industry.

4. Section 9(a) of the Act states that “[r]epresentatives designated . . . for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit. . . .” 29 U.S.C. § 159(a) (1976). The appropriate bargaining unit is comprised of employees who have a substantial mutual interest in wages, hours and other conditions of employment. *THE DEVELOPING LABOR LAW* 201 (C. Morris ed. 1971) [hereinafter cited as *LABOR LAW* 1971]. A unit determination “demarcates (1) who will be permitted to vote in the representation election, and (2) the job title grouping of employees who will be covered by the NLRB certification if the union prevails at the election.” Shepard, *Health Care Institution Labor Law: Case Law Developments, 1974-1978*, 4 *AM. J. L. & MED.* 1, 6 (1978).

5. H.R. REP. NO. 1051, 93d Cong., 2d Sess. 6-7 (1974), reprinted in *SUBCOMMITTEE ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT 274-75* (Comm. Print 1974) [hereinafter cited as *LEGISLATIVE HISTORY*]; S. REP. NO. 766, 93d Cong., 2d Sess. 5 (1974), reprinted in *LEGISLATIVE HISTORY, supra*, at 12. The National Labor Relations Board was directed to give “due consideration” to the prevention of proliferation of bargaining units in the health care industry. See text accompanying note 60 *infra* for the text of the committee reports.

6. The National Labor Relations Board, established to administer and enforce the Act, is comprised of five Members, each of whom is appointed to a five-year term by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a) (1976). Pursuant to § 3(b) of the Act, the Board has delegated its decision making authority in representation cases to Regional Directors. See *id.* § 153(b). The Board has imposed discretionary limitations on the exercise of its powers to enforce the Act. See *id.* § 164(1). It has created a set of “jurisdictional standards” which vary, depending on the enterprise, and are based on a required annual dollar volume of business. See *OFFICE OF THE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 1-16* (1974) [hereinafter cited as *AN OUTLINE OF LAW AND PROCEDURE*]. The jurisdictional revenue requirements for privately operated health care institutions include: \$250,000 annual business volume for hospitals, *Butte Medical Prop.*, 168 N.L.R.B. 266, 268 (1967), \$100,000 for nursing homes, *University Nursing Home, Inc.*, 168 N.L.R.B. 263, 264 (1967) (proprietary nursing home); *Drexel Home, Inc.*, 182 N.L.R.B. 1045, 1047 (1970) (nonprofit nursing home), and \$250,000 for all other private health care institutions defined in the Act, *East Oakland Community Health Alliance, Inc.*, 218 N.L.R.B. 1270, 1271 (1975). See *THE DEVELOPING LABOR LAW* 403-04, 414-15 (C. Morris ed. 1976) [hereinafter cited as *LABOR LAW* 1976].

ation. Since then, differing interpretations of this congressional directive by the Board and the federal circuit courts⁷ have resulted in almost unanimous court denials to enforce the Board's bargaining unit decisions.⁸

7. In unfair labor practice proceedings, *see* 29 U.S.C. § 158 (1976) (lists unfair labor practices), circuit courts review Board unit determinations. *See id.* § 160(f) (grant of judicial review); note 115 *infra* and accompanying text.

8. Trustees of the Masonic Hall & Asylum Fund v. NLRB, 699 F.2d 626 (2d Cir. 1983), *granting enforcement to* 261 N.L.R.B. No. 49, 110 L.R.R.M. 1159 (1982) (Board order for service and maintenance unit); NLRB v. Frederick Memorial Hosp., Inc., 691 F.2d 191 (4th Cir. 1982), *denying enforcement to* 254 N.L.R.B. 36 (1981) (Board order for registered nurse unit); Long Island Jewish-Hillside Medical Center v. NLRB, 685 F.2d 29 (2d Cir. 1982), *denying enforcement to* 261 N.L.R.B. No. 39, 110 L.R.R.M. 1095 (1982) (Board order for single facility registered nurse unit); NLRB v. HMO Int'l/Cal. Medical Group Health Plan, Inc., 678 F.2d 806 (9th Cir. 1982), *denying enforcement to* 238 N.L.R.B. 884 (1978) (Board order for registered nurse unit excluding licensed vocational nurses); NLRB v. Foundation for Comprehensive Health Servs., 654 F.2d 731 (9th Cir. 1981) (per curiam) (mem.), *denying enforcement to* 251 N.L.R.B. 161 (1980) (Board order for professional unit excluding social workers), *on remand*, 261 N.L.R.B. No. 17, 109 L.R.R.M. 1377 (1982); Beth Israel Hosp. & Geriatric Center v. NLRB, 677 F.2d 1343 (10th Cir. 1981), *modified*, 688 F.2d 697 (10th Cir. 1982) (en banc), *petition for cert. dismissed*, 103 S. Ct. 433 (1982), *denying enforcement to* No. 27-CA-6658 (NLRB Aug. 27, 1980) (Board order for registered nurse unit); St. Anthony Hosp. Sys. v. NLRB, 655 F.2d 1028 (10th Cir. 1981), *modified sub nom.* Beth Israel Hosp. & Geriatric Center v. NLRB, 688 F.2d 697 (10th Cir. 1982) (en banc), *petition for cert. dismissed*, 103 S. Ct. 433 (1982), *denying enforcement to* 252 N.L.R.B. 50 (1980) (Board order for registered nurse unit); Vicksburg Hosp., Inc. v. NLRB, 653 F.2d 1070 (5th Cir. 1981), *granting enforcement to* 251 N.L.R.B. 6 (1980) (Board order for service, maintenance and technical unit); Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450 (10th Cir. 1981), *modified by Beth Israel & Geriatric Center*, 688 F.2d 697 (10th Cir. 1982) (en banc), *petition for cert. dismissed*, 103 S. Ct. 433 (1982), *denying enforcement to* No. 27-CA-6574-2 (NLRB Apr. 14, 1980) (Board order for registered nurse unit); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980), *denying enforcement to* 242 N.L.R.B. 440 (1979) (Board order for unit of four licensed stationary engineers); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965 (3d Cir. 1979), *denying enforcement to* 239 N.L.R.B. 872 (1978) (Board order extending comity to a state agency maintenance unit determination); NLRB v. Mercy Hosp. Ass'n, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980), *denying enforcement to* 238 N.L.R.B. 1018 (1978) (Board order for maintenance unit); NLRB v. Sweetwater Hosp. Ass'n, 604 F.2d 454 (6th Cir. 1979), *granting enforcement to* 219 N.L.R.B. 803 (1975) (Board order for technical unit); NLRB v. St. Francis Hosp., 601 F.2d 404 (9th Cir. 1979), *denying enforcement to* 232 N.L.R.B. 32 (1977) (Board order for registered nurse unit); NLRB v. Mercy Hosps., Inc., 589 F.2d 968 (9th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979), *denying enforcement to* 224 N.L.R.B. 419 (1976) (Board refusal to honor stipulation for service-and-maintenance and all-clerical unit); Bay Medical Center, Inc. v. NLRB, 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979), *granting enforcement to* 231 N.L.R.B. 607 (1977) (Board order for technical unit excluding licensed practical nurses with prior bargaining history); NLRB v. West Suburban Hosp., 570 F.2d 213 (7th Cir. 1978), *denying enforcement to* 224 N.L.R.B. 1349 (1976) (Board order for maintenance

This Comment examines the ongoing controversy over the appropriate legal standard to be applied in the determination of bargaining units in the health care industry. It reviews the basic law which governs the selection of appropriate units,⁹ discusses the legislative history of the 1974 amendments as they relate to bargaining units,¹⁰ and considers the intent of the accompanying admonition against unit proliferation.¹¹ Implementation of the congressional mandate is examined in Board unit determinations.¹² The Board's persistent use of the traditional industrial community of interest test¹³ is examined in light of circuit court decisions which have advocated new approaches.

This Comment concludes that the new "disparity of interest test"¹⁴ is more consistent with the congressional mandate to avoid unit proliferation in the health care industry and argues that the Board should abandon its sole reliance on traditional criteria in favor of this more responsive approach.

II. Criteria for Board Unit Determinations

Congress empowered the Board with the exclusive authority to determine the "unit appropriate for the purpose of collective bargaining."¹⁵ In making these determinations, the Board seeks to fulfill a

unit); *St. Vincent's Hosp. v. NLRB*, 567 F.2d 588 (3d Cir. 1977), *denying enforcement to* 238 N.L.R.B. 1525 (1978) (Board order for unit of boiler operators); *Long Island College Hosp. v. NLRB*, 566 F.2d 833 (2d Cir. 1977), *cert. denied*, 435 U.S. 996 (1978), *denying enforcement to* 228 N.L.R.B. 83 (1977) (Board order extending comity to a 13-year old state agency maintenance and engineering unit determination); *Memorial Hosp. v. NLRB*, 545 F.2d 351 (3d Cir. 1976), *denying enforcement to* 220 N.L.R.B. 402 (1975) (Board order extending comity to state agency maintenance unit determination).

9. See notes 15-37 *infra* and accompanying text.

10. See notes 38-60 *infra* and accompanying text.

11. See note 60 *infra* and accompanying text.

12. See notes 62-114 *infra* and accompanying text.

13. The community of interest test is a multi-factor criterion utilized by the Board in its industrial unit determinations. See AN OUTLINE OF LAW AND PROCEDURE, *supra* note 6, at 131. Because the designated unit must function for the mutual benefit of all employees, see J. ABODEELY, R. HAMMER & A. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT 245 (1981) [hereinafter cited as APPROPRIATE BARGAINING UNIT], the Board weighs such factors as similarities in skills, duties, working conditions, the nature of the employer's organization, bargaining history, the desires of the employees, and the extent of union organization in rendering unit determinations. AN OUTLINE OF LAW AND PROCEDURE, *supra* note 6, at 132-40. See notes 27-37 *infra*.

14. The disparity of interest test focuses on employee dissimilarity and encourages broader unit determinations. See notes 128-60 *infra* and accompanying text.

15. 29 U.S.C. § 159(b) (1976). See *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 804 (1975) (Board has exclusive jurisdiction to make unit determinations).

double objective: (1) assure maximum freedom¹⁶ so that employees may exercise the rights guaranteed to them by the Act,¹⁷ and (2) promote harmonious labor relations through the process of collective bargaining.¹⁸ Because the size and composition of bargaining units bear importantly on both pre-election strategy¹⁹ and on the post-election bargaining relationship,²⁰ the parties often disagree over the make-up of the unit.²¹ When the parties cannot voluntarily agree, the Board exercises its statutory powers²² and defines the appropriate unit.²³

16. 29 U.S.C. § 159(b) (1976).

17. Section 7 of the Act confers upon employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ." *Id.* § 157; *see id.* § 158(d) (defines "to bargain collectively"); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978) (hospital employees are entitled to self-organization through solicitation and distribution during nonworking time in nonworking areas); *D'Amico v. NLRB*, 582 F.2d 820, 824 (3d Cir. 1978) (employee right to engage in collective bargaining is integral part of Act and provision furthering this right should be accommodated); *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 376 (5th Cir. 1977) (employees have the right to choose a bargaining representative free from interference).

18. *See* 29 U.S.C. § 158(a)(5), (b)(3) (1976) (both union and employer have the duty to bargain collectively). In this regard, the Board functions to: (1) supervise the selection of the bargaining representative, *id.* § 159, and (2) monitor the relationship among employer, employees and the union. *Id.* § 160.

19. An employee, labor organization or employer may petition the Board for a representation election. *Id.* § 159(c). There must be a 30% showing of interest in the bargaining unit, *see AN OUTLINE OF LAW AND PROCEDURE, supra* note 6, at 39, 46, to compel a representation election, and the union must obtain a majority of the votes cast by members of the Board designated unit. 29 U.S.C. § 159(a) (1976). Therefore, when a union has a substantial showing of support it will seek a broad unit while a poor showing will motivate the union to petition for a narrower unit election. *See Feheley, Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO ST. L.J. 235, 285 (1975). Employees seek broader units, placing the onus on the union to organize a larger group. R. GORMAN, *BASIC TEXT IN LABOR LAW* 67-68 (1976).

20. Generally, health care employers seek the largest possible unit in order to reduce the number of negotiation sessions with different bargaining agents and the potential for work slowdowns and disruption. Unions prefer smaller units comprised of employees with similar skill or job functions. This facilitates the union's adequate representation of all unit members because the need to harmonize competing interests is substantially reduced. *See Feheley, supra* note 19, at 285-86.

21. *See Southwest La. Hosp. Ass'n v. Local Union 87, Office & Prof. Employees Int'l Union*, 664 F.2d 1321, 1322-23 (5th Cir. 1982); *LABOR LAW* 1971, *supra* note 4, at 200; *Feheley, supra* note 19, at 283-85.

22. 29 U.S.C. § 159(b) (1976).

23. *LABOR LAW* 1971, *supra* note 4, at 200-01.

The Act contains few guidelines to aid the Board in its unit determinations.²⁴ Accordingly, as the specialized body authorized by Congress to regulate labor relations, the Board has been granted broad discretion in this regard.²⁵ Its decisions are rarely disturbed absent a finding that the determination was arbitrary or capricious.²⁶

In the industrial sphere, the Board has developed a "community of interest"²⁷ test which it employs on a case-by-case basis²⁸ when making unit determinations. The Board seeks to group together employees

24. While § 9(b) does not prescribe specific criteria for establishing units, it does impose specific statutory limitations on the Board's discretion in determining bargaining units. 29 U.S.C. § 159(b) (1976). The Act expressly prohibits the Board from (1) finding a unit appropriate if the unit includes both professional and nonprofessional employees unless a majority of the professionals vote for inclusion in such a unit, *id.* § 159(b)(1); (2) deciding that a craft unit is inappropriate because a different unit had been approved by a prior Board decision unless a majority of the employees in the proposed unit vote against separate representation, *id.* § 159(b)(2); (3) finding a unit appropriate that includes both guards and other employees, *id.* § 159(b)(3); or (4) establishing a unit solely on the basis of organization. *Id.* § 159(c)(5). The Supreme Court has observed that "[t]he issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute" *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). In any given case there may be more than one appropriate unit. The Board need not designate *the* most appropriate unit. Its duty extends only to the selection of *an* appropriate unit. *Atlas Hotels, Inc. v. NLRB*, 519 F.2d 1330, 1334 (9th Cir. 1975) (Board reasonably concluded bakery workers constituted appropriate bargaining unit); *International Union of Operating Eng'rs v. NLRB*, 595 F.2d 844, 848-49 (D.C. Cir. 1979) (Board decision to place operating engineers at two subsidiaries in separate bargaining units was appropriate); *MPC Restaurant Corp. v. NLRB*, 481 F.2d 75, 78-79 (2d Cir. 1973) (Board agent has power to limit evidence submitted in determining unit).

25. Since unit determinations involve a "large measure of informed discretion," they are "rarely to be disturbed." *Packard Motor Car*, 330 U.S. at 491 (substantial evidence supporting Board unit determination proscribed further judicial inquiry). *Accord* *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805 (1976) (court of appeals erred in determining the unit instead of remanding for a Board decision). *Cf.* *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (Board's determination that in-plant food prices and services are mandatory bargaining subjects should not be rejected merely because the courts prefer another view of the statute).

26. *NLRB v. Pinkerton's, Inc.*, 428 F.2d 479, 485, 486 (6th Cir. 1970) (Board abused its discretion in finding local unit appropriate); *Local 1325, Retail Clerks Int'l Ass'n v. NLRB*, 414 F.2d 1194, 1201, 1205 (D.C. Cir. 1969) (Board failed to justify its conclusion that a state-wide unit for a retail chain was appropriate); *NLRB v. Campbell Sons' Corp.*, 407 F.2d 969, 979 (4th Cir. 1969) (employees in Board certified unit were neither *the* appropriate unit nor *an* appropriate unit). *Cf.* *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-73 (1971) (Board erred in finding that retiree benefits are mandatory subjects of bargaining as retirees are not employees under the Act).

27. *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962). *See generally* APPROPRIATE BARGAINING UNIT, *supra* note 13, at 11-83 (discusses criteria for Board unit determinations).

28. *Continental Baking Co.*, 99 N.L.R.B. 777, 782, 784 (1952); *cf.* *Chrysler Corp.*, 76 N.L.R.B. 55, 58-59 (1948) (Board employed community of interest test in finding unit of office and clerical employees appropriate).

who share substantial mutual interests in wages, hours and other terms and conditions of employment.²⁹ When considering whether a community of interest exists among a given group of employees, the Board reviews such factors as: similarity of skills, duties and working conditions,³⁰ the nature of the employer's organization, including the functional integration,³¹ the organizational and the supervisory structure,³² the interchange among employees³³ and their physical proximity,³⁴ the bargaining history,³⁵ the desires of the employees,³⁶ and the extent of union organization.³⁷

29. 29 U.S.C. § 159(a) (1976).

30. Sears, Roebuck & Co., 191 N.L.R.B. 398, 405-06 (1971) (employees of service station, warehouse, store dock area and retail store at employer's establishment constitute a single unit); Western Wirebound Box Co., 191 N.L.R.B. 748, 759 (1971) (single truck driver unit appropriate); Yale Univ., 184 N.L.R.B. 860, 862 (1970) (nonfaculty, clerical and technical employees in medical school department placed in one unit).

31. Pickering & Co., 248 N.L.R.B. 772, 773-74 (1980) (high degree of functional integration at two-plant operation rebutted presumptive appropriateness of single-plant unit); Michigan Wisconsin Pipe Line Co., 194 N.L.R.B. 469, 470 (1971) (system-wide unit of production and maintenance appropriate where employer's operations more highly integrated than most utilities); Threads-Inc., 191 N.L.R.B. 667, 668 (1971) (closely integrated functions rendered separate departmental unit inappropriate).

32. White Castle Sys., Inc., 264 N.L.R.B. No. 43, 111 L.R.R.M. 1280, 1282 (1982) (separate units at each of three restaurants inappropriate due to lack of supervisory autonomy, uniform operating and personnel procedures and substantial employee interchange); Wyandotte Sav. Bank, 245 N.L.R.B. 943, 944 (1979) (single location units appropriate where employees relied on individual branch managers for direction and evaluation); Haag Drug Co., 169 N.L.R.B. 877, 877-78 (1968) (single store in retail chain presumptively appropriate).

33. Victoria Station, Inc. v. NLRB, 586 F.2d 672, 675 (9th Cir. 1978) (low degree of employee interchange among different plants justified separate units); Gray Drug Stores, Inc., 197 N.L.R.B. 924, 925 (1972) (substantial and frequent interchange of employees among 30 stores, lack of manager autonomy and geographic proximity rebuts single-store unit presumption); Purity Supreme, Inc.; 197 N.L.R.B. 915, 917 (1972) (single unit inappropriate due to extensive employee interchange and high degree of centralization and integration in employer's chain).

34. Pomona Convalescent Home, 265 N.L.R.B. No. 167, 112 L.R.R.M. 1087, 1088 (1982) (unit at one of nine facilities appropriate due to distance and administrative autonomy); Legal Action of Wis., Inc., 261 N.L.R.B. No. 157, 110 L.R.R.M. 1189, 1190 (1982) (single location unit appropriate due to substantial geographic distance between offices); Drug Fair-Community Drug Co., 180 N.L.R.B. 525, 527 (1969) (unit based on a metropolitan area appropriate).

35. Sambo's Restaurants, Inc., 212 N.L.R.B. 788, 788 (1974) (bargaining history is evidence of parties agreement of multi-store bargaining unit); R.L. Sweet Lumber Co., 207 N.L.R.B. 529, 535 (1973), *enforced*, 515 F.2d 785 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975) (prior bargaining history was determinative in placing employees in single unit); Buckeye Village Mkt., Inc., 175 N.L.R.B. 271, 272-73 (1969) (historical representation by single unit appropriate despite multiple units in other local grocery stores).

36. Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 156 (1941) (Board's use of self-determination elections in bargaining unit determinations is appropriate); NLRB v. Ideal Laundry and Dry Cleaning Co., 330 F.2d 712, 717 (10th Cir. 1964) (Board

III. Legislative History of the 1974 Amendments and Congressional Concern Over Bargaining Unit Proliferation

Passage of the 1974 amendments to the Act restored³⁸ federal legislative protection to employees³⁹ of nonprofit health care institutions.⁴⁰

should consider the desires of employees in bargaining unit determinations); *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 300 (1937) (when considerations are evenly balanced, the determining factor is the desire of employees).

37. *Ballentine Packing Co.*, 132 N.L.R.B. 923, 924 (1961); *accord* *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 441-42 (1965). However, § 9(c)(5) of the Act prohibits the Board from finding the extent of union organization among employees to be *controlling* in bargaining unit determinations. 29 U.S.C. § 159(c)(5) (1976).

38. Pub. L. No. 360, 88 Stat. 395 (1974); *see* note 2 *supra*. The 1935 statute (Wagner Act), Pub. L. No. 198, 49 Stat. 449 (1935), did not specifically exclude nonprofit health care institutions from its coverage. *Southwest La. Hosp. Ass'n v. Local Union 87, Office & Prof. Employees Int'l Union*, 664 F.2d 1321, 1323 n.3 (5th Cir. 1982). In the absence of qualifying language or a specific exclusion, the Wagner Act extended § 7, 49 Stat. at 452, rights to all employees. *See* AMERICAN ARBITRATION ASSOCIATION AND THE FEDERAL MEDIATION AND CONCILIATION SERVICE, LABOR RELATIONS IN HOSPITALS AND HEALTH CARE FACILITIES 7-8 (1976) [hereinafter cited as LABOR RELATIONS IN HOSPITALS]. Although there was little collective bargaining activity in the health care field in the early years after the Act's passage, *id.* at 11, the Board did assert jurisdiction. *Central Dispensary & Emergency Hosp.*, 44 N.L.R.B. 533 (1942) (charitable hospital), *enforced*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). In enforcing the Board's exercise of jurisdiction, the circuit court stated that "[w]e cannot understand what considerations of public policy deprive hospital employees of the privilege granted to the employees of other institutions." 145 F.2d at 853; *accord* H.R. REP. NO. 1252, 92d Cong., 2d Sess. 2 (1972); 120 CONG. REC. 12,937 (1974) (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 94.

The Taft-Hartley amendments of 1947, Pub. L. No. 101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-144, 151-167, 171-183, 185-187 (1976)), specifically exempted nonprofit institutions from the ambit of the Act. 61 Stat. at 137; 120 CONG. REC. 12,937 (1974) (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 94. Section 2(2) of the Act excluded from the definition of "employer" "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . ." 61 Stat. at 137 (codified as amended at 29 U.S.C. § 152(2) (1976)). This exemption was premised on the belief that hospital services were local in nature, 93 CONG. REC. 4997 (1947) (statement of Sen. Taft), thereby precluding Board jurisdiction, which is limited to cases involving enterprises whose operations "affect commerce." *See* 29 U.S.C. § 152(6)-(7) (1976). Moreover, it was believed that the exemption would ease the financial burden for many institutions. 93 CONG. REC. 4997 (1947) (statement of Sen. Tydings); *see* H.R. REP. NO. 1252, 92d Cong., 2d Sess. 3 (1972); Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 Nw. U.L. REV. 202, 203 (1975). In the years following the Taft-Hartley amendments, the health care industry developed into a large-scale enterprise, engaged in substantial interstate commercial activity. 120 CONG. REC. 12,937 (1974) (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 95; H.R. REP. NO. 1252, 92d Cong., 2d Sess. 4-5 (1972). Although they could no longer be characterized as "local, charitable institutions," *id.*, nonprofit hospitals remained free, for the most part, from federal and state labor legislation. *See* FEDERAL MEDIATION AND CONCILIATION SERVICE, IMPACT OF

The legislators of the ninety-third congress⁴¹ were motivated by a dual

THE 1974 HEALTH CARE AMENDMENTS TO THE NLRA ON COLLECTIVE BARGAINING IN THE HEALTH CARE INDUSTRY 13, 16 (1979) [hereinafter cited as FMCS STUDY]; APPROPRIATE BARGAINING UNIT, *supra* note 13, at 243-44. In the absence of federal legislation it was the responsibility of the states to enact statutes covering nonprofit hospitals. *Id.* Prior to 1974, hospital workers were protected by legislation in relatively few states—Minnesota, New York, Wisconsin, Massachusetts, Pennsylvania, Utah, Michigan, Connecticut, Oregon, Montana, Washington, and Rhode Island. *See* FMCS STUDY, *supra*, at 33-43. Eight of these states specifically included nonprofit hospitals in their statutes. *See* APPROPRIATE BARGAINING UNIT, *supra* note 13, at 243 n.13. In those states lacking a statute granting jurisdiction over nonprofit hospitals and nursing homes to the state labor relations agency, health care employers were under no duty to participate in the collective bargaining process. 120 CONG. REC. 16,900 (1974) (statement of Rep. Ashbrook), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 290.

The existing state laws were subsequently preempted by the federal amendments. Massachusetts Nurses Ass'n, 225 N.L.R.B. 678, 679 (1976); *In re* Minnesota, 219 N.L.R.B. 1095, 1097 (1975); D'Alba, *Health Care Decisions of the National Labor Relations Board Since the 1974 Amendments to the National Labor Relations Act*, in AMERICAN BAR ASSOCIATION, LABOR RELATIONS LAW, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 30 (A. Knapp ed. 1977). The Board, instead of the state labor relations agencies, now has jurisdiction over health care institutions which met the Act's requirements. Dorn, *The Hospital Amendments to the National Labor Relations Act—Other Organized Employee's View*, in AMERICAN BAR ASSOCIATION, LABOR RELATIONS LAW, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 114 (A. Knapp ed. 1977).

39. At the time of passage of the health care amendments, the number of employees in nonprofit hospitals constituted 1.5 million, or 56% of all hospital workers. S. REP. NO. 766, 93d Cong., 2d Sess. 3 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 10; 120 CONG. REC. 12,937 (1974) (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 94; H.R. REP. NO. 1051, 93d Cong., 2d Sess. 4 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 272; 120 CONG. REC. 16,900 (1974) (statement of Rep. Ashbrook), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 291.

40. The definition of "health care institution" in § 2 of the Act was amended to "include any hospital, convalescent hospital, health maintenance organization health clinic, nursing home, extended care facility, or other institution devoted to the care of the sick, infirm, or aged person." 29 U.S.C. § 152(14) (1976). The drafters of the 1974 amendments regarded the health care industry as unique and meritorious of attention. Senator Taft noted, "[t]his legislation clearly reflects the congressional recognition that health care is significantly different enough from other aspects of the economy to merit special protections and procedures under the act." 120 CONG. REC. 13,560 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 256. Therefore, Congress chose not merely to confer equal status to nonprofit hospitals, but to create a host of new provisions fashioned to accommodate the special relationship between the health care industry and the public welfare. *See id.* at 12,936 (1974) (statement of Sen. Cranston), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 91; Feheley, *supra* note 19, at 236-38; note 2 *supra* (discussion of the amendments).

41. In the 92d Congress, legislation to repeal the exemption for nonprofit hospitals in § 2(2) of the Act, *see* H.R. 11,357, 92d Cong., 2d Sess., 120 CONG. REC. 12,941 (1974) (statement of Sen. Taft), was approved by the House of Representatives by a wide margin. 118 CONG. REC. 27,135 (1972) (H.R. 11,357, introduced by Reps. Thompson and Ashbrook, passed by a vote of 285 to 95). It failed, however, to reach

purpose.⁴² to extend the benefits afforded by the Act to nonprofit hospital employees,⁴³ and to safeguard the public against disruptions in patient care.⁴⁴ The need to achieve stable labor relations was

the Senate floor. 120 CONG. REC. 12,941 (1974) (statement of Sen. Taft), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 105.

Legislation offering a simple exclusion of the exemption was introduced both in the House and the Senate during the first session of the 93d Congress. *See* FMCS STUDY, *supra* note 38, at 20. On January 3, 1973, Reps. Thompson and Ashbrook re-introduced their bill. H.R. 1236, 93d Cong., 1st Sess. (1973); *see* 119 CONG. REC. 67 (1973). On February 7, 1973, Sens. Cranston and Javits submitted legislation to extend the Act to nonprofit hospitals. S. 794, 93d Cong., 1st Sess. (1973); *see* 119 CONG. REC. 3762 (1973). *See generally* 120 CONG. REC. 12,941 (1974) (statement of Sen. Taft).

42. *See* 120 CONG. REC. 13,560 (1974) (statement of Sen. Humphrey), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 256-57.

43. Prior to the passage of the amendments, the Board had asserted jurisdiction over other types of health care institutions including proprietary hospitals and nonprofit nursing homes which met jurisdictional revenue requirements. Drexel Home, Inc., 182 N.L.R.B. 1045, 1047 (1970) (nonprofit nursing home); Butte Medical Properties, 168 N.L.R.B. 266, 268 (1967) (proprietary hospital); University Nursing Home, Inc., 168 N.L.R.B. 263, 264 (1967) (proprietary nursing home). *See* H.R. REP. NO. 1252, 92d Cong., 2d Sess. 4 (1972); 120 CONG. REC. 16,901 (1974) (statement of Sen. Ford), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 294. *See* note 6 *supra* for a discussion of jurisdictional limitations. While these facilities offered nearly identical patient care services as nonprofit hospitals, only the latter were statutorily exempt. 120 CONG. REC. 12,937 (1974) (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 95. Consequently, hospital workers lagged far behind other industries in wage increases. *Cf. id.*, *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 93 (recognizes weaker economic position of hospital workers). Low wages and poor working conditions resulted in high and constant employee turnover. *Id.* This uneven national policy toward nonprofit health care workers was further evidenced by their inclusion in a number of federal statutes other than the Act. 120 CONG. REC. 12,937 (1974) (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 95, *id.* at 16,901 (statement of Sen. Ford), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 294; FMCS STUDY, *supra* note 38, at 14 (these statutes included the Fair Labor Standards Act, the Equal Employment Opportunity Act and the Social Security Act).

44. The only avenue open to employees faced with an employer who refused to accept collective bargaining was to engage in a strike to compel the employer to recognize or bargain with a union. Congress viewed these recognition strikes as the major cause of disruptions in the industry. 120 CONG. REC. 12,936 (1974) (statement of Sen. Cranston), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 91; *id.* at 12,938 (statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 96; *id.* at 16,899 (statement of Sen. Thompson), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 288; *id.* at 16,900 (statement of Sen. Ashbrook), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 290. This approach to secure the basic right of representation interrupted, and consequently adversely affected, patient care. 120 CONG. REC. 12,945 (1974) (statement of Sen. Taft), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 116. Thus, Senator Taft noted, "the committee . . . took a significant step forward in establishing the factor of public interest to be considered

accorded high priority because of the vital nature of medical care.⁴⁵ Disruptions caused by organizational drives and recognition strikes⁴⁶ in the health care setting, unlike those in industrial plants, were thought by Congress to threaten the quality and delivery of life-sustaining services.⁴⁷

Because health care institutions employ individuals in an extraordinary range of job classifications,⁴⁸ the medical industry was believed to be "particularly vulnerable to a multiplicity of bargaining units."⁴⁹ The legislators reasoned that unwarranted unit fragmentation, leading to jurisdictional disputes and concomitant work disruptions,⁵⁰ would result if each group were permitted to engage separately in collective bargaining. This could have an adverse effect on the cost of medical care, especially if rival unions were to engage in wage "leap-frogging"⁵¹ and "whipsawing."⁵² Thus, bargaining unit proliferation

by the Board in unit cases." *Id.*, reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 114.

45. *Id.* at 12,945 (statement of Sen. Taft), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 116.

46. See note 44 *supra*; 120 CONG. REC. 16,899 (1974) (statement of Sen. Thompson), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 289.

47. 120 CONG. REC. 12,938 (1974) (statement of Sen. Williams), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 97; Feheley, *supra* note 19, at 236-37.

48. LABOR RELATIONS IN HOSPITALS, *supra* note 38, at 11.

49. 120 CONG. REC. 12,944 (1974) (statement of Sen. Taft), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 113. Many occupational groupings were already afforded representation through national organizations, while other skilled occupations which had traditionally enjoyed a long history of unionization in the industrial sphere offered fresh opportunities for recruitment. APPROPRIATE BARGAINING UNIT, *supra* note 13, at 245.

50. 120 CONG. REC. 12,944 (1974) (statement of Sen. Taft), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 114.

51. *Id.* at 12,945 (statement of Sen. Taft), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 114. See Trustees of the Masonic Hall & Asylum Fund v. NLRB, 699 F.2d 626, 632 (2d Cir. 1983). Leapfrogging refers to a situation in which an employer, who has already bargained with several unions separately, is forced to renegotiate more favorable terms with the last union to have reached an agreement. H. ROBERTS, ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS 284 (2d ed. 1971). The other unions then may demand the same terms as the hold-out union which leapfrogged over the agreement pattern already set by the other unions. *Id.*

52. 120 CONG. REC. 12,945 (1974) (statement of Sen. Taft), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 114. See Bonanno Linen Serv. v. NLRB, 454 U.S. 404 (1982); NLRB v. Brown, 380 U.S. 278, 281 (1965); Arden Elec., 262 N.L.R.B. No. 37, 110 L.R.R.M. 1529, 1529 (1982) (Jenkins & Hunter, MM., dissenting); Kaiser Steel Corp., 259 N.L.R.B. 643, 645 (1981). Whipsawing is a union tactic whereby a union seeking to obtain benefits from a number of employers applies pressure to one in order to use this as a base to obtain the same, or greater benefits from the others. H. ROBERTS, *supra* note 51, at 581.

was an issue of major concern during the congressional debates.⁵³ Minimizing the number of bargaining units was regarded as a method to achieve a balance between labor stability and continuity of health care.⁵⁴

Senator Taft, in his initial bill,⁵⁵ sought to limit statutorily the number of bargaining units in the health care industry to four.⁵⁶ This rigid approach, however, was not adopted.⁵⁷ Instead, a compromise⁵⁸ was reached whereby Congress left undisturbed the broad discretionary powers accorded by the Act to Board unit determinations,⁵⁹ but indicated its stance against bargaining unit proliferation in the health

53. See 120 CONG. REC. 12,944-45 (1974) (statement of Sen. Taft), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 113-14; *id.* at 13,559-60 (statement of Sen. Taft), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 255; *id.* at 22,949 (statement of Rep. Ashbrook), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 411; Bumpass, *Appropriate Bargaining Units in Health Care Institutions: An Analysis of Congressional Intent and Its Implementation by the National Labor Relations Board*, 20 B.C.L. REV. 867, 871-74 (1979); Fehleley, *supra* note 19, at 287-89.

54. 120 CONG. REC. 12,944-45 (1974) (statement of Sen. Taft), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 113-14.

55. On July 31, 1973, Senator Taft introduced S. 2292. 119 CONG. REC. 26,792 (1973). This bill went beyond the Cranston-Javits straight exemption, *see* note 41 *supra*, by including pre-strike and picketing notice requirements and limitations on the number of bargaining units in health care institutions to safeguard patient care continuity. 119 CONG. REC. 26,792-94 (1973), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 106-11.

56. 119 CONG. REC. 26,792 (1973). These units included: (1) professional employees, (2) technical employees, (3) clerical employees, and (4) service and maintenance employees. S. 2292, 93d Cong., 1st Sess., 119 CONG. REC. 26,793 (1973).

57. The bill was never reported out of committee. See 120 CONG. REC. 12,943-44 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 111-12. The Ninth Circuit has suggested that "[i]t is likely that rejection was based on a perceived need for flexibility according to which more than four units might be appropriate for very large employers with highly diverse personnel, while fewer might be necessary for health care providers with smaller or more homogeneous work forces." *NLRB v. HMO Int'l/Cal. Medical Group Health Plan, Inc.*, 678 F.2d 806, 810 (9th Cir. 1982).

58. See 120 CONG. REC. 22,575 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 361; S. REP. NO. 766, 93d Cong., 2d Sess. 46 (1975) (individual views of Sen. Dominick), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 46. The Senate and House bills were identical except for the addition of two house amendments dealing with an emergency board cooling off procedure and the rights of employees not to join unions based on their religious convictions. The conference committee adopted a modified form of both. FMCS STUDY, *supra* note 38, at 21-22.

59. Section 9(b) of the Act—which confers upon the Board the power to designate appropriate bargaining units—remained unchanged. 29 U.S.C. § 159(b) (1976); *see* text accompanying notes 15-18 *supra* for a discussion of § 9(b). Thus, the amendments did not create special rules for bargaining unit determinations. *Memorial Hosp. v. NLRB*, 545 F.2d 351, 360 n.12 (3d Cir. 1976). *See* notes 24-26 *supra* and accompanying text.

care field by issuing a statement in both the House and Senate conference reports:

Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center . . .* and *Woodland Park Hospital . . .* as well as the trend toward broader units enunciated in *Extencicare of West Virginia . . .*.⁶⁰

The specific approval of these decisions, which limit the number of bargaining units in the health care industry, reflected the legislative desire to avoid unit proliferation. Varying interpretations of the congressional intent as expressed in the committee reports, however, has resulted in disagreement between the Board and the federal circuit courts.⁶¹

IV. Interpretation of Legislative Intent: The Two Views

A. The Board

Since passage of the 1974 amendments, the Board has found various units to be appropriate in the health care field. These determinations have included professional units of registered nurses,⁶² physicians,⁶³ and residual professional employees.⁶⁴ Appropriate non-professional

60. H.R. REP. NO. 1051, 94th Cong., 2d Sess. 7 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 275; S. REP. NO. 766, 93d Cong., 2d Sess. 5 (1974) *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 12 (citations omitted). In *Four Seasons Nursing Center*, the Board refused to certify a bargaining unit consisting of two maintenance employees out of a nursing home staff of 143. 208 N.L.R.B. 403, 403 (1974). In *Woodland Park Hospital*, the Board dismissed a petition for a separate unit of x-ray technicians. 205 N.L.R.B. 888, 889 (1973). In *Extencicare of West Virginia*, the Board found a combined unit of service, maintenance and technical employees appropriate in order to avoid "unwarranted unit fragmentation." 203 N.L.R.B. 1232, 1233 (1973).

In a footnote to the committee reports, Congress cautioned that "[b]y our reference to *Extencicare*, we do not necessarily approve all of the holdings of that decision." S. REP. NO. 766, 93d Cong., 2d Sess. 5 n.1 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 12; *see* H.R. REP. NO. 1051, 94th Cong., 2d Sess. 7 n.1 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 5, at 275 (contains materially identical footnote). This has been interpreted by the Board to refer to its decision in *Extencicare* to exclude licensed practical nurses from the broader bargaining unit. *See* St. Catherine's Hosp. of Dominican Sisters, Inc., 217 N.L.R.B. 787, 788 (1975).

61. *See generally* Husband, *Determining Appropriate Bargaining Units in Health Care Institutions—The Gap Widens*, 32 LAB. L.J. 780 (1981) (discusses the conflict between the Board and the courts over the standard for unit determinations in health care facilities).

62. *See* notes 74-78 *infra* and accompanying text.

63. *See, e.g.*, Montefiore Hosp., 261 N.L.R.B. No. 82, 110 L.R.R.M. 1048, 1049 (1982); Ohio Valley Hosp. Ass'n, 230 N.L.R.B. 604, 605 (1977).

64. *See, e.g.*, Samaritan Health Servs., Inc., 238 N.L.R.B. 629, 634 (1978); Sutter Community Hosps., Inc., 227 N.L.R.B. 181, 185 (1976).

units have included technical employees,⁶⁵ service and maintenance employees,⁶⁶ business office clerical employees,⁶⁷ and maintenance department employees.⁶⁸ In its initial health care unit determinations,⁶⁹ the Board specifically acknowledged the importance of the congressional directive.⁷⁰ In subsequent decisions, on the other hand,

65. See notes 79-93 *infra* and accompanying text.

66. See, e.g., Trustees of the Masonic Hall & Asylum Fund, 261 N.L.R.B. No. 49, 110 L.R.R.M. 1159 (1982), *enforcement granted*, 699 F.2d 626 (2d Cir. 1983); Peter Bent Brigham Hosp., 231 N.L.R.B. 929, 931 (1977).

67. Allegheny Gen. Hosp., 239 N.L.R.B. 872, 877 (1978), *enforcement denied*, 608 F.2d 965 (3d Cir. 1979) extended to the health field the industrial policy of granting separate units to clericals who perform mostly business-type functions and those whose work relationship is closer to service and maintenance employees. See Mercy Hosps., Inc., 217 N.L.R.B. 765, 770 (1975), *cert. denied*, 440 U.S. 910 (1979); Sisters of St. Joseph of Peace, 217 N.L.R.B. 797, 798 (1975). This distinction is inconsistent with the congressional approval of broader units and the Board's rejection of the "direct" and "indirect" patient care dichotomy as a basis for determining unit composition. See Mount Airy Found., 217 N.L.R.B. 802, 802 (1975). Moreover, this division has resulted in inconsistent placement of occupational classifications. Compare St. Luke's Episcopal Hosp., 222 N.L.R.B. 674, 677 (1976) (admitting clerks placed in business office clerical unit) with William W. Backus Hosp., 220 N.L.R.B. 414, 416 (1975) (admitting clerks placed in service and maintenance unit).

68. See notes 94-107 *infra* and accompanying text.

69. Shortly after passage of the health amendments, the Board issued a group of consolidated bargaining unit determinations which set a basic five-unit structure for the industry. The following decisions established units of registered nurses, residual professionals, technical employees, business office clericals, and service and maintenance employees: Mercy Hosps., Inc., 217 N.L.R.B. 765 (1975) (registered nurses, service and maintenance, and business office clericals), *enforcement denied*, 589 F.2d 968 (9th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); St. Catherine's Hosp. of Dominican Sisters, 217 N.L.R.B. 787 (1975) (technical, office clerical, and service and maintenance); Newington Children's Hosp., 217 N.L.R.B. 793 (1975) (service and maintenance, including "hospital" clericals); Sisters of St. Joseph of Peace, 217 N.L.R.B. 797 (1975) (business office clericals); Duke Univ., 217 N.L.R.B. 799 (1975) (maintenance unit); Mount Airy Found., 217 N.L.R.B. 802 (1975) (nonprofessional unit excluding business office clericals). Two other cases were also decided in this group. Nathan & Miriam Barnert Memorial Hosp. Ass'n, 217 N.L.R.B. 775 (1975) (service and maintenance, and technical); Shriners Hosps. for Crippled Children, 217 N.L.R.B. 806 (1975) (unit of stationary engineers found inappropriate).

70. In *Mercy Hosps., Inc.*, the Board noted, "our consideration of all issues concerning the composition of appropriate bargaining units in the health care industry must necessarily take place against this background of avoidance of undue proliferation. . . ." 217 N.L.R.B. 765, 766 (1975). Thus, in *Shriners Hosps. for Crippled Children*, 217 N.L.R.B. 806 (1975), a petition for five stationary engineers was rejected though the Board recognized that similar units had been approved in other industries. *Id.* at 808. For Board approval of boilerroom operator units, see, e.g., B.P. Alaska, Inc., 230 N.L.R.B. 986, 987 (1977) (oil production); Towmotor Corp., 187 N.L.R.B. 1027, 1028 (1971) (truck manufacturing); Empire State Sugar Co., 166 N.L.R.B. 31, 34 (1967) (processing, manufacture, sale and distribution of sugar

the Board has often made only brief mention of the congressional mandate in applying the community of interest test.⁷¹ The Board has steadfastly maintained that its use of this test "satisfies legislative concern regarding unit fragmentation in the health care industry."⁷²

Nevertheless, some Board health care decisions have had the effect of encouraging unit proliferation despite references to the legislative intent. Thus, although the Board acknowledged the need to minimize the number of bargaining units,⁷³ it established an irrebutable presumption in favor of registered nurse units⁷⁴ in *Mercy Hospitals, Inc.*⁷⁵

products), *enforced*, 401 F.2d 559, 563 (2d Cir. 1968); *Georgia-Pacific Corp.*, 156 N.L.R.B. 946, 948 (1966) (pulp and paper production).

Other early Board unit cases demonstrating recognition of the congressional mandate include: *Riverside Methodist Hosp.*, 223 N.L.R.B. 1084, 1084 (1976) (unit of plant operations department employees inappropriate viewed against the congressional admonition), *rev'd*, 241 N.L.R.B. 1183 (1979) (maintenance unit found appropriate in health field); *The Jewish Hosp. Ass'n*, 223 N.L.R.B. 614, 616 (1976) (unit of engineering department employees inappropriate viewed against the congressional admonition); *Duke Univ.*, 217 N.L.R.B. 799, 800 (1975) (switchboard operators unit congressionally foreclosed); *St. Catherine's Hosp.*, 217 N.L.R.B. at 789 (Board weighed legislative history to conclude that neither a separate unit of licensed practical nurses nor x-ray technicians were appropriate).

71. See notes 136-56 & 161-96 *infra* and accompanying text for court criticism of Board health care unit determinations.

72. *Riverside*, 241 N.L.R.B. at 1183. *Accord* *St. Francis Hosp.*, 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153, 1158 (1982) (Board reaffirmed reliance on community of interest standard). See notes 97-113 *infra* for a discussion of *St. Francis Hospital*. In *Allegheny Gen. Hosp.*, the Board stated, "Congress intended that the appropriateness of health care units should be determined by the Board's traditional community-of-interests criteria. . . ." 239 N.L.R.B. 872, 875 (1978), *enforcement denied*, 608 F.2d 965, 971 (3d Cir. 1979). See *Bumpass*, *supra* note 53, at 897-900.

73. See note 70 *supra*.

74. In *Mercy Hosps.*, the Board relied upon the "impressive" and "singular" history of separate collective bargaining by registered nurses to establish the irrebutable presumption. 217 N.L.R.B. 765, 767 (1975). However, the *Mercy* record contained no evidence indicating that such a bargaining history existed. See *Bumpass*, *supra* note 53, at 910; Emanuel, *Hospital Bargaining Unit Decisions*, in AMERICAN BAR ASSOCIATION, LABOR RELATIONS LAW, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 193-94 (A. Knapp ed. 1971). Consequently, the Board based its rationale for a separate registered nurse unit on oral arguments and its own past decisions. *Mercy Hosps., Inc.*, 217 N.L.R.B. at 767. This presumption, see also *Dominican Santa Cruz Hosp.*, 218 N.L.R.B. 1211 (1975) (in absence of petition for registered nurse unit, certification of professionals excluding registered nurses is appropriate); *Methodist Hosp. Inc.*, 217 N.L.R.B. 765 (1975) (registered nurses entitled to representation in separate unit), prohibited an employer from submitting evidence to refute the appropriateness of a registered nurse unit and resulted in comparatively small "residual" professional units. See, e.g., *Morristown-Hamblen Hosp. Ass'n*, 226 N.L.R.B. 76, 78 (1976) (four emergency room physicians and one registered pharmacist); *Doctor's Community Hosp.*, 220 N.L.R.B. 977, 977, 978 n.4 (1975) (two physical therapists and one therapeutic dietician); *Bishop Ran-*

Moreover, while the Board subsequently abandoned this expansive policy in favor of a case-by-case approach in *Newton-Wellesley Hospital*,⁷⁶ it has continued to find separate nurse units appropriate⁷⁷ even in instances where registered nurses participated in a team approach to patient care and worked in proximity with other professionals.⁷⁸

The Board has established a policy tantamount to automatic approval of separate technical units⁷⁹ which, it has, with some exceptions, continued to adhere to.⁸⁰ In *Barnert Memorial Hospital Cen-*

dall Hosp., 217 N.L.R.B. 1129, 1131 (1975) (four medical technologists and one pharmacist).

75. 217 N.L.R.B. 765 (1975).

76. 250 N.L.R.B. 409, 411 (1980).

77. See, e.g., Ralph K. Davies Medical Center, 256 N.L.R.B. 1113, 1116 (1981); The Long Island College Hosp., 256 N.L.R.B. 202, 206 (1981); Milwaukee Children's Hosp. Ass'n, 255 N.L.R.B. 1009, 1011 (1981); Doctors' Hosp. of Montclair, 254 N.L.R.B. 1374, 1375 (1981); National Medical Convalescent, 254 N.L.R.B. 1354, 1358 (1981); Frederick Memorial Hosp. Inc., 254 N.L.R.B. 36, 37 (1981), enforcement denied, 691 F.2d 191 (4th Cir. 1982); Addison-Gilbert Hosp., 253 N.L.R.B. 1010, 1011 (1981); St. Anthony Hosp. Sys., 252 N.L.R.B. 50, 51 (1980). See Emanuel, *supra* note 74, at 193 n.38.

On the other hand, the Board has, at times, placed registered nurses in the same unit as other professionals. Cf. St. John of God Hosp., Inc., 260 N.L.R.B. No. 117, 109 L.R.R.M. 1209, 1210 (1982) (unit of registered nurses, licensed practical nurses and two technical employees); Doctors Osteopathic Hosp., 242 N.L.R.B. 447, 448 n.6 (1979) (unit of all professional and nonprofessional employees not in dispute); Kaiser Found. Health Plan of Colo., 230 N.L.R.B. 438, 439 (1977) (registered nurses shared close working relationship and had community of interest with other professional employees); Family Doctor Medical Group, 226 N.L.R.B. 118, 121 (1976) (small facility and close working relationship among professionals).

The circuit courts have found that registered nurse units may be appropriate only when the Board considers all relevant criteria, including the congressional directive. See, e.g., NLRB v. Frederick Memorial Hosp., Inc., 691 F.2d 191, 194-95 (4th Cir. 1982); *HMO Int'l*, 678 F.2d at 812; *St. Francis Hosp.*, 601 F.2d at 416; cf. *Hillside Medical Center*, 685 F.2d at 35.

78. Brookwood Hosp., 252 N.L.R.B. 748, 749 (1980) (Board concluded that team approach to health care did not result in an all-professional unit). The Board subsequently retreated in *Mount Airy Found.* where it indicated that when registered nurses and other professionals share job functions, separate registered nurse units will not be approved. 253 N.L.R.B. 1003, 1006 (1981). But see Ralph K. Davies Medical Center, 256 N.L.R.B. 1113, 1116 (1981) (separate registered nurse unit appropriate despite shared characteristics with other professionals).

79. *Barnert Memorial Hosp.*, 217 N.L.R.B. at 777; Newington Children's Hosp., 217 N.L.R.B. 793, 795 (1975).

80. See Pine Manor, Inc., 238 N.L.R.B. 1654, 1656 (1978) (technical employees granted option to have separate representation or join service and maintenance unit); Appalachian Regional Hosps., Inc., 233 N.L.R.B. 542, 543 (1977) (service, maintenance, and technical employees shared supervisors, had integrated job functions and had substantial contact with each other); National G. South, Inc., 230 N.L.R.B.

ter,⁸¹ the Board found a unit of technical employees appropriate over the objections of the hospital that they should have been included in the service and maintenance unit. The finding that these employees are frequently certified, licensed or registered by schools, governmental bodies or private organizations was viewed as an overriding factor in favor of separate representation.⁸² Similarly, in *Newington Children's Hospital*,⁸³ the Board granted requests to exclude technical employees from maintenance and service units.⁸⁴

Decisions that have followed these cases have overwhelmingly granted separate representation to technical employees.⁸⁵ Yet such decisions do not fully consider the legislative history of the 1974 amendments. The House and Senate committee reports which accompanied the amendments cited with approval⁸⁶ *Woodland Park Hospital*⁸⁷ and *Extendicare of West Virginia, Inc.*,⁸⁸ wherein the Board denied separate representation to technical workers, including them in the larger unit of service and maintenance employees.⁸⁹ Moreover, the automatic approval of such units conflicts with the Board's traditional test for technical units in the industrial sphere. In *The Sheffield Corp.*,⁹⁰ the Board overruled its prior test, which automatically excluded industrial employees from production and maintenance

976, 979 (1977) (unit of all nonsupervisory personnel, including vocational nurses and service and maintenance employees found appropriate); Illinois Extended Care Convalescent Center, 220 N.L.R.B. 1085, 1085 (1975) (four technical employees included in comprehensive unit).

81. 217 N.L.R.B. 775 (1975).

82. *Id.* at 776.

83. 217 N.L.R.B. 793 (1975).

84. *Id.* at 794.

85. *See, e.g.*, Schlesinger Geriatric Center, 260 N.L.R.B. No. 58, 109 L.R.R.M. 1171, 1172 (1982) (technical employees excluded from nursing home's service and maintenance unit); Community Health Servs., Inc., 259 N.L.R.B. 362, 363 (1981) (technical unit of mental health workers); Butler Hosp., 250 N.L.R.B. 1310, 1310 n.2 (1980) (technical unit of mental health workers); Allegheny Gen. Hosp., 239 N.L.R.B. 872, 877 (1978), *enforcement denied*, 608 F.2d 965 (3d Cir. 1979) (Board adhered to industrial sector's unit pattern in finding separate units of technical and service and maintenance employees appropriate); Middlesex Gen. Hosp., 239 N.L.R.B. 837, 837 (1978) (employees who meet specialized training and certification requirements placed in technical unit); *Jewish Hosp. Ass'n.*, 223 N.L.R.B. at 617 (Board refused to place technical employees in service and maintenance unit). *See Emanuel, supra* note 74, at 198 n.59.

86. *See* note 60 *supra* and accompanying text.

87. 205 N.L.R.B. 838 (1973).

88. 203 N.L.R.B. 1232 (1973).

89. 205 N.L.R.B. at 889; 203 N.L.R.B. at 1233.

90. 134 N.L.R.B. 1101 (1961).

units,⁹¹ and replaced it with a "pragmatic judgment" based on the traditional community of interest criteria.⁹² Thus, while separate representation for technical employees is considered on a case-by-case basis in the industrial sphere, health care technical employees are frequently granted separate units on the basis of licensure, registration or certification.⁹³

Since *Allegheny General Hospital*,⁹⁴ the Board has steadfastly granted separate representation to maintenance employees when they meet the community of interest test⁹⁵ as applied in the industrial sphere.⁹⁶ Recently, in *St. Francis Hospital*,⁹⁷ the Board considered

91. *Litton Indus. Inc.*, 125 N.L.R.B. 722, 725 (1959) (technical employees automatically excluded from production and maintenance units).

92. *The Sheffield Corp.*, 134 N.L.R.B. at 1103-04. *See Mack Trucks, Inc.*, 214 N.L.R.B. 382, 386 (1974) (technical employees will not be represented separately where evidence reveals they perform interrelated tasks with other employees).

93. Reliance on these factors has arguably resulted in (1) the Board ceding its authority to states and private organizations and (2) improper approval of units on an automatic basis. *See Barnert Memorial Hosp.*, 217 N.L.R.B. at 784-86 (Kennedy & Penello, MM., dissenting); King, *Legislative View: Is Congressional Intent Being Realized—Or Are Significant Changes Needed?*, in AMERICAN BAR ASSOCIATION, LABOR RELATIONS LAW, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 147, 165-69 (A. Knapp ed. 1977); Bumpass, *supra* note 53, at 906 nn. 236-38.

94. 239 N.L.R.B. 872 (1978), *enforcement denied*, 608 F.2d 965, 971 (3d Cir. 1979). Prior to this case, Board decisions in this area were regarded by the circuit courts as being in a state of "disarray." *Long Island College Hosp. v. NLRB*, 566 F.2d 833, 844 (2d Cir. 1977), *cert. denied*, 435 U.S. 996 (1978). Although the Board unanimously agreed in *Jewish Hosp. Ass'n of Cincinnati*, 223 N.L.R.B. 614 (1976), that separate maintenance units are not congressionally foreclosed, they could not agree on what test to apply. *See id.* at 616, 625. A divided Board, utilizing various tests, yielded inconsistent decisions which included both approval and rejection of separate maintenance units. *See, e.g.*, decisions cited in *NLRB v. Mercy Hosp. Ass'n*, 606 F.2d 22, 26 n.2 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980), and *NLRB v. West Suburban Hosp.*, 570 F.2d 213, 215 n.1 (7th Cir. 1978).

95. *See, e.g.*, *St. Francis Hosp.*, 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153, 1154, 1162 (1982); *Garden City Hosp.*, 244 N.L.R.B. 778, 779 (1979); *Divine Providence Hosp.*, 248 N.L.R.B. 521, 523 (1980); *Southern Baptist Hosps., Inc.*, 242 N.L.R.B. 1329, 1330-31 (1979); *St. Vincent Hosp. & Medical Center*, 241 N.L.R.B. 492, 493 (1979); *Southern Md. Hosp. Center*, 241 N.L.R.B. 494, 495 (1979); *Faulkner Hosp.*, 242 N.L.R.B. 47, 49 (1979).

96. *American Cyanamid Co.*, 131 N.L.R.B. 909, 910 (1961) (maintenance unit is appropriate where there is separate departmental status, supervision, and utilization of maintenance skills). Former Board Chairman Van De Water has observed that the Board's analysis of maintenance units in the health care industry is indistinguishable from its bargaining unit determinations in other industries. *St. Francis Hosp.*, 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153, 1168 (1982) (Van De Water, C., dissenting). *Compare American Cyanamid Co.*, 131 N.L.R.B. 909 (1961) (manufacturing) *with Southern Baptist Hosps., Inc.*, 242 N.L.R.B. 1329 (1979) (health care).

97. 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153 (1982).

traditional industrial factors⁹⁸ in approving a separate unit of thirty-nine hospital maintenance workers from a complement of over four hundred employees.⁹⁹ This ruling is consistent with the Board's trend toward certification of such units¹⁰⁰ despite the specific congressional approval of *Four Seasons Nursing Center*¹⁰¹ in which the Board dismissed a petition for a separate maintenance unit.¹⁰² In reaching its decision in *St. Francis Hospital*, the Board reaffirmed its use of the traditional community of interest criteria in its health care unit determinations.¹⁰³ Presented as a "two-tiered" approach,¹⁰⁴ this procedure varies from its industrial counterpart in one respect—the Board has predetermined that it will consider units only if they conform to one of seven named categories.¹⁰⁵ This "preliminary step"¹⁰⁶ to its usual community of interest analysis is intended to screen out, and thereby restrict, the number of units.¹⁰⁷ Yet, under the following circumstances, this figure could be inflated beyond seven units: (1) a separate guard unit pursuant to statutory requirement;¹⁰⁸ (2) where a prior bargaining relationship existed with an employee group which does not conform to one of the seven basic units;¹⁰⁹ (3) a stipulation of the parties;¹¹⁰ (4) unit approval due to comity;¹¹¹ or (5) some other "ex-

98. *Id.*, 112 L.R.R.M. at 1161-62.

99. *Id.*, 112 L.R.R.M. at 1162.

100. McLean Hosp., 234 N.L.R.B. 424, 426 (1978); Trinity Memorial Hosp., Inc., 230 N.L.R.B. 855, 856 (1977); Hebrew Rehabilitation Center for the Aged, 230 N.L.R.B. 255, 256 (1977); Sinai Hosp., 226 N.L.R.B. 425, 426 (1976); West Suburban Hosp., 224 N.L.R.B. 1349, 1351 (1977), *enforcement denied*, 570 F. 2d 213, 216 (7th Cir. 1978); St. Francis Hosp. Medical Center, 223 N.L.R.B. 1451, 1455 (1976). See note 95 *supra*.

101. 208 N.L.R.B. 403 (1971), *cited with approval* in H.R. REP. NO. 1051, 93d Cong., 2d Sess. 7 (1974) *reprinted* in LEGISLATIVE HISTORY, *supra* note 5, at 275; S. REP. NO. 766, 93d Cong., 2d Sess. 5 (1974), *reprinted* in LEGISLATIVE HISTORY, *supra* note 5, at 12.

102. 208 N.L.R.B. 403, 403 (1974) (Board dismissed a petition for unit of two maintenance employees). *Accord* *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 862-64 (1980).

103. 265 N.L.R.B. No. 120, 112 L.R.R.M. at 1158.

104. *Id.*

105. These categories include the following groups of employees: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees, and skilled maintenance employees. *Id.*

106. *Id.*

107. *Id.*

108. See 29 U.S.C. § 159(b)(3) (1976).

109. Bay Medical Center, Inc., 231 N.L.R.B. 607, 609 (1977), *enforcement granted*, 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979).

110. Otis Hosp., Inc., 219 N.L.R.B. 164 (1975).

111. Long Island College Hosp., 228 N.L.R.B. 83, 87, *enforcement denied*, 566 F.2d 833 (2d Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

traordinary circumstance.”¹¹² Arguably, “by *any* reasonable definition of the term, this constitutes unit proliferation.”¹¹³

Thus, the Board’s willingness to grant separate representation to numerous groups of employees has not always resulted in the proper balance between its application of the community of interest test and the special needs of a vital industry to minimize the number of bargaining units.¹¹⁴

B. The Circuits

There is no provision in the Act for direct judicial review of Board unit determinations. Although the Act does provide that any party “aggrieved by a final order” of the Board may be granted review in the United States Court of Appeals,¹¹⁵ decisions in representation proceedings are not considered to be “final orders.”¹¹⁶ Thus, a party seeking judicial review must commit an unfair labor practice,¹¹⁷ usually achieved through employer refusal to bargain with the union,¹¹⁸ in order to challenge a Board unit ruling. When judicial review is sought, it is the duty of the court to determine whether the Board has overstepped its power¹¹⁹ in the underlying representation proceeding. Moreover, “[w]hen the Board so exercises the discretion given to it by Congress, it must ‘disclose the basis of its order’ and ‘give clear indication that it has exercised the discretion with which Congress empowered it.’ ”¹²⁰

112. See *St. Francis Hosp.*, 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153, 1160 (1982); *Southwest Health Servs.*, 263 N.L.R.B. No. 1, 110 L.R.R.M. 1461, 1462 (1982) (unit of ambulance service employees); *Michael Reese Hosp. & Medical Center*, 242 N.L.R.B. 322 (1979) (unit of chauffeur drivers).

113. Emanuel, *supra* note 74, at 192.

114. See notes 121-27 & 136-96 *infra* and accompanying text for criticism of exclusive Board reliance on the community of interest test.

115. See 29 U.S.C. § 160(e)-(f) (1976).

116. *AFL v. NLRB*, 308 U.S. 401, 409 (1940).

117. See *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971); *Southwest La. Hosp. Ass’n v. Local Union 87, Office & Prof. Employees Int’l Union*, 664 F.2d 1321, 1322-23 (5th Cir. 1982). See note 8 *supra* for cases denying enforcement of Board bargaining unit determinations.

118. *Trustees of the Masonic Hall & Asylum Fund v. NLRB*, 699 F.2d 626, 635 n.17 (2d Cir. 1983).

119. *Packard Motor Car*, 330 U.S. at 491; see *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-72 (1971).

120. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 (1965) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)). The Board may explain the basis for its orders by referring to its other decisions or general practices. *Id.* at 443 n.6. However, when the Board has reached a novel conclusion, it must find the

Since passage of the 1974 amendments, circuit courts have reviewed twenty Board health care unit determinations.¹²¹ Despite their limited power of judicial review, the courts have denied enforcement in sixteen instances.¹²² The courts have repeatedly criticized the Board for failing to balance the traditional community of interest criteria against the congressional admonition to prevent unit proliferation.¹²³ Judicial deference, usually accorded liberally,¹²⁴ is not present in these cases because of the circuit court view that the Board has failed to specify "the manner in which its unit determination . . . implement[s] or reflect[s] that admonition. . . ."¹²⁵ The courts have expressed their disagreement with the Board's approach by: (1) advocating the adoption of the so-called "disparity of interest" test,¹²⁶ and (2) emphasizing the principle of nonproliferation in the application of the traditional community of interest criteria.¹²⁷

1. *Disparity of Interest Test*

The Ninth Circuit has proposed,¹²⁸ and the Tenth Circuit has adopted,¹²⁹ a new "disparity of interest" standard for the Board to apply in its health care unit determinations. In *NLRB v. St. Francis Hospital*,¹³⁰ the Ninth Circuit proposed that the Board focus its in-

"reasons for the decisions in and distinctions among these cases" *Id.* at 442. See generally Zimmerman, *The NLRB and the Courts: Mutual Respect is Overdue*, in LABOR LAW DEVELOPMENTS 60-66 (1982) (lectures presented at the Institute on Labor Law, Dallas, Texas, Oct. 29-30, 1981) (discusses relationship between the Board and the circuit courts in the context of registered nurse unit decisions); Feerick, *The Second Circuit And the NLRB*, N.Y.L.J., Dec. 5, 1980, at 1, col. 1 (reviews role of Board and circuit courts in unit determinations).

121. See note 8 *supra*.

122. See note 8 *supra*; see also notes 25-26 *supra* and accompanying text (limited judicial review of Board unit determinations).

123. See notes 136-56 & 161-96 *infra* and accompanying text.

124. See note 25 *supra*.

125. *NLRB v. Mercy Hosp. Ass'n*, 606 F.2d 22, 27 (2d Cir. 1979) (quoting *NLRB v. West Suburban Hosp.*, 570 F.2d 213, 216 (7th Cir. 1978)), *cert. denied*, 445 U.S. 971(1980).

126. See notes 128-56 *infra* and accompanying text.

127. See notes 161-96 *infra* and accompanying text.

128. *NLRB v. Foundation for Comprehensive Health Servs.*, 654 F.2d 731 (9th Cir. 1981) (mem.); *NLRB v. HMO Int'l/Cal. Medical Group Health Plan*, 678 F.2d 806 (9th Cir. 1982); *NLRB v. St. Francis Hosp.*, 601 F.2d 404 (9th Cir. 1979).

129. *Beth Israel Hosp. & Geriatric Center v. NLRB*, 677 F.2d 1343 (10th Cir. 1981), *modified*, 688 F.2d 697 (10th Cir.) (en banc), *petition for cert. dismissed*, 103 S. Ct. 433 (1982); *St. Anthony Hosp. Sys. v. NLRB*, 655 F.2d 1028 (10th Cir. 1981), *modified sub nom. Beth Israel Hosp. & Geriatric Center v. NLRB*, 688 F.2d 697 (10th Cir.) (en banc), *petition for cert. dismissed*, 103 S. Ct. 433 (1982); *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 456, 457 (10th Cir. 1981).

130. 601 F.2d 404 (9th Cir. 1979).

quiry on the disparity instead of the community of interest among a given group of employees.¹³¹ Referring to Senator Williams' statement¹³² that "a notable disparity of interests between employees in different job classifications"¹³³ could sometimes require a number of bargaining units, the court stated,

[w]e view that language and the remaining legislative history of the 1974 amendments to the Act as requiring the Board to determine not the similarities among employees in the same job classification (indeed the fact that they share the same classification would inevitably lead to the discovery of many similarities), but instead the "disparity of interests" among employee classifications which would prevent a combination of groups of employees into a single broader unit thereby minimizing unit proliferation.¹³⁴

The disparity of interest approach addresses the congressional approval of broader units by directing attention to those separate employee interests which, if they were to be included in the larger unit, would inhibit fair representation.¹³⁵ Thus, in *St. Francis Hospital*,¹³⁶

131. *Id.* at 419.

132. During consideration of the Senate conference report, Sen. Williams stated that

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 such a history in the area or a notable disparity of interests between employees in different job classifications.

120 CONG. REC. 22,575 (1974). There is disagreement as to the weight which should be accorded to Sen. Williams' remarks. Post-passage statements of legislators "cannot serve to *change* the legislative intent of Congress expressed before the Act's passage." Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) (emphasis added). The Senator made his statement after passage of the bill by both houses of congress, but before adoption of the conference reports. Some courts and commentators regard the statements as post-passage and thus contend that they should not be considered. See Bumpass, *supra* note 53, at 874-82. The Ninth Circuit, on the other hand, has interpreted the Senator's words as "entirely consistent" with the legislative history of the amendments. *St. Francis*, 601 F. 2d at 415 n.12.

133. 601 F.2d at 415.

134. *Id.* at 419.

135. The bargaining agent is under the duty to represent all employees equally and fairly regardless of union membership or activities. See *Vaca v. Sipes*, 386 U.S. 171 (1967). A union breaches its duty of fair representation when its conduct toward a bargaining unit member is arbitrary, discriminatory or in bad faith. *Id.* at 190. This duty is incumbent upon the union regardless of bargaining unit size. Thus, it is unlikely that the Court was referring to this standard, as to do so would require prospective proof that the union representative would breach this duty.

the court rejected the Board's irrebutable presumption rule in favor of registered nurses as a failure to give "due consideration" to the congressional mandate¹³⁷ and instructed the Board to center its analysis on whether the interests of the nurses are so distinct from the other professional employees that their inclusion in an overall unit would violate their right to fair representation.¹³⁸

The Board declined to adopt this suggestion, characterizing the difference in approaches as "largely semantic."¹³⁹ In *Newton-Wellesley Hospital*,¹⁴⁰ the Board argued that the disparity of interest test is already encompassed within the traditional criteria and as such the court's standard is only distinctive in degree, not in substance.¹⁴¹ Thus, the Board concluded that its traditional analysis did conform to *St. Francis Hospital*.¹⁴²

Nevertheless, in *Presbyterian/St. Luke's Medical Center v. NLRB*,¹⁴³ the Tenth Circuit adopted the disparity of interest test and distinguished it from the community of interest test.¹⁴⁴ The court explained that the appropriateness of the registered nurse unit should be determined from the dissimilarity of employee interests rather than the similarity of training, hours, and conditions of employment.¹⁴⁵ It is the identification of different elements that determines which employees are not to be included in the proposed unit. The court outlined the proper approach as one which begins with a broad unit that may be narrowed by the exclusion of employees deemed to have separate interests from the larger group.¹⁴⁶ This departs from the Board's approach, which is to start with a narrow unit and subsequently add employees who have similar interests.¹⁴⁷

136. 601 F.2d 404 (9th Cir. 1979).

137. *Id.* at 414.

138. *Id.* at 416.

139. *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411 (1980); *see also* *Trustees of the Masonic Hall & Asylum Fund v. NLRB*, 699 F.2d 626, 641 (2d Cir. 1983) (discusses Board's analysis of the disparity of interest test).

140. 250 N.L.R.B. 409 (1980).

141. 250 N.L.R.B. at 412. The Board's interpretation of the disparity of interest test has been echoed by the Second Circuit. *Trustees of the Masonic Hall*, 699 F.2d 626 (2d Cir. 1983).

142. 250 N.L.R.B. at 412.

143. 653 F.2d 450 (10th Cir. 1981).

144. *Id.* at 456.

145. *Id.* at 457 n.6.

146. *Id.*

147. *Id.*

In *NLRB v. HMO International/California Medical Group Health Plan*,¹⁴⁸ the Ninth Circuit once again called upon the Board to modify its traditional approach by adopting a disparity of interest test.¹⁴⁹ The Board certified a separate unit of registered nurses instead of the employer-requested unit of both registered and licensed vocational nurses.¹⁵⁰ The court did not rule on whether the registered nurse unit was appropriate.¹⁵¹ Rather, it remanded for a legal and factual analysis of the nonproliferation issue,¹⁵² noting that the Board had neither fulfilled its responsibility to consider the public interest nor had it developed a viable method to implement congressional intent.¹⁵³

Similarly, in *NLRB v. Foundation for Comprehensive Health Services*,¹⁵⁴ the Ninth Circuit denied enforcement of the Board's order for a unit of professional employees which excluded a social worker¹⁵⁵ and remanded for consideration of the unit determination in light of the disparity of interest test.¹⁵⁶

Recently, two Members of the Board have joined the Ninth and Tenth Circuits in concluding that the disparity of interest analysis embodies the standard intended by Congress. In *St. Francis Hospital*,¹⁵⁷ former Chairman Van De Water and Board Member Hunter, in separate dissents, rejected the majority's use of the community of interest test¹⁵⁸ in its health care unit determinations as violative of legislative intent.¹⁵⁹ Employing the disparity of interest test, both dissenting Members concluded that the maintenance employees who were granted separate representation did not exhibit a sufficient degree of separateness to justify their own unit.¹⁶⁰

148. 678 F.2d 806 (9th Cir. 1982).

149. *Id.* at 809, 810.

150. *Id.* at 807.

151. *Id.* at 812.

152. *Id.* at 811.

153. *Id.* at 808.

154. 654 F.2d 731 (9th Cir. 1981) (mem.).

155. See *Foundation for Comprehensive Health Servs.* 251 N.L.R.B. 161(1980).

156. See *Foundation for Comprehensive Health Servs.* 261 N.L.R.B. No. 17, 109 L.R.R.M. 1377 (1982).

157. 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153 (1983).

158. *Id.*, 112 L.R.R.M. at 1157-58, 1160 (Fannin, Jenkins & Zimmerman, MM.). See notes 103-13 *supra* and accompanying text for a discussion of the majority opinion.

159. *St. Francis Hosp.*, 265 N.L.R.B. No. 120, 112 L.R.R.M. at 1168-69 (Van De Water, C., dissenting); *id.* at 1173 (Hunter, M., dissenting).

160. *Id.*, 112 L.R.R.M. at 1168 (Van De Water, C., dissenting); *id.* at 1175 (Hunter, M., dissenting).

2. Community of Interest Test and the Public Interest

In *Trustees of the Masonic Hall & Asylum Fund v. NLRB*,¹⁶¹ the Second Circuit recently rejected the disparity of interest test in favor of a legal standard which balances the traditional community of interest factors against the public interest in preventing unit fragmentation.¹⁶² It has interpreted this balancing approach to be the appropriate legal standard in unit health care determinations "by consensus of the circuits."¹⁶³ The court granted enforcement to a Board order for a service and maintenance unit of four hundred employees, comprising eighty-four percent of all nonsupervisory workers in the employer's four facilities.¹⁶⁴ Although the court noted that the Board did not articulate how it engaged in the balancing approach mandated by Congress, it inferred from the resulting broad unit that the Board had taken the nonproliferation policy into account.¹⁶⁵ The court distinguished previous Board orders which were not enforced because of their failure to properly balance the application of traditional unit principles and the congressional admonition.¹⁶⁶ A review of court cases confirms this observation.

In *NLRB v. Mercy Hospital Association*,¹⁶⁷ the Second Circuit denied enforcement of the Board's order establishing a separate bargaining unit for twenty-three maintenance employees from a hospital force of more than twelve hundred.¹⁶⁸ The court, observing that the Board had not complied with the congressional concern "that less extreme unit fragmentation arising from application of usual industrial unit criteria could . . . impede effective delivery of health care services,"¹⁶⁹ concluded that the Board had premised its unit determination solely on the community of interest criteria without giving weight to the public interest factor.¹⁷⁰ Similarly, in *Long Island Jewish-Hillside Medical Center v. NLRB*,¹⁷¹ the Second Circuit criticized the Board's reluctance to effectuate the congressional policy against

161. 699 F.2d 626 (2d Cir. 1983).

162. *Id.* at 632, 641-42.

163. *Id.* at 632.

164. *Id.* at 627-28, 636.

165. *Id.* at 637.

166. *Id.* at 636, *distinguishing Long Island Jewish-Hillside Medical Center*, 685 F.2d 29 (2d Cir. 1982); *Mercy Hosp.*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *St. Vincent's Hosp.*, 567 F.2d 588 (3d Cir. 1977).

167. 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980).

168. *Id.* at 24.

169. *Id.* at 27.

170. *Id.*

171. 685 F.2d 29 (2d Cir. 1982).

unit proliferation and its reliance on industrial criteria in the health care industry.¹⁷² The Board had employed a single facility presumption¹⁷³ to find a unit of eighty registered nurses in one division appropriate when the medical center employed more than 630 registered nurses among its three divisions.¹⁷⁴ Concluding that congressional concern with unit proliferation extended to unit scope as well as to composition, the Second Circuit held the single-facility presumption to be inapplicable in the health care context.¹⁷⁵

The Third Circuit has held on three occasions that Board approval of units limited to boiler room operators¹⁷⁶ and maintenance employees¹⁷⁷ was not consistent with "[t]he legislative history of the health care amendments . . . [which] directed the Board to apply a standard in this field that was not traditional."¹⁷⁸ In *St. Vincent's Hospital v. NLRB*,¹⁷⁹ the court rejected the Board's certification of a unit of four boiler operators and three maintenance workers in a hospital with 280 employees because its "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."¹⁸⁰

172. *Id.* at 34 n.2. The Second Circuit cited the following decisions as establishing standards consistent with congressional intent: *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-71 (3d Cir. 1979); *NLRB v. Mercy Hosp. Ass'n*, 606 F.2d 22, 26-28 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *NLRB v. St. Francis Hosp.*, 601 F.2d 404, 416 (9th Cir. 1979).

173. Because many health care institutions are multiple-facility complexes, the issue arose whether a unit limited to a single facility of such an institution was appropriate. In *Saint Anthony Center*, 220 N.L.R.B. 1009 (1975), the Board held that single-facility units would be considered presumptively appropriate in the health care field. *Id.* at 1011. The Board has reasoned that the congressional directive is inapplicable to questions of unit scope because work disruptions in one facility would not seriously interfere with the operations of the others. *National G. South, Inc.*, 230 N.L.R.B. 976, 978 n.5 (1977). The Board has looked to the bargaining history, employee interchange, geographic separation between facilities, and the degree of centralization and control. *Montefiore Hosp. & Medical Center*, 235 N.L.R.B. 241 (1978); *Samaritan Health Servs., Inc.*, 238 N.L.R.B. 629 (1978); *Long Island Jewish-Hillside Medical Center*, 685 F.2d at 32.

174. 685 F.2d at 30-31.

175. *Id.* at 34. The Second Circuit does not follow this approach in cases outside the health care industry. *NLRB v. J.W. Mays, Inc.*, 675 F.2d 442, 444 (2d Cir. 1982).

176. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 966 (3d Cir. 1979); *Memorial Hosp. v. NLRB*, 545 F.2d 351 (3d Cir. 1976).

177. *St. Vincent's Hosp.*, 567 F.2d 588, 592 (3d Cir. 1977).

178. *Id.* at 592.

179. *Id.*

180. *Id.*

In *Allegheny General Hospital v. NLRB*,¹⁸¹ the Third Circuit refused to enforce the Board's grant of comity to a state agency maintenance unit determination.¹⁸² The court chastised the Board for its failure to abide by the court's earlier holdings¹⁸³ in *Memorial Hospital v. NLRB*,¹⁸⁴ which denied Board extension of comity where the parties contested the determination,¹⁸⁵ and *St. Vincent's Hospital*. The Third Circuit concluded, "it is in this court by virtue of its responsibility as the statutory court of review of NLRB orders that Congress has vested a superior power for the interpretation of the congressional mandate."¹⁸⁶ The court noted that the Board, in adopting the industrial *American Cyanamid Co.*¹⁸⁷ test to determine the appropriateness of maintenance units in health care, had not applied the proper standard because it did not consider the effect of unit fragmentation and the public interest.¹⁸⁸

The Fourth Circuit denied enforcement of the Board's bargaining order for a registered nurses' unit in *NLRB v. Frederick Memorial Hospital*,¹⁸⁹ because of the Board's exclusive reliance on the traditional community of interest test, and its failure to explain how its decision implemented the congressional admonition.¹⁹⁰ The court conceded, however, that had it been an industrial dispute, the Board's ruling would have remained undisturbed.¹⁹¹

In *NLRB v. West Suburban Hospital*,¹⁹² the Seventh Circuit criticized the Board for exclusively relying on a community of interest analysis and for giving "mere lip-service mention" to the congressional directive.¹⁹³ Finding that the Board's certification of a maintenance unit was in violation of legislative intent, the court denied enforcement.¹⁹⁴ Similarly, in *Mary Thompson Hospital, Inc. v. NLRB*,¹⁹⁵ the Board's determination that four stationary engineers constituted an

181. 608 F.2d 965 (3d Cir. 1979).

182. *Id.* at 966, 967.

183. *Id.* at 968.

184. 545 F.2d 351 (3d Cir. 1976).

185. *Id.* at 367.

186. 608 F.2d at 970.

187. *See* note 96 *supra*.

188. 608 F.2d at 971.

189. 691 F.2d 191 (4th Cir. 1982).

190. *Id.* at 194, 195.

191. *Id.* at 193 (*dicta*).

192. 570 F.2d 213 (7th Cir. 1978).

193. *Id.* at 216.

194. *Id.*

195. 621 F.2d 858 (7th Cir. 1980).

appropriate unit prompted the Seventh Circuit to chastise the Board for failing to even give "lip-service" to the directive, despite the clear language in *West Suburban Hospital*.¹⁹⁶

Court decisions demonstrate a deep concern that the Board articulate the manner in which it implements the congressional directive. In this respect, the circuits are in accord. Nevertheless, despite the general consensus that the Board must consider the public interest in its unit determinations, the courts are presently in disagreement over the appropriate legal standard that should be employed in the health care field.

V. A Suggested Approach: Adoption of the Disparity of Interest Test

A review of Board decisions reveals that the Board has not actively applied the nonproliferation principle in all areas of its health care determinations. Considering the Board's most recent pronouncement in *St. Francis Hospital*,¹⁹⁷ together with other decisions requiring separate representation in "exceptional" circumstances,¹⁹⁸ one may conclude that the Board has approved an equal number of units in the health care industry as in the industrial sphere.¹⁹⁹ This result, moreover, constitutes the undue proliferation of bargaining units which Congress directed the Board to prevent. Thus, the circuit court position, that the Board must begin to explicitly consider the congressional mandate in its decision-making, merits serious attention.

The Second Circuit's formulation of the appropriate legal standard in *Trustees of the Masonic Hall*²⁰⁰ retains the traditional unit criteria which the Board has employed in its health care determinations. The use of the community of interest test by the Board, however, has in specific instances resulted in undue proliferation or has failed to demonstrate its consideration of the public interest.²⁰¹ Furthermore, despite urging by the Second Circuit that the Board incorporate a balancing approach in its decision-making, the Board has not yet demonstrated its willingness to do so.

196. The court stated, "[s]uch flagrant disregard of judicial precedent must not continue. Not only is the Board obligated under the principles of *stare decisis* to follow this court's decision in *West Suburban*, but it also owes deference to the other courts of appeals which have ruled on this issue." *Id.* at 864.

197. See notes 97-107 *supra* and accompanying text.

198. See notes 108-12 *supra* and accompanying text.

199. See Bumpass, *supra* note, 53, at 903.

200. See notes 161-66 *supra* and accompanying text.

201. See notes 74-196 *supra* and accompanying text; *Trustees of the Masonic Hall*, 699 F.2d 626, 635 (2d Cir. 1983).

A new approach, therefore, tailored to the special needs of the health care field may provide the best alternative for this industry. The disparity of interest test, advocated by the Ninth and Tenth Circuits,²⁰² offers such an alternative. It would fulfill the congressional intent of avoiding unit proliferation by granting approval only where it is clear that the requesting employees are entitled to separate representation because of their distinctive interests. The party seeking a narrower unit would carry the burden of establishing that the conditions of employment were so dissimilar that fair representation could only be achieved through a separate unit.²⁰³

The disparity of interest test, moreover, would insure that the Board retained its discretion in unit determinations as it neither creates presumptions nor places limitations on unit number or composition.²⁰⁴ Contrary to the view recently expressed by the Second Circuit,²⁰⁵ this test is not a rigid one, but rather a pragmatic approach which is premised on the need to avoid unit proliferation. It seeks to harmonize that goal with employee rights by providing that those with dissimilar interests will be granted separate representation.

The 1974 amendments have had an important impact on the character of unionization in health care.²⁰⁶ The more specialized craft unions have been obliged to make internal changes and new affiliations²⁰⁷ while the larger unions have emerged to dominate the field.²⁰⁸ Inasmuch as this has resulted in fewer choices for health care workers, it does not mean that their representation has been less effective.²⁰⁹

202. See notes 128-56 *supra* and accompanying text.

203. See note 135 *supra*.

204. Adopting the disparity of interest test, former Chairman Van De Water concluded in *St. Francis Hospital* that only two units were presumptively appropriate in the health care industry. 265 N.L.R.B. No. 120, 112 L.R.R.M. 1153, 1167 (1982). This approach of limiting health care units to those consisting of either professionals or nonprofessionals, however, would seriously infringe on the Board's discretion. *Id.*, 112 L.R.R.M. at 1159 n.12. Member Hunter, who declined to join in this approach, strikes the proper balance by not restricting the number of appropriate units. *Id.*, 112 L.R.R.M. at 1174 n.126.

205. In *Trustees of the Masonic Hall v. NLRB*, the court concluded that the disparity of interest test was a rigid approach which would lead to wall-to-wall units in the health care industry. 699 F.2d 626, 641 (2d Cir. 1983). This view ignores the fact that smaller units may be established when the test is met. See *St. Francis*, 265 N.L.R.B. No. 120, 112 L.R.R.M. at 1167 n.89 (Van De Water, C., dissenting).

206. APPROPRIATE BARGAINING UNIT, *supra* note 13, at 284.

207. *Id.*

208. *Id.* at 288.

209. *Id.* at 289.

The duty of fair representation is binding on all bargaining agents regardless of unit size.²¹⁰ Broader units do signify, however, fewer contracts to negotiate and administer and less chance of disruption in health care delivery.²¹¹ Thus, the disparity of interest test represents a vehicle to balance the important goals of labor stability and employee free choice.

VI. Conclusion

The 1974 amendments to the Act were passed by Congress to extend its coverage to nonprofit hospital employees and to protect the public interest. This Comment has traced the legislative history of the amendments and highlighted the congressional concern with the unique attributes of the health care industry. It has argued that the congressional directive to avoid unit proliferation has not been satisfied by the Board's traditional community of interest approach which tends to create narrow bargaining units in some instances. Instead, this Comment has proposed that the disparity of interest test should be adopted by the Board in its unit determinations in the health field. By focusing on the disparate interests rather than similar interests among a group of employees, the Board will achieve broader units as intended by Congress.

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210. See note 135 *supra*.

211. APPROPRIATE BARGAINING UNIT, *supra* note 13, at 289-90.